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

Date: **17 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
with CONFIDENTIAL, EX PARTE ANNEXES 1-4**

**Public Redacted Version of Defence Application for Judicial Review of Registrar's
Decision on Inclusion of Defence Witnesses into ICC Protection Programme, 13
May 2024, ICC-02/05-01/20-1126-Conf-Exp**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

The Office of the Prosecutor	Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman Dr Cyril Laucci, Lead Counsel Mr Iain Edwards, Associate Counsel
Legal Representatives of 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 [REDACTED]
States' Representatives	Amicus Curiae

REGISTRY

Registrar Mr Osvaldo Zavala Giler	Counsel Support Section [REDACTED]
Victims and Witnesses Unit [REDACTED]	Detention Section
Victims Participation and Reparations Section	Others [REDACTED]

INTRODUCTION

1. The Defence for Mr Abd-Al-Rahman (“Defence”) respectfully requests that the Honourable Trial Chamber I (“Trial Chamber”) review the Registrar’s decision (“Impugned Decision”)¹ denying the inclusion into the International Criminal Court Protection Program (“ICCPP”) of witnesses [REDACTED] (“the Witnesses”).

2. The Defence submits that the Impugned Decision is unreasonable and irrational, and that, had the Registrar’s decision-making process not been tainted with error, the Witnesses would have been included into the ICCPP. The Defence respectfully requests that the Trial Chamber direct the Registrar to include the Witnesses into the ICCPP, or in the alternative, remit the matter back to the Registrar for a new decision taking into account only relevant considerations, and not taking into account irrelevant considerations.

I. CLASSIFICATION

3. Pursuant to Regulation 23bis(1) of the Regulations of the Court (“RoC”), this application is filed as confidential *ex parte* – Defence, Registry only – as it relates to the protection of Defence witnesses by the VWU, which is, by its very nature, a confidential and *ex parte* process, for which the Prosecution and the Distinguished Legal Representatives of Victims (“the LRVs”) have no standing. The Defence proposes to file a public redacted version of this application in due course.

4. Annexes 1-4 are also filed as confidential and *ex parte*.

II. PAGE LIMIT

5. By email of 13 May 2024, the Defence has sought an extension of page limit from 10 to 13 pages for the purpose of the present submission.² This limited extension

¹ Annex 4.

² E-mail from the Defence to the Chamber, 13 May 2024, 15.43.

was granted.³ The final number of pages is 14. The Defence prays the Chamber to authorize that number of pages.

III. PROCEDURAL BACKGROUND

6. In order to respect the page-limit for filings before the Trial Chamber, the Defence incorporates by reference the procedural background set out in its Request for Protection of Defence Witnesses seeking an order from the Trial Chamber admitting the Witnesses into the ICCPP ("Request #1107").⁴

7. Request #1107 was made in the absence of a decision from the Registrar to the Defence's request for reconsideration, dated [REDACTED],⁵ of the VWU Decision denying inclusion of the Witnesses into the ICCPP, dated [REDACTED].⁶

8. On 11 April 2024, the Trial Chamber issued its Decision rejecting Request #1107, finding that "a review by the Chamber of this matter is premature at this stage."⁷

9. On [REDACTED], the Registrar issued the Impugned Decision, upholding the Initial VWU Decision and rejecting the Witnesses' admission into the ICCPP. In the Impugned Decision, as in the Initial VWU Decision, the Registrar relied extensively on an undated document called the Service Delivery Document ("SDD").⁸

IV. APPLICABLE LAW

10. Assistance in determining the applicable standard of review in such a case can be derived from other cases in which a Party has asked a Trial Chamber to judicially review the Registrar's decision in a matter dealing with witness protection. For example, in the *Ruto & Sang* case, the Trial Chamber relied on its responsibilities under

³ E-mail from the Chamber to the Defence, 13 May 2024, 15.52.

⁴ Defence Request for Protection of Defence Witnesses, [ICC-02/05-01/20-1107-Conf-Exp](#), 28 March 2024, paras 6-11.

⁵ ICC-02/05-01/20-1107-Conf-Exp-Anx3: "CONFIDENTIAL - Request for Reconsideration of [REDACTED] decisions denying admission into the ICCPP", sent by email entitled on [REDACTED], ("Request for Reconsideration"). See also [REDACTED].

