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No. ICC-02/05-01/20

Date: 18 July 2023

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

**Decision on the Defence's Motion pursuant to Article 67(1)(e) of the Rome
Statute**

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

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Detention Section

**Victims Participation and Reparations
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Other

I. Procedural background

1. On 31 May 2023, a report containing security incidents referred to by P-0874 was disclosed to the Defence (the ‘Report’).¹
2. On 22 June 2023, the Defence filed a Motion seeking, *inter alia*, that Trial Chamber I (the ‘Chamber’) order the recall of Prosecution witnesses residing in Sudan at the time of their appearance (the ‘Motion’).²
3. On 30 June 2023, the Prosecution filed its response, opposing the Motion (the ‘Response’).³
4. On the same date, the Common Legal Representative of Victims (the ‘CLRV’) filed her observations to the Motion, equally opposing it (the ‘Observations’).⁴
5. On 5 July 2023, the Chamber held a status conference where it heard, *inter alia*, oral submissions by the parties on the Motion.⁵

II. Submissions

6. In its Motion, the Defence submits that the Report provides ‘incontrovertible proof’ that [REDACTED].⁶ It contends that the Registry and the Prosecution failed to fulfil their disclosure obligations by not disclosing that information to the Chamber and to the Defence.⁷ The Defence avers that as a result it was prevented from cross-examining witnesses on the issue of [REDACTED].⁸ The Defence therefore requests the Chamber to order the recall of at least 20 Prosecution witnesses, who were residing in Sudan at the time of their appearance, for the limited purpose of their cross-examination by the Defence on the issues stated in the Report.⁹

¹ DAR-OTP-00004296-R01.

² Motion pursuant to Article 67(1)(e) of the Statute, ICC-02/05-01/20-979-Conf (with 2 confidential annexes).

³ Prosecution’s response to “Motion Pursuant to article 67(1)(e) of the Statute”, ICC-02/05-01/20-985-Conf.

⁴ CLRV Observations on Defence “Motion pursuant to Article 67(1)(e) of the Statute”, ICC-02/05-01/20-984-Conf.

⁵ ICC-02/05-01/20-T-123-ENG.

⁶ Motion, ICC-02/05-01/20-979-Conf, paras 7, 11.

⁷ Motion, ICC-02/05-01/20-979-Conf, paras 9-10, 18, 19.

⁸ Motion, ICC-02/05-01/20-979-Conf, paras 17-20.

⁹ Motion, ICC-02/05-01/20-979-Conf, para. 23; Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 18, lines 1-14. *See* e-mail of 6 July 2023 at 15:47. In respect of 13 witnesses under the International Criminal Court’s Protection Programme (ICCPP), the Defence submits that ‘Information regarding their whereabouts is under the control of the VWS. The request to recall those witnesses is subject to their presence in Sudan at the time of their testimony’.

7. The Defence further requests that the Chamber finds that [REDACTED], and that the Registry and the Prosecution failed to comply with their disclosure obligations.¹⁰

8. In its Response, the Prosecution contends that the Report does not provide any new material information, nor does it provide incontrovertible proof of [REDACTED].¹¹ It further submits that the Defence has failed to show good cause for recalling witnesses.¹² The Prosecution contends that the Registry did not fail to disclose to the Chamber the information reflected in the Report.¹³

9. In her Observations, the CLRV takes no position regarding the Defence's [REDACTED].¹⁴ She observes the Prosecution's delay in disclosing the Report.¹⁵ The CLRV further submits that the Report is of limited probative value.¹⁶ She contends that the Motion fails to meet the standard for recalling witnesses.¹⁷

III. Analysis

10. The Chamber will address each item of the Defence's relief sought in turn.

A. Request to recall witnesses and finding on [REDACTED]

11. The Chamber notes that the statutory framework does not explicitly provide for a chamber's power to recall witnesses. However, other trial chambers have held that good cause and the most compelling circumstances must be demonstrated to make such an order.¹⁸ The Chamber further notes that trial chambers have considered the probative value and the cumulative nature of the evidence, whether the requesting party had the opportunity to examine

¹⁰ Motion, ICC-02/05-01/20-979-Conf, para. 23.

