

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 06 July 2026

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

Public redacted version of the “Registry’s Observations on the “Defence Application for Judicial Review of Registrar’s Decision on Inclusion of Defence Witnesses into ICC Protection Programme” (ICC-02/05-01/20-1126-Conf-Exp)”, ICC-02/05-01/20-1136-Conf-Exp filed on 27 May 2023

Source: Registry

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☒ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☐ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar

M. Zavala Giler, Osvaldo

☐ Counsel Support Section

☒ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

I. Introduction

1. Pursuant to Trial Chamber I's ("Chamber") order communicated on 14 May 2024 by way of email,¹ the Registry hereby submits its observations in relation to the "Defence Application for Judicial Review of Registrar's Decision on Inclusion of Defence Witnesses into ICC Protection Programme" ("Defence application").²

II. Level of classification

2. In accordance with regulation 23 bis(2) of the Regulations of the Court, the present observations are classified as confidential, *ex parte*, as they refer to a submission which has the same classification.

III. Observations

A. Preliminary remarks

1. The Registry notes that the Registrar's decision³ ("Impugned Decision") referred to in the Defence application was issued by the Registrar following a "request for reconsideration of the Chief of VWU⁴'s decision [REDACTED] ("Request for reconsideration") submitted by the Defence to the Registrar on [REDACTED].
2. The Registry recalls that the Chamber in its "Decision on the reconsideration request of the cooperation decision"⁵ has provided relevant guidance as to the standards to be applied to a request for reconsideration and in particular

¹ Email from Trial Chamber I Communications, 14 May 2024 at 4:01.

² "Defence Application for Judicial Review of Registrar's Decision on Inclusion of Defence Witnesses into ICC Protection Programme", (ICC-02/05-01/20-1126-Conf-Exp), 14 May 2024.

³ The Impugned Decision is included in annex 4 to the "Defence Application for Judicial Review of Registrar's Decision on Inclusion of Defence Witnesses into ICC Protection Programme", (ICC-02/05-01/20-1126-Conf-Exp), 14 May 2024.

⁴ Victims and Witnesses Unit.

⁵ Trial Chamber I, "Decision on the reconsideration request of the cooperation decision », ICC-02/05-01/20-650-Red, 29 March 2022.

indicated that “reconsideration (by a Chamber of its decisions) is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. **New facts** (emphasis added) and arguments arising since the decision was rendered may be relevant to this assessment.”⁶

3. The Registry notes that the Registrar has applied the same standards when reconsidering the initial VWU decision and rejecting the Defence Request noting *inter alia* that the Defence did not provide any new facts or arguments.
4. The Defence application to the Chamber reiterates arguments previously raised in the Request for reconsideration, that have therefore been addressed in the Impugned Decision and does not contain any new facts or legal arguments.
5. As the Defence arguments are similar to those previously submitted to the Registrar in the context of the Request for reconsideration and simply presented again to the Chamber, the Registry will not repeat the reasoning developed in the Impugned Decision but will only provide the Chamber with concise observations where necessary. The Registry stands by the responses and legal argumentation developed in the Impugned Decision and respectfully requests that it be incorporated, by way of reference, to the present submission.
6. Consequently, the Registry’s observations will be limited to the nature of the decision to include a witness in the ICCPP and legal basis upon which this Decision has been made (B) and to the analysis performed by the Registry in reaching its decision (C) that includes comments on the methodology used by the VWU (a) and on the substantial assessment of the risk to the three witnesses (b). The Registry considers that the question of equality of arms has been sufficiently addressed in the Impugned Decision and will therefore not address it anew in this submission.

⁶ Ibid para 10.