⁶ ICC-02/05-01/20-1107-Conf-Exp-Anx2: Email from VWU to the Defence, [REDACTED] ("Initial VWU Decision"),

⁷ [REDACTED].

⁸ ICC-02/05-01/20-1107-Conf-Exp-Anx4: Service Delivery Document ("SDD")..

Article 68(1) of the Statute in ruling that its review of the Registrar's decisions would be based on the assessment of: (a) whether the Registrar made a manifestly unreasonable decision; and (b) whether the Registrar's Decision is affected by a material error of law or fact.⁹

11. Article 43(6) provides, in relevant part, that:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide [...] protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court [...]

12. Article 64(6)(e) provides that:

In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary [...] provide for the protection of the accused, witnesses and victims.

13. Article 68(1) of the Rome Statute provides, in relevant part, that:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. [...] These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

14. Regulation 95 of the Regulations of the Registry ("RoR") provide for the power of the Registry to assist a person at risk to move to another area. Regulation 96 of the RoR provides for the maintenance of a protection programme.

15. The Defence also relies on the Prosecution and Registry Joint Protocol on the Mandate, Standards and Procedure for Protection ("Joint Protocol"),¹⁰ [REDACTED].

V. SUBMISSIONS

16. Article 68(1) of the Statute imposes a duty on the Trial Chamber to take appropriate measures to protect *inter alia* the physical well-being and dignity of witnesses. Decisions taken by the Registrar, even if delegated to the VWU, regarding protection and assistance for witnesses can be subject to judicial review by a Chamber.

⁹ *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.

¹⁰ [REDACTED].

17. The Defence submits that the Impugned Decision should be quashed for error on the grounds that it: (i) is based, in whole or in part, on the SDD that is devoid of any legal authority; (ii) was taken pursuant to a delegation of authority that has no lawful basis; (iii) is inadequately reasoned; (iv) is unreasonably based on undue weight accorded to considerations related to the risk of exposure emanating from involvement with the Court; and (v) places the Defence on an unequal footing compared to the Prosecution, and therefore violates the principle of equality of arms.

(i) The Impugned Decision is erroneously based on the SDD

18. As a preliminary and overarching issue, both the Initial VWU Decision and the Impugned Decision refer to and rely on the SDD. The Registrar further considers that the SDD is applicable [REDACTED] and acts as a “*compilation*” of the [REDACTED] applicable to all VWU-Defence interactions.¹¹

19. The Defence submits that the SDD is no more than an informative pamphlet, devoid of any legal authority. It was designed simply to provide [REDACTED].¹² [REDACTED].¹³

20. Further, the undated SDD does not feature as a source of applicable law under Article 21 of the Statute. By describing the SDD as a mere “*compilation*” of applicable law with an objective that is purely informative, the [REDACTED]. [REDACTED]. The Registrar should not have relied on a document that has no legal force; in so doing, he committed a significant legal error.

21. The Defence previously contended that the document was drafted without any consultation with Defence teams in support of the submission that the SDD has no legal value. The Registrar submits [REDACTED].¹⁴

22. [REDACTED].

23. [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

24. The Defence submits that, the SDD having no legal authority, the only instrument to which VWU and the Registrar can validly refer in deciding on the Witnesses' inclusion into the ICCPP is the Joint Protocol. Its legal basis was identified as being Articles 43(6), and 68(1) and (4) of the Rome Statute.¹⁵ The Joint Protocol states in terms that it is applicable *mutatis mutandis* to the Defence pursuant to [REDACTED] thereof, in the absence of any other agreement with the Defence. [REDACTED].¹⁶

25. The Registrar submits that [REDACTED].¹⁷ [REDACTED]. Consequently, it is submitted that the Registrar's argument that a [REDACTED] of the Protocol is not applicable to the Defence¹⁸ and that, instead, that a document with no legal authority, the [REDACTED], should apply, is irrational and unreasonable. [REDACTED]. The Registrar interprets the Joint Protocol *contra legem* by excluding its applicability to Defence witnesses on this ground.

26. The Joint Protocol, therefore, is the sole instrument legitimately capable of governing VWU's interactions with the Defence, regarding the protection of its witnesses.