¹¹ Response, ICC-02/05-01/20-985-Conf, paras 5-13; Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 9, lines 21-25 to p. 10, lines 1-10.

¹² Response, ICC-02/05-01/20-985-Conf, paras 14-21; Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 17, lines 8-14.

¹³ Response, ICC-02/05-01/20-985-Conf, para. 13.

¹⁴ Observations, ICC-02/05-01/20-984-Conf, para. 4.

¹⁵ Observations, ICC-02/05-01/20-984-Conf, para. 5.

¹⁶ Observations, ICC-02/05-01/20-984-Conf, paras 13-18.

¹⁷ Observations, ICC-02/05-01/20-984-Conf, paras 8, 19.

¹⁸ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of Decision on Defence application to exclude the evidence of or recall P-0547, 21 September 2022, ICC-01/12-01/18-2344-Red, para. 34; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Red, para. 10; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Redacted version of "Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf)" of 2 October 2014, 11 December 2014, ICC-01/05-01/08-3154-Red2, para. 27.

on the areas in which it seeks further examination, as well as the requesting party's ability to further challenge the witness' evidence.¹⁹

12. Lastly, in determining whether there are sufficient grounds to recall a witness, the Chamber 'will not recall a witness simply because a party has obtained material after completion of the witness's testimony that it could have obtained through the exercise of reasonable diligence before the testimony.'²⁰

13. First, as observed by the Prosecution,²¹ the Report provides no new information. The Defence has been long aware of witnesses expressing concerns for their safety should their testimonies [REDACTED],²² including by P-0874 prior to his testimony.²³ The Chamber granted, (without Defence objection),²⁴ in-court protective measures to several witnesses (including P-0874) to mitigate these risks.²⁵

14. While the Defence submits that the Report indicates that [REDACTED] is 'extremely official',²⁶ and that the measures undertaken by the Court to protect the privacy of witness' testimonies have been ineffective,²⁷ no such inferences can be drawn from the Report. As observed by the Presiding Judge during the status conference on 5 July 2023, the security incident referred to by P-0874 'seems to have been, if it happened, a one-off which is specific

¹⁹ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of Decision on Defence application to exclude the evidence of or recall P-0547, 21 September 2022, ICC-01/12-01/18-2344-Red, paras 31-41; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Requests Following Prosecution's Notice of Filing of an Item Received in Response to an RFA, 16 March 2018, ICC-02/04-01/15-1207, paras 14-15; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Red, paras 10-13; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Redacted version of "Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08- 3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter (ICC-01/05- 01/08-3139-Conf)" of 2 October 2014, 11 December 2014, ICC-01/05-01/08-3154-Red2, paras 25-34.

²⁰ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of "Decision on 'Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'", 11 December 2014, ICC-01/05-01/08-2924-Red, para. 35.

²¹ Response, ICC-02/05-01/20-985-Conf, paras 5-7.

²² Transcript of hearing, 18 July 2022, ICC-02/05-01/20-T-064-CONF-ENG, p. 3, lines 5-12; Defence response to Prosecution's second request for in-court protective measures, 13 June 2022, ICC-02/05-01/20-702, para. 2; Defence Response to Prosecution's request for in-court protective and special measures, 14 March 2022, ICC-02/05-01/20-628-Conf, paras 3-4.

²³ Transcript of hearing, 26 September 2022, ICC-02/05-01/20-T-080-CONF-ENG, p. 11.

²⁴ Defence response to Prosecution's second request for in-court protective measures, 13 June 2022, ICC-02/05-01/20-702, para. 2; Defence Response to Prosecution's request for in-court protective and special measures, 14 March 2022, ICC-02/05-01/20-628-Conf, paras 3-4.

