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No.: ICC-02/05-01/20

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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

Public

Public Redacted Version of “Prosecution’s request for variation of time limits for the newly collected materials, and third request for the authorisation of non-disclosure of witness identities”, 13 April 2021, ICC-02/05-01/20-341-Conf-Exp

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of the Victims

Ms Amal Clooney
Mr Nasser Mohamed Amin Abdalla

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Prosecution requests the Single Judge to authorise the addition of materials relating to Witnesses P-0643 and P-0924 (“Two Witnesses”), which were collected after the disclosure deadline of 29 March 2021, under regulation 35 of the Regulations of the Court. The Prosecution will disclose their newly registered materials in English and Arabic with non-standard redactions applied to their identities shortly.

2. The Prosecution also requests the Single Judge to authorise the non-disclosure of the identity of Witness P-0924 under article 68(1) of the Rome Statute and rule 81(4) of the Rules of Procedure and Evidence to mitigate security risks to him and his family members resulting from his cooperation with the Court. The Prosecution hereby supplements its application concerning Witness P-0643 in its second request for the authorisation of the non-disclosure of witness identities on 26 February 2021.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this request and annexes are filed as confidential, *ex parte*, only available to the Prosecution, because they contain sensitive information pertaining to witness security. The Prosecution is simultaneously filing a confidential redacted version of this request.

III. PROCEDURAL HISTORY

4. On 18 December 2020, the Pre-Trial Chamber II partially granted the Prosecution’s request for an extension of time,¹ ordering the Prosecution to submit applications for the authorisation of the non-disclosure of witness identities and the non-disclosure of entire items of evidence by 26 February 2021, and to disclose all the evidence it intends to rely upon for the confirmation hearing by 29 March 2021.²

5. On 18 December 2020 and 26 February 2021, the Prosecution submitted two requests for the authorisation of the non-disclosure of the identities of twenty six

¹ ICC-02/05-01/20-218-Red, paras. 7, 16-20. *See also* ICC-02/05-01/20-228, paras. 4-5, 9.

² ICC-02/05-01/20-238, p. 15.

witnesses.³ Since then, the Prosecution withdrew its applications for the authorisation of the non-disclosure of the identities of five witnesses, P-0039, P-0091, P-0129, P-0843, and P-0877, having established that such disclosure would not endanger the witnesses or their family members.⁴

IV. SUBMISSIONS

Regulation 35 permits the variation of time limits

6. Pursuant to regulation 35 of the Regulations of the Court, applications to extend any time limit ordered by the Chamber should set out the grounds on which the variation is sought. The Chamber may extend a time limit if good cause is shown. After the lapse of a time limit, an extension of time may only be granted if the participants seeking the extension can demonstrate that they were unable to file the application within the time limit for reasons outside their control.

There is a good cause to vary the time limits for the Two Witnesses

7. The Prosecution intends to rely on the evidence of the Two Witnesses for the confirmation of charges against Mr Abd-Al-Rahman. However, the Prosecution was unable to review and disclose the materials in question because they did not exist prior to the 29 March 2021 deadline. Due to security, logistical and personal reasons, the Prosecution was unable to interview the Two Witnesses earlier.

8. Witness P-0643 gave an additional statement to the Prosecution [REDACTED], which was registered in Ringtail [REDACTED].⁵ It is 13 pages long, including cover and closing pages, and clarifies discrete points in his earlier interview conducted in September 2017. The Prosecution disclosed the transcripts of the first interview in February 2021, well within the 29 March 2021 deadline. The relevance of his first

³ ICC-02/05-01/20-242-Conf-Exp (“First Request”); ICC-02/05-01/20-287-Conf-Exp (“Second Request”).

⁴ ICC-02/05-01/20-250-Conf; ICC-02/05-01/20-310-Conf; ICC-02/05-01/20-328-Conf.

⁵ Annex 2.

interview is summarised in the Prosecution's second request for authorisation of the non-disclosure of witness identities.⁶

9. Having interviewed Witness P-0924 [REDACTED], the Prosecution registered his statement in Ringtail [REDACTED].⁷ It is 23 pages long, including cover and closing pages. Witness P-0924 described arrests, detention, torture, and killing of those displaced from surrounding villages to Deleig in March 2004. He also described his own detention in Deleig in March 2004, and the role of Mr Abd-Al-Rahman in the incident.

10. For security, logistical and personal reasons, the Two Witnesses had to be interviewed [REDACTED]. The interviews took place during a recent investigative mission to [REDACTED], which was the first such mission since Mr Abd-Al-Rahman's surrender where the Prosecution was able to conduct witness interviews [REDACTED].

11. The Prosecution had planned to meet Witness P-0643 [REDACTED]. In the meantime, the Prosecution had difficulties reaching him on the phone for some time. When the Prosecution finally reached him, plans were made to interview Witness P-0643 [REDACTED] during the then upcoming mission.