(ii) No legal basis for the purported delegation of authority to the Chief of VWU

27. The Initial VWU Decision was made by the Chief of VWU, as informed to the Defence via email on [REDACTED].¹⁹ The Defence submits that the Chief of VWU acted *ultra vires* in making the Initial VWU Decision in light of the relevant provisions of the RoR and the Protocol [REDACTED].²⁰

28. In the Impugned Decision, it is averred that, [REDACTED].²¹ [REDACTED].²² [REDACTED]. Without evidence of lawful delegation of authority, the Defence

¹⁵ [ICC-01/09-01/11-1097-Red](#), para. 20. See also paras 18 and 21.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ Request #1107, para. 17, referencing Regulation 96(4) of the RoR and [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

maintains its submission that the Initial Decision was rendered *ultra vires*. The number of years of purported practice of delegation of authority to the Chief of VWU is wholly beside the point and bears no relevance.

(iii) The Impugned Decision is inadequately reasoned

29. To date, the Defence has received no, or no adequate, information on the actual analysis carried out by VWU on the Witnesses' individual risk factors. In response to the Defence's submissions on the refusal of disclosure of the [REDACTED],²³ [REDACTED].²⁴ [REDACTED].

30. The Defence needs sight of the [REDACTED] in order to assess the appropriateness and reasonableness of the actual decisions taken, but is hamstrung by the Registrar's unreasonable [REDACTED]. The Impugned Decision fails to provide any other justification, legal or otherwise, refuting the Defence's interpretation of the Joint Protocol which would allow it to access the [REDACTED]. The Registrar has acted unreasonably and irrationally, therefore, in disclosing the [REDACTED].

31. To the extent, therefore, that the Impugned Decision relies on a confidential analysis, it is insufficiently reasoned and is therefore vitiated by unreasonableness.

32. Similar considerations are at play in respect of the delayed and only partial disclosure of the [REDACTED]. The Registrar indicates that: [REDACTED].²⁵

33. At the outset, the Defence notes that [REDACTED]. [REDACTED].²⁶ This cannot possibly be correct. The war in Sudan in general, and in Darfur in particular, developed and evolved over that six-month period. It is well-documented that the humanitarian situation in Darfur has deteriorated significantly in that period. By simply providing cherry-picked excerpts of the [REDACTED], the Registrar once more shields behind all-too-easily deployed arguments relating to [REDACTED]. The Registry fails to explain why the Defence should not be allowed sight of information

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

from “[REDACTED]”²⁷ or even explain what these other sources are. If it is open-source material, there can be no legitimate basis for depriving the Defence of access thereto. If it is not open-source, the Registrar fails to explain why the careful use of redactions could not address any concerns about disclosure to the Defence.

34. Finally, the Registrar’s argument that VWS cannot share the full [REDACTED] with the Defence is not consistent with the terms of the Joint Protocol. The suggestion that the Defence does not have the capacity “[REDACTED]” is, regrettably, rather imperious. The Defence has exactly the same capacity to collect, for example, open-source material as the Registry and OTP, and exactly the same capacity to analyse both open-source and non-open-source material as the Registry and OTP. These two organs of the Court, though staffed by undeniably accomplished and experienced investigators and analysts, hold no magic key granting them access to an obscure trove of knowledge, inaccessible to the mere mortals who make up Defence and LRV teams. The Registrar’s haughty pronouncement is legally and factually erroneous and unreasonable, especially since both the VWU Initial Decision and the Impugned Decision refer to [REDACTED].²⁸

35. In sum, the Registrar cannot reasonably assert that it has provided an adequately reasoned decision that is based on limited [REDACTED] excerpts to be read in conjunction with the most limited additional information communicated to the Defence, and absent disclosure of [REDACTED]. This unreasonably secretive approach deprives the Defence from understanding with any particularity the basis of the VWU Initial Decision and the Impugned Decision, and deprives the Defence from being in any position to know just how reasonable, or otherwise, the Decisions are. Only armed with this information can the Defence make an informed decision on whether and how to contest the substance of the Decisions. Indeed, the Registrar has recognised that “[REDACTED]”.²⁹

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

(iv) The Impugned Decision fails to consider the essential risk bearing on the witnesses as a result of their involvement with the Court

36. In the Impugned Decision, the Registrar concludes that the risk to which the Witnesses would be exposed is the risk relating to [REDACTED].³⁰ Whilst it is right to say that this was *one of the risks* referred to by the Witnesses, it was by no means the only risk that they articulated.