²⁵ Transcript of hearing, 26 September 2022, ICC-02/05-01/20-T-080-CONF-ENG, p. 11; Second Decision on in-court protective measures, 16 June 2022, ICC-02/05-01/20-705-Conf; Confidential redacted version of the Decision on in-court protective measures, 25 March 2022, ICC-02/05-01/20-645-Conf-Red.

²⁶ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 16, lines 11-12.

²⁷ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 16, lines 2-25.

to his particular circumstances and [does not] appear to have caused him any great fear as he refused to go back when ordered to.’²⁸

15. The Report does not indicate, as correctly noted by the Prosecution,²⁹ and by the CLRV,³⁰ any broader dissemination of such incidents outside of [REDACTED]. Additionally, as observed by the CLRV,³¹ and the Prosecution,³² the Report does not in any way lend support to the Defence’s claim of [REDACTED].³³ Further, as noted by the CLRV the events described in the report took place on c. 12 October 2022 ‘and is therefore of lesser relevance to the questioning of witnesses who testified before this date’.³⁴ Finally, nothing in the Report suggests that P-0874’s cooperation (or any other witness’ cooperation) with the Court has been discovered by the Sudanese authorities, and appears to demonstrate that the protective measures granted by the Court were effective. As noted by the CLRV, this is ‘a relevant factor for the Chamber to consider when assessing the probability or seriousness of the prospect of subornation that lies at the heart of the Motion’,³⁵ and therefore also on the necessity to recall witnesses to further explore this issue.

16. The Chamber recalls that, in a previous ruling,³⁶ it dismissed the Defence’s claim, that [REDACTED], as unfounded. The alleged actions by the [REDACTED] do not affect that finding. In this regard, the Chamber equally dismisses the Defence’s request to find that since 12 May 2021 [REDACTED].³⁷ The Chamber emphasises that, as noted by the Prosecution,³⁸ ‘it is accepted by all that the risk exists’³⁹ and therefore the incident described by P-0874, simply provides confirmation of that risk, in respect of one witness in circumstances peculiar to him. As pointed out by the CLRV ‘in respect of witnesses residing in Sudan [...] not employed by, or otherwise part of GoS police or military entities, the Report is of limited

²⁸ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 11, lines 13-15.

²⁹ Response, ICC-02/05-01/20-985-Conf, para. 10.

³⁰ Observations, ICC-02/05-01/20-984-Conf, para. 15.

³¹ Observations, ICC-02/05-01/20-984-Conf, para. 16.

³² Response, ICC-02/05-01/20-985-Conf, para. 20.

³³ Motion, ICC-02/05-01/20-979-Conf, para. 20; Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p.8, lines 4-11.

³⁴ Observations, ICC-02/05-01/20-984-Conf, para. 13.

³⁵ Observations, ICC-02/05-01/20-984-Conf, para. 18.

³⁶ Decision on Defence submissions on cooperation with Sudan, 21 January 2021, ICC-02/05-01/20-561-Conf, para. 40.

³⁷ Motion, ICC-02/05-01/20-979-Conf, para. 23.

³⁸ Response, ICC-02/05-01/20-985-Conf, para. 8.

³⁹ Response, ICC-02/05-01/20-985-Conf, para. 8.

probative value'.⁴⁰ It was on the basis of such a risk that protective measures were unopposed and granted to a significant number of witnesses testifying in this trial.⁴¹

17. The Defence further submits that its capacity to cross-examine witnesses on the issue of [REDACTED] was 'significantly hampered throughout the Prosecution case.'⁴² The Chamber did not prevent the Defence from cross-examining witnesses on this issue. As noted by the Presiding Judge during the status conference on 5 July 2023, the Chamber's previous ruling decided upon, and therefore put a stop to the Defence's repeated arguments on the alleged effect of [REDACTED] on the integrity of the proceedings. The Chamber did not prevent the Defence from exploring this issue during cross-examination of Prosecution witnesses.⁴³ In fact, as observed by the Prosecution⁴⁴ and as conceded by the Defence,⁴⁵ the Defence cross-examined several witnesses on this issue throughout the Prosecution's case,⁴⁶ including some of those the Defence now seeks to recall for exactly that purpose.⁴⁷