12. Witness P-0924 did not have travel documents, and the Prosecution could not meet him [REDACTED]. The Prosecution had initially planned to interview him [REDACTED]. Once the Prosecution had the first opportunity to conduct interviews [REDACTED], it was decided to interview Witness P-0924 [REDACTED].

13. The Prosecution disclosed the evidence it intends to rely upon for the confirmation hearing by 29 March 2021, save for the items collected after the deadline or otherwise subject to regulation 35 requests. With respect to the Two Witnesses, the Prosecution was unable to file the request within the prescribed time limit because it had not completed their interviews and assessed their statements for inclusion in the

⁶ ICC-02/05-01/20-287-Conf-Exp, para. 31.

⁷ Annex 3.

confirmation evidence list. Further, Witness P-0924 is a new addition to the Prosecution's confirmation witness list, whose security situation is still being evaluated.

14. The Prosecution is preparing to disclose the newly registered materials of the Two Witnesses in English and Arabic shortly.

The Court is obliged to take measures to protect victims and witnesses

15. Pursuant to article 68(1) of the Statute, the Court shall take appropriate measures to protect the safety, physical and psychological well-being of victims and witnesses. Under rule 81(4) of the Rules, these measures may include authorising the non-disclosure of witness identities prior to the commencement of the trial. However, the measures should not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

16. The Appeals Chamber has held that to authorise the non-disclosure of witness identities pursuant to rule 81(4) of the Rules, the Pre-Trial Chamber must be satisfied that: (i) endangerment of the witness or members of their family may be caused by the disclosure of the witness's identity, (ii) the protective measure is necessary, and (iii) the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial under article 68(1) of the Statute.⁸

17. The Appeals Chamber has also confirmed that "it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial."⁹

Disclosure could endanger the Two Witnesses or their family members

18. The current security situation of the Two Witnesses does not allow for the disclosure of their identities. The Prosecution seeks to delay the disclosure of their

⁸ ICC-01/04-01/06-773, para. 21; ICC-01/04-01/07-475, para. 67.

⁹ ICC-01/04-01/07-475, para. 68.

identities by applying non-standard redactions to their witness statements and related materials.

19. [REDACTED].¹⁰

20. The individual circumstances of P-0643, including his past security incidents and last known place of residence, are summarised in the Prosecution's second request for authorisation of the non-disclosure of witness identities. His situation has not changed since 26 February 2021, and the Prosecution incorporates its earlier submissions in relation to his individual circumstances by reference.¹¹

21. In sum, disclosing the identities of the Two Witnesses before implementing mitigation measures could endanger the witnesses and their family members.

The requested protective measures are necessary

22. The requested redactions to the identities of the Two Witnesses are necessary. Given their current security situations, less restrictive measures would not be sufficient to protect the witnesses and their family members. As detailed above, the Prosecution assesses that disclosure of their identities at this time could endanger them. In addition, the Prosecution is preparing referrals to the VWS in relation to the Two Witnesses in the coming days.

The requested protective measures cause no prejudice to the accused

23. The requested protective measures for the Two Witnesses are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial under article 68(1) of the Statute because the Prosecution:

- a. will disclose their statements and annexes with the necessary redactions only to information that could reasonably be expected to reveal their identities;

¹⁰ ICC-02/05-01/20-242-Conf-Exp, paras. 12-15.

¹¹ ICC-02/05-01/20-287-Conf-Exp, para. 31.

- b. has requested identity redactions at the stage of the confirmation of charges, the purpose of which is to determine whether there is sufficient evidence to commit the case to trial;
- c. will lift such non-standard redactions as soon as the circumstances that necessitate the non-disclosure of witness identities cease to exist; and
- d. has already disclosed the statements of more than 100 witnesses without identity redactions.

24. The Prosecution is making concerted efforts to clear the witnesses subject to its non-disclosure requests, so that their identities can be made available to the parties and participants. As it has done previously, the Prosecution will lift identity redactions for each of these witnesses as soon as practicable and after establishing that such disclosure would not endanger the witnesses and their family members.

25. For ease of reference, the Prosecution has attached the statements of the Two Witnesses with see-through coloured highlights as Annexes 2 and 3. In addition to the standard redactions, for which specific authorisation is not required, Annexes 2 and 3 show the non-standard redactions in pink sought to be applied to identifying information under category F. The corresponding statements with redactions will be available in eCourt shortly.

26. The chart in Annex 1 outlines the extent of the requested non-standard redactions sought to be applied to the information in each witness statement and its corresponding annexes that would reveal the identities of the Two Witnesses. Non-standard redactions have also been applied to all metadata fields in eCourt containing the names of the Two Witnesses. The Arabic translations of statements relating to these witnesses, which are to be disclosed under rule 76(3) of the Rules of Procedure and Evidence, will contain redactions mirroring the redactions to the original statements.

V. CONCLUSION

27. For the above reasons, the Prosecution respectfully requests the Single Judge to vary the time limits for the newly collected materials, and to authorise the non-disclosure of the identities of the Two Witnesses.



Fatou Bensouda
Prosecutor

Dated this 15th day of April 2021

At The Hague, the Netherlands