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TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

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

**Public Redacted Version of "Prosecution's request to authorise delayed disclosure
of witnesses' identities", 3 December 2021**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Pursuant to article 68(1) of the Rome Statute and rule 81(4) of the Rules of Procedure and Evidence, the Prosecution requests Trial Chamber I (“Chamber”) to authorise the delayed disclosure of the identities of Witnesses [REDACTED]¹ until no later than 30 days prior to the commencement of trial.²

2. Security concerns justify the delayed disclosure of their identities, in particular in the current precarious security situation in the aftermath of the 25 October 2021 military coup in Sudan. Such delayed disclosure is necessary to mitigate any security risks to them and their family members, preserve critical evidence, and ensure the integrity of the proceedings. As set out below, the Prosecution is taking steps to permit the disclosure of the identity of these witnesses at the earliest opportunity.

3. The requested delay will not prejudice Mr Abd-Al-Rahman’s fair trial rights since (i) the Defence has received redacted versions of their witness statements, transcripts and associated material sufficiently in advance of the commencement of the trial;³ (ii) the redactions applied do not materially hinder the understanding of the statements or transcripts in terms of the substance of the witness accounts; (iii) the number of witnesses for whom the delayed disclosure is sought is limited; and (iv) the Prosecution will call these witnesses to testify at a later stage of the trial to give the Defence sufficient time to prepare.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this request and its four annexes as confidential, *ex parte*, only available to the Prosecution, because they contain sensitive information pertaining to witness security.

¹ [REDACTED].

² The Prosecution notes that after excluding the cover page and the notification page from the page count pursuant to regulation 36 of the Regulations of the Court, this filing is within the 12 page-limit as instructed by the Chamber.

³ [REDACTED].

The Prosecution will file a confidential redacted version of this request as soon as possible after filing this request.

III. SUBMISSIONS

The Court shall take measures to protect victims and witnesses

5. Pursuant to articles 64(2) and 68(1) of the Statute, the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Trial Chamber has the authority to 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 witnesses' 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.⁴

6. Trial Chambers of this Court have previously authorised delayed disclosure of witnesses' identities prior to the commencement of trial beyond the disclosure

⁴ As recognised in *Katanga*, "the Defence's right to have evidence disclosed – essential as this may be – cannot be considered to be absolute. Where the protection of victims and witnesses is at stake, the Chamber must seek a solution which strikes a fair balance between the equally legitimate rights of the accused, on the one hand, and of the victims and witnesses on the other." See *Katanga*, Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp), 29 May 2009, ICC-01/04-01/07-1179-tENG, para. 31.

deadline set by the Chamber.⁵ Trial Chambers have also authorised the Prosecution to withhold witness identities until after the commencement of trial.⁶

7. The Court's appellate jurisprudence sets out several criteria relevant to substantiating a request for delayed disclosure⁷:

- i. the existence of an "objectively justifiable risk" to the safety of the person concerned if the particular information is disclosed to the accused;⁸
- ii. the infeasibility or insufficiency of less restrictive protective measures;⁹ and
- iii. an assessment as to whether the redactions sought are "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".¹⁰

⁵ *Bemba*, Public redacted version of "Prosecution Application for Delayed Disclosure", 4 June 2015, ICC-01/05-01/13-985-Conf-Exp, 29 June 2016, ICC-01/05-01/13-985-Red2, para. 9; *Katanga*, Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp), 29 May 2009, ICC-01/04-01/07-1179-tENG (translation of ICC-01/04-01/07-1179), para. 47; *Ntaganda*, Decision on Prosecution application for delayed disclosure, 2 April 2015, ICC-01/04-02/06-537-Red2, p. 22; *Kenyatta*, Confidential redacted version of 'Decision on prosecution application for delayed disclosure of witness identities', 21 December 2012, ICC-01/09-02/11-580-Conf-Red, paras. 37, 44 and p. 22; *Ruto & Sang*, Confidential redacted version of Decision on the second and third Prosecution requests for delayed disclosure of witness identities, 23 January 2013, ICC-01/09-01/11-564-Red, p. 32; *Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Exp, 21 December 2012, ICC-01/09-02/11-580-Red2, paras 28-36.

⁶ *Katanga*, Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp), 29 May 2009, ICC-01/04-01/07-1179-tENG (translation of ICC-01/04-01/07-1179), para. 48 (authorising a witness's identity to be withheld from the Defence until 45 days prior to their testimony); *Kenyatta*, Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Exp, para. 51, p. 23.

⁷ While not all the decisions cited in this section address specifically the issue of delayed disclosure, they all offer guidance on the balancing exercise of withholding the identities of witnesses against the rights of the accused for a fair and expeditious trial.