B. The nature and legal basis of the decision to include a witness in the Court Protection Programme

7. The decision to include or not a witness in the Court Protection Programme ("ICCPP") is an administrative decision taken by the VWU per delegation of the Registrar following a protection referral submitted by a party to the proceedings or the Legal Representative of a Victim ("LRV") (the "referring entity"). The decision is taken by the VWU on behalf of the Registrar within the scope of its mandate as foreseen in article 43(6) of the Rome Statute and rule 17(2)(a) (i) and (ii) of the Rules of Procedure and Evidence.
8. This decision is taken according to the criteria listed in regulation 96(3) of the Regulations of the Registry ("ROR").
9. Therefore the legal basis for the decision to accept or not a witness in the ICCPP directly derives from the ICC legal framework and not from the VWU's "Service Delivery Document" ("SDD") or the "Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedure for Protection" (Joint-Protocol").
10. The SDD is a compilation of the different applicable rules that govern the protection of victims and witnesses and is aimed to provide the Prosecution, the Defence and the LRV with an overview of VWU's services, provided equally and neutrally to all of them, in relation to the protection, support and appearance of witnesses and victims before the Court. It also describes the procedures to follow for the provision of such services. The Joint-Protocol is a document designed to regulate and coordinate some of the functions and relations between the Prosecution and the Registry, in particular the VWU, in respect of the protection of persons at risk considering that both organs of the Court have been allocated by the Rome Statute specific witness protection responsibilities. Neither of these documents – the SDD or the Joint Protocol – can be considered, or are indeed considered as the legal basis for a decision to include an individual in the ICCPP. The Defence insistence that the SDD should be excluded and the Joint-Protocol used as the authoritative legal basis for such determination to be made, is misplaced.

11. [REDACTED].

12. [REDACTED].⁸

C. The analysis performed by the Registry

a) The methodology and sharing of information

13. [REDACTED].

14. [REDACTED].

15. [REDACTED].⁷ [REDACTED].

16. [REDACTED].

17. The Registry therefore considers that the level of information provided to the Defence was sufficient and in line with the applicable ICC legal framework as well as with an application *mutadis mutandis* of the Joint-Protocol.

b) The analysis of the risk towards the [REDACTED] witnesses

18. The Defence, in addition to challenging that it was not provided with the full [REDACTED], disagrees with the analysis conducted by the VWU and thereafter confirmed by the Registrar in the Impugned Decision

⁷ Annex 4 to ICC-02/05-01/20-1126-Conf-Exp already quoted above, para.13-15

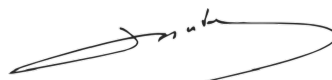
⁹ Annex 4 to ICC-02/05-01/20-1126-Conf-Exp already quoted above, para.40-45

19. In particular the Defence disagrees with the Registry's assessment of the risk to the witnesses that has led to the conclusion not to include them in the ICCPP.
20. Inclusion in the ICCPP is a measure of last resort, exclusively reserved for the most serious risks, should no other alternative protection measures be sufficient to mitigate the risk to witnesses referred for protection. Fulfilling the elements for the admission into ICCPP as foreseen in regulation 96(3) of the RoR does not automatically translate in an inclusion in the ICCPP as the risk identified should also reach a certain threshold.
21. [REDACTED].
22. [REDACTED].
23. [REDACTED].¹⁰
24. In its application to the Chamber, the Defence stressed that the VWU and the Registrar did not challenge, or even discuss the materiality of the risk of being [REDACTED].
25. [REDACTED].
26. The VWU also included in its assessment the information provided by the Defence regarding the possibility for the witnesses [REDACTED] an hypothesis already mentioned by the Defence in its referral for protection. According to the VWU assessment however the witnesses [REDACTED], and not because of their interaction with the Defence. The VWU also considered that these witnesses [REDACTED].
27. It can also be added that Witness [REDACTED] would place them at risk.
28. [REDACTED].

¹⁰ See Annex 4 to ICC-02/05-01/20-1126-Conf-Exp already quoted above, para.26-32

29. The Registry therefore maintains its previous conclusion that the [REDACTED], like all other Sudanese nationals, are at serious risk of harm because of the current armed conflict in Sudan but that the specific risks to [REDACTED] in relation to their involvement with the Court, does not reach the threshold required for inclusion in the ICCPP. The Registry is nonetheless still considering the provision of alternative protection measures and reiterates its invitation to the Defence to work on a protection scheme that could alleviate the Defence concerns.

30. In conclusion, the Registry considers that the Impugned Decision, based on a neutral and objective evaluation of the risks and threats to the [REDACTED] witnesses using the internal tools developed by the VWU, is reasonable and not affected by any material error of law or fact.¹¹



Marc Dubuisson, Director, Division of Judicial Services
on behalf of
Osvaldo Zavala Giler, Registrar

Dated this 06 July 2026

At The Hague, Netherlands

¹¹ *Prosecutor v. Ruto & Sang*, Confidential redacted version of the "Decision on the request of the Prosecution for review of the Registrar's decision regarding Witness 24", ICC-01/09-01/11-635, 6 March 2013, para. 19.