18. The Defence's proposed line of questioning for witnesses it seeks to recall is as follows:

*(i) [the witness'] knowledge of and any experience related to the criminalisation or de facto punishment of any cooperation with the Court in Sudan, (ii) the threat of being found guilty of treason and sentenced to death in the event anyone were to be found to be witnesses before the Court without authorization from the Sudanese authorities and (iii) the conditions of such authorization.*⁴⁸

19. In response to the Presiding Judge's questions during the status conference on 5 July 2023, the Defence further clarified the line of questioning as follows: 'Did you seek and/or

⁴⁰ Observations, ICC-02/05-01/20-984-Conf, para. 14.

⁴¹ Response, ICC-02/05-01/20-985-Conf, para. 8.

⁴² Motion, ICC-02/05-01/20-979-Conf, para. 18.

⁴³ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p.15, lines 14-19.

⁴⁴ Response, ICC-02/05-01/20-985-Conf, para. 14.

⁴⁵ Motion, ICC-02/05-01/20-979-Conf, para. 4; Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 15, lines 20-21.

⁴⁶ P-0874, P-0903, P-0712, P-0120, P-0020, P-0980, P-0986 and P-0994. See Transcript of hearing, 29 September 2022, ICC-02/05-01/20-T-083-CONF-ENG, p. 6, line 14 to p. 11, line 21; Transcript of hearing, 13 April 2022, ICC-02/05-01/20-T-032-CONF-ENG, p. 90, line 18 to p. 91, line 4; Transcript of hearing, 28 April 2022, ICC-02/05-01/20-T-036-CONF-ENG, p. 28, line 24 to p. 30, line 12; Transcript of hearing, 29 April 2022, ICC-02/05-01/20-T-037-CONF-ENG, p. 48, line 7 to p. 52, line 7; Transcript of hearing, 13 May 2022, ICC-02/05-01/20-T-042-CONF-ENG, p. 45, line 8 to p. 46, line 9; Transcript of hearing, 7 June 2022, ICC-02/05-01/20-T-044-CONF-ENG, p. 7, line 13 to p. 8, line 4; Transcript of hearing, 19 July 2022, ICC-02/05-01/20-T-065-CONF-ENG, p. 23, line 23 to p. 32, line 6; Transcript of hearing, 3 October 2022, ICC-02/05-01/20-T-084-CONF-ENG, p. 17, line 4 to p. 24, line 16.

⁴⁷ P-0874, P-0020, P-0980, P-0986 and P-0994. See e-mail of 6 July 2023, at 15:47.

⁴⁸ Motion, ICC-02/05-01/20-979-Conf, para. 1.

obtain authorisation from the Sudanese authorities to appear before this Court? And if the answer to that question is positive, then the next question will be: What are the conditions of this authorisation?'.⁴⁹ It added that 'if the witnesses appear, yes, we may also use that opportunity to ask them if they know about that incrimination and risk of death penalty. But the essential question is the one that I mentioned already'.⁵⁰ Moreover, as made clear by the Prosecution, none of the witnesses had sought authorisation to testify from the Sudanese authorities.⁵¹

20. As noted above, the Defence had the opportunity to cross-examine the Prosecution's witnesses on these issues. Moreover, considering that the Defence was aware of the basis for granting the protective measures referred to above, the Chamber is of the view that the Defence had access to sufficient material to explore these lines of questioning at the time of the appearance of the witnesses in question. As observed by the CLRV, the lines of questioning proposed by the Defence, which the Defence suggests would be put to any witness living in Sudan at the time of their testimony, (regardless of their position *vis-à-vis* the Sudanese authorities), 'suggests an open-ended fishing expedition, not supported by investigative results' or any information reported by any other witnesses to the VWU, the Prosecution or the CLRV (in the case of dual status individuals).⁵² The Chamber finds therefore that the Defence has not been able to substantiate their assertion that a significant line of questioning has arisen following the disclosure of the Report.⁵³

21. Moreover, the Chamber recalls that the Defence is able to present evidence relating to these issues and challenge the Prosecution's evidence, during the upcoming presentation of its case.