⁸ *Kenyatta*, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, ICC-01/09-02/11-832; *Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Exp, 21 December 2012, ICC-01/09-02/11-580-Red2; *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 12 May 2008, ICC-01/04-01/07-475, para. 71; *Kenyatta*, Decision on the protocol establishing a redaction regime, 1 October 2012, ICC-01/09-02/11-495, para. 11.

⁹ *Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 12 October 2006, ICC-01/04-01/06-568, para. 37; *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 13 December 2006, ICC-01/04-01/06-773, para. 33; *Kenyatta*, Decision on the protocol establishing a redaction regime, 1 October 2012, ICC-01/09-02/11-495, para. 11.

¹⁰ *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 12 May 2008, ICC-01/04-

There is an objectively justifiable risk to the witness's safety arising from the disclosure of the identities of witnesses [REDACTED] to the accused

8. The Prosecution has only recently interviewed witnesses [REDACTED] ("New Witnesses") and intends to rely on their evidence. Given their relevance to the charges, as set out below, the Prosecution made strenuous efforts to interview the New Witnesses at the earliest opportunity, however they were unavailable and/or unwilling to be interviewed earlier than September 2021.

9. [REDACTED].

Overall instability in Sudan

10. The situation in Sudan remains volatile over a month after the military coup.¹¹ On 11 November 2021, a new Sovereignty Council was appointed and on 21 November 2021, an agreement was reached reinstating the Prime Minister of Sudan with a view to forming a new government which is yet to occur. The Forces of Freedom and Change ("FFC"), the civilian coalition which had shared power with the military since 2019, rejected the agreement. On 1 December 2021, the Prime Minister appointed new under-secretaries for the various ministries pending the appointment of a new cabinet. Protests by civilians against the coup and the agreement to form a new government continue, and the situation remains unstable.¹²

Impact on Prosecution's operations and witness security

01/07-475, paras. 71-73; *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 13 December 2006, ICC-01/04-01/06-773, para. 33-34; *Kenyatta*, Decision on the protocol establishing a redaction regime, 1 October 2012, ICC-01/09-02/11-495, para. 11.

¹¹ [REDACTED].

¹²<https://www.nytimes.com/2021/11/11/world/africa/sudan-military-coup.html>; <https://www.reuters.com/world/africa/sudans-military-rulers-draw-bashir-era-veterans-tighten-grip-2021-11-11/>; <https://suna-sd.net/read?id=726888>; <https://www.africa-confidential.com/browse-by-country/id/46/SUDAN>.

11. The political and security instability in Sudan creates a challenging operating environment for the Prosecution. [REDACTED],¹³ [REDACTED].

12. The recent coup [REDACTED].

13. [REDACTED].

14. The New Witnesses are [REDACTED].¹⁴ They provide crucial incriminating evidence, which will be relied upon at trial.

15. Witnesses [REDACTED] have both [REDACTED] However, given the current political and security situation in Sudan, pandemic-related travel restrictions, and challenges [REDACTED].

16. Regarding [REDACTED].

17. The Prosecution is taking concrete steps to plan missions to Sudan in [REDACTED].

Individual Circumstances of the New Witnesses

18. The individual circumstances of the New Witnesses, including the nature of their evidence, their last known places of residence, and past security incidents, where applicable, are summarised below.

19. Witness [REDACTED] was interviewed by the Prosecution [REDACTED].¹⁵ [REDACTED].¹⁶

20. Witness [REDACTED] was interviewed by the Prosecution [REDACTED]¹⁷¹⁸ [REDACTED].¹⁹

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ See Annex 2.

¹⁶ [REDACTED].

¹⁷ See Annex 3.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

21. Witness [REDACTED] was interviewed by the Prosecution [REDACTED]²⁰ [REDACTED].²¹

Delayed disclosure of Witnesses [REDACTED]

22. The Prosecution also requests the delayed disclosure of the identities of P[REDACTED] until no later than 30 days prior to the commencement of trial.

23. The delayed disclosure of their identities was previously authorised by the Pre-Trial Chamber²² which stated that “disclosing the identity of the witnesses before the Court has put in place adequate protective measures against potential threats would pose an objectively justifiable risk to them. Under these circumstances, it would be irresponsible to reveal the witnesses’ identity and it does not appear feasible to sufficiently mitigate the risks by way of alternative measures.”²³ Further, the Pre-Trial Chamber assessed the evidence provided by the witnesses concerning Mr Abd-Al-Rahman to be of “relatively minor significance when viewed in the context of the Prosecutor’s case as a whole”²⁴, thereby agreeing that withholding the disclosure of their identity would not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

24. Due to the current situation in Sudan, the Prosecution [REDACTED]. [REDACTED].

25. The Prosecution has [REDACTED] with [REDACTED] and was informed that [REDACTED] has concerns about his security. [REDACTED].