37. The most important, if not only relevant condition that the Witnesses were at risk as a result of their interaction with the Defence and with the Court was plainly met: [REDACTED].

38. This risk was perfectly articulated in the applications for their inclusion within the ICCPP.

39. [REDACTED].³¹

40. [REDACTED].³² [REDACTED].

41. [REDACTED].³³

42. [REDACTED]. This severe risk and its connection with the Witnesses' interaction with the Defence and appearance before the Court were ignored in the initial VWU Decision for each of the [REDACTED] Witnesses, where the VWU Chief concludes that the risk [REDACTED].³⁴ [REDACTED].

43. The Impugned Decision did not reconsider the Initial Decision on this crucial aspect and failed to consider the obvious link between the Witnesses' interaction with the Defence and appearance with the Court and the risks bearing on them: this is made obvious by the Registrar's conclusion that [REDACTED].³⁵ This conclusion is grossly misconceived and fails to take into account the risks highlighted in the Witnesses' Applications. [REDACTED]. They simply ignore it. Ignoring that severe risk amounts

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

to an error of fact and law fatally vitiating the Initial and Impugned Decisions and calling for judicial redress by the Chamber.

(v) *The Impugned Decision violates the principle of equality of arms*

44. By not overturning the VWU Initial Decision, the Registrar has further confirmed an unequal situation between the Prosecution and the Defence. Indeed, as previously submitted, the refusal to include the Witnesses in the ICCPP when inclusion is not only objectively justified, it is plainly the only right result, raises an equality of arms issue vis-à-vis the Prosecution. [REDACTED]. The Registrar's assertion that [REDACTED].³⁶ [REDACTED]. Whilst it is recognised that ICCPP assessments are, by their nature, dependent on individual circumstances, the contrast between the number of admitted Prosecution and Defence witnesses is nevertheless striking.

45. Finally, the Defence highlights the alarming advice given to the Defence by the Registrar "[REDACTED]".³⁷ [REDACTED]. Experience shows that defence witnesses are almost always acutely aware of the extent to which their interactions with defence teams place them in a vulnerable position. Potential defence witnesses almost always want to know what protection the Court can provide them. Experience also shows that potential defence witnesses are already aware of the existence of the ICCPP or of the possibility to get relocated, even if they are unaware of the precise details of the programme. For example, potential defence witnesses have often asked if the ICC can protect them from threats associated with their interactions with the Defence by setting them up in other countries. The Defence, of course, must be entitled to set out the various options available *to the Court* in terms of protection, without making any promises about what an independent service of the Registry may ultimately recommend. Were a defence team to keep its silence about even the possibility of the availability of inclusion in the protection programme when witnesses know that far-reaching protection by the Court is available, this may act as a serious disincentive *ab initio* to potential defence witnesses cooperating with the Defence. [REDACTED].

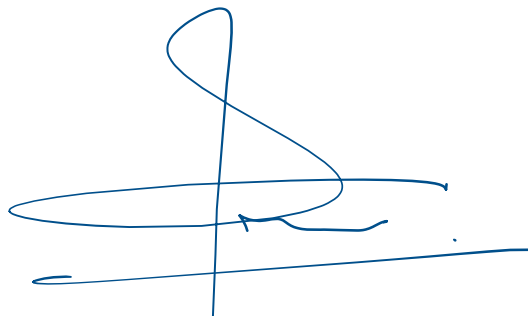
³⁶ [REDACTED].

³⁷ [REDACTED].

46. The Registrar would thus seek to widen the inequality between the Prosecution and the Defence even further with regards to witness protection. Whilst the Prosecution has a much freer hand in advising on and providing protective measures for its own witnesses, including by [REDACTED],³⁸ the Defence is [REDACTED]. Consequently, not only is the Defence placed in a prejudicial position when compared with the Prosecution in terms of protection of its witnesses, but it is also restricted in its capacity to inform its witnesses about possibilities regarding their protection and obtain witnesses to testify in an environment where well-founded fears for their and their families' safety have been mitigated.

47. For the foregoing reasons, the Defence respectfully request that the Trial Chamber find the Impugned Decision to be unreasonable and unlawful, and order the admission of Witnesses [REDACTED], together with their families, in the ICCPP pursuant to Regulation 96 of the RoR.

Respectfully submitted,



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 17 July 2026 at The Hague, The Netherlands

³⁸ [REDACTED].