22. Finally, the Chamber accepts the Prosecution's,⁵⁴ and the CLRV's,⁵⁵ submissions that in the circumstances, applying principles of judicial economy and having regard to the impact on the witnesses themselves, taken with the corresponding risks involved in the affected witnesses,

⁴⁹ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 7, lines 23-25 to p. 8, line 1.

⁵⁰ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 9, lines 6-8.

⁵¹ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 9, lines 21-25 to p. 10, line 10.

⁵² Observations, ICC-02/05-01/20-984-Conf, para. 18.

⁵³ Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p.14, lines 22-25 to p. 15, line 1; Observations, ICC-02/05-01/20-984-Conf, para. 18.

⁵⁴ Response, ICC-02/05-01/20-985-Conf, para. 21; Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-123-CONF-ENG, p. 17, lines 10-14.

⁵⁵ Observations, ICC-02/05-01/20-984-Conf, para. 16.

having to appear before the Chamber for a second time, are additional factors which need to be taken into account.

23. In light of the above, the Chamber finds that no good cause nor any compelling circumstances have been demonstrated which require it to order the recall of witnesses in question.

B. Request regarding the Prosecution's and the Registry's disclosure obligations

24. The Defence also request a finding by the Chamber that the Registry and the Prosecution failed to comply with their disclosure obligations by not transmitting the information mentioned in the Report to the Chamber and/or the Defence before the Report was disclosed.⁵⁶ The Prosecution acknowledged the late disclosure of the Report and apologised for it.⁵⁷ The Chamber is satisfied that whilst there was a failure by the Prosecution to provide timely disclosure it was an inadvertent one and, for the reasons set out above, that no discernible prejudice has been demonstrated. Notwithstanding this finding, the Defence may, if it so wishes, seek the submission into evidence of the Report.

25. In respect of the Registry, the Chamber recalls that the process of evidence disclosure 'established by the Rome Statute framework is imposed on the prosecution alone: in other words, no positive obligation is imposed on the other organs of the Court.'⁵⁸ The relief requested by the Defence has no basis in the law. The Chamber notes the Registry's policy as expressed in the email that '[the VWU] would only approach the Chamber if in receipt of corroborated information that could have an actual impact on the proceedings. As described below the information provided by [P-0874] did not reach such threshold.'⁵⁹ The Registry's role was to inform the Prosecution, which it did, and any failure to disclose is therefore ascribable to the Prosecution.

26. Accordingly, the Chamber rejects the Defence's request to find that the Prosecution and the Registry failed to comply with their disclosure obligations *vis-à-vis* the Report.

⁵⁶ Motion, ICC-02/05-01/20-979-Conf, para. 23.

⁵⁷ Response, ICC-02/05-01/20-985-Conf, para. 3.

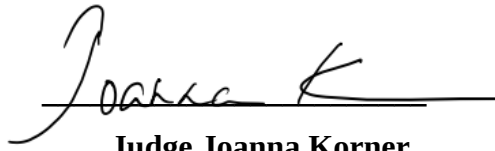
⁵⁸ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence application for disclosure of victims applications, 21 January 2009, ICC-01/04-01/06-1637, para. 10.

⁵⁹ See e-mail of 15 June 2023, at 12:01.

IV. Conclusion

27. For the above reasons the Chamber:

REJECTS the Defence's Motion in its entirety.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 18 July 2023

At The Hague, The Netherlands