²⁰ See Annex 4.

²¹ [REDACTED].

²² *Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Prosecutor’s requests for non-disclosure of witness identities, 12 May 2021, ICC-02/05-01/20-386.

²³ *Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Prosecutor’s requests for non-disclosure of witness identities, 12 May 2021, ICC-02/05-01/20-386, para. 30.

²⁴ *Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Prosecutor’s requests for non-disclosure of witness identities, 12 May 2021, ICC-02/05-01/20-386, para. 31.

26. The planned missions to Sudan [REDACTED] for the disclosure of the identities of [REDACTED].

There is good cause for the limited delay requested for the disclosure of the identities of Witnesses [REDACTED]

27. In sum, given the profile of these witnesses, [REDACTED], the identities of Witnesses [REDACTED] should remain redacted [REDACTED].

28. The authorisation to withhold the witnesses' identities is provisional and will be re-evaluated [REDACTED].²⁵ [REDACTED]. These grounds constitute good cause for the limited extension requested, which is reasonable and necessary to enable the Prosecution to safely complete the disclosure.²⁶

Less restrictive protective measures are insufficient and not feasible

29. The requested redactions to the identifying information of the New Witnesses are necessary. Given their current security situation, less restrictive measures would not be sufficient to protect the witnesses and their family members. As detailed above, the Prosecution assesses that the disclosure of their identities at this time would endanger them. [REDACTED].

The requested protective measures will not prejudice Mr Abd-Al-Rahman's fair trial rights

30. The requested protective measures for the witnesses are not prejudicial to or inconsistent with the rights of the accused²⁷ and a fair and impartial trial under articles 64(2) and 68(1) of the Statute on the basis that the Prosecution:

²⁵ *Abd-Al-Rahman ("Ali Kushayb")*, Decision on the Prosecutor's requests for non-disclosure of witness identities, 12 May 2021, ICC-02/05-01/20-386, para. 29.

²⁶ *Al Hassan*, Public redacted version of "Prosecution's request for extension of time limits in the Decision on the evidence disclosure protocol and other related matters", 14 January 2020, ICC-01/12-01/18-552-Conf-exp, 15 January 2020, ICC-01/12-01/18-552-Red2, para. 4.

²⁷ In the *Ntaganda* case, Trial Chamber VI considered that the Defence was entitled to receive, even if in a heavily redacted form, the witnesses' statements. *See Ntaganda*, Public redacted version of : Decision on the Prosecution request for redactions, 7 April 2015, ICC-01/04-02/06-545-Red2, para. 64.

- a. has disclosed their statements and annexes with the necessary redactions only to information that could reasonably be expected to reveal their identities;
- b. will lift such non-standard redactions as soon as the circumstances that necessitate the non-disclosure of witness identities cease to exist;
- c. has already disclosed the statements of 112 of the 122 witnesses on its provisional trial witness list without identity redactions, with the remaining 5 witnesses to be disclosed shortly; and
- d. will call these witnesses to testify at a later stage in the trial.

31. The Prosecution has made strenuous efforts to ensure the protection of the witnesses subject to the previous non-disclosure requests, so that the witnesses' identities can be disclosed to the parties and participants. The Prosecution will continue to do so with respect to the witnesses subject to this application.

32. For ease of reference, the Prosecution has attached the transcripts/statements and related material of the New Witnesses with see-through coloured highlights as Annexes 2 to 4. In addition to the standard redactions, for which specific authorisation is not required, these Annexes show the non-standard redactions in pink sought to be applied to identifying information under category F.²⁸ Translations from Arabic into English to certain pages in the [REDACTED] transcripts and annexes are underway and will be promptly available to the Chamber.²⁹ The corresponding transcripts with redactions are available in e-Court.

33. The chart in Annex 1 outlines the extent of the requested non-standard redactions sought to be applied to the information that would lead to the identification of the witnesses in the interview transcripts/statement and their related material. Non-

²⁸ Category F is not included in the redaction protocol, however it has been consistently used to mark the non-standard redactions for which authorisation from the Chamber is required.

²⁹ [REDACTED].

standard redactions have also been applied to all metadata fields in e-Court containing the names of the New Witnesses.

IV. CONCLUSION

34. For the above reasons, the Prosecution respectfully requests the Chamber to authorise the delayed disclosure of the identities of these witnesses until 30 days prior to the commencement of trial.

35. The Prosecution will continue assessing the risk to the safety and security of its witnesses and immediately inform the Chamber of any changes in the current security situation.



Karim A. A. Khan QC
Prosecutor

Dated this 21st day of December 2021

At The Hague, The Netherlands