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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 first request for the authorisation of
non-disclosure of witness identities”, 18 December 2020,
ICC-02/05-01/20-242-Conf-Exp**

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

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I. INTRODUCTION

1. The Prosecution requests the Single Judge to authorise the non-disclosure of the identities of Witnesses P-0085, P-0091, P-0117, P-0119, P-0123, P-0129, P-0843 and P-0884 (“Eight Witnesses”) under article 68(1) of the Rome Statute and rule 81(4) of the Rules of Procedure and Evidence to mitigate security risks to them and their family members resulting from their cooperation with the Court. The Prosecution disclosed statements and related materials of the Eight Witnesses with non-standard redactions applied to their identities on 7 December 2020.¹

II. CONFIDENTIALITY

2. 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

3. On 17 August 2020, the Single Judge ordered the Prosecution to file any applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence by 11 September 2020.²

4. On 9 September 2020, the Prosecution requested an extension of time for the filing of such applications.³ On 10 September 2020, Pre-Trial Chamber II (“Chamber”) indicated that it would decide on the Prosecution’s request in due course.⁴

5. On 2 November 2020, the Chamber ordered the Prosecution to conclude risk assessments and implementation of measures to protect witnesses and persons at risk, and submit any and all applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence by 18

¹ See [ICC-02/05-01/20-225](#); [ICC-02/05-01/20-225-Conf-AnxA](#); [ICC-02/05-01/20-225-Conf-AnxB](#); [ICC-02/05-01/20-225-Conf-AnxC](#).

² [ICC-02/05-01/20-116](#), p. 8.

³ [ICC-02/05-01/20-149-Red2](#).

⁴ [ICC-02/05-01/20-151](#), para. 8.

December 2020.⁵ On 3 December 2020, the Prosecution requested to extend this deadline until 1 March 2021 in light of unresolved witness security concerns and other related grounds.⁶

6. On 7 December 2020, the Prosecution filed its submissions on the evidence demonstrating that Mr Abd-Al-Rahman is also known as Ali Kushayb.⁷ To support its submissions, the Prosecution disclosed evidence, including statements and related materials of the Eight Witnesses with non-standard redactions applied to their identities.⁸

IV. SUBMISSIONS

The Court shall take measures to protect victims and witnesses

7. 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.

8. 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.⁹

⁵ [ICC-02/05-01/20-196](#), p. 20.

⁶ [ICC-02/05-01/20-218-Red](#), paras. 6 and 16-20. See also [ICC-02/05-01/20-228](#), paras. 4-5 and 9.

⁷ [ICC-02/05-01/20-224](#). See also [ICC-02/05-01/20-196](#), para. 38 and p. 20.

⁸ [ICC-02/05-01/20-225](#); [ICC-02/05-01/20-225-Conf-AnxA](#); [ICC-02/05-01/20-225-Conf-AnxB](#); [ICC-02/05-01/20-225-Conf-AnxC](#).

⁹ [ICC-01/04-01/06-773](#), para. 21; [ICC-01/04-01/07-475](#), para. 67.

9. 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.”¹⁰

Disclosure would endanger the witnesses or their family members

10. The Prosecution intends to rely on the evidence of the Eight Witnesses for the confirmation of charges against Mr Abd-Al-Rahman. Their current security situation does not allow for the disclosure of their identities. The Prosecution seeks to delay the disclosure of their identities by applying non-standard redactions to their witness statements and related materials.

11. Five of the Eight Witnesses reside in Sudan, two are believed to reside in Chad, and one is in an interim protection location. [REDACTED].

12. The Prosecution assesses that threat actors, including Mr Abd-Al-Rahman’s associates, have the capacity to interfere with witnesses and their family members in both Sudan and Chad. Mr Abd-Al-Rahman’s associates, some of whom have engaged in violent retaliation in the past, are assessed as being capable of carrying out operations against witnesses in Sudan and Chad.

13. On 11 December 2020, in the context of the review of Mr Abd-Al-Rahman’s continued detention, the Single Judge observed that the Court was still not in a position to protect witnesses in Darfur.¹¹ The Single Judge also took note of new information provided by the Prosecution, which showed that “witness security is still far from guaranteed and that persons apparently related to Mr Abd Al-Rahman have access to certain witnesses”.¹² [REDACTED].¹³

14. Additionally, in his initial assessment of whether Mr Abd-Al-Rahman’s detention appeared necessary to ensure he does not obstruct or endanger the investigation or the court proceedings, which remains unchanged, the Single Judge

¹⁰ [ICC-01/04-01/07-475](#), para. 68.

¹¹ [ICC-02/05-01/20-230-Conf](#), paras. 24 and 28.

¹² [ICC-02/05-01/20-230-Conf](#), para. 28.

¹³ [ICC-02/05-01/20-230-Conf](#), paras. 29-30.

took into consideration Mr Abd-Al-Rahman's high ranking position, his personal connections, and the likelihood that he still has supporters who may have access to actual or potential witnesses. The Single Judge also considered reports of threats allegedly made by the suspect and his supporters to human rights activists in February 2020.¹⁴

15. In addition, [REDACTED] are assessed as having an interest in influencing or controlling the evidence that could be obtained by the Court in relation to the Darfur suspects, including Mr Abd-Al-Rahman. [REDACTED].

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

17. Witness P-0085 gave a statement to the Prosecution in September 2006.¹⁵ P-0085 described the attacks on Bindisi town and the surrounding villages in August 2003, as well as Mr Abd-Al-Rahman's role in the operations. According to the Prosecution's latest information, he resides in [REDACTED].

18. Witness P-0091 gave a statement to the Prosecution in October 2006.¹⁶ P-0091 described the role of Ja'far Abd-Al-Hakam, Mr Abd-Al-Rahman and other Janjaweed leaders in receiving money, weapons and training from the Government of Sudan. He has reported several security incidents in the past. According to the Prosecution's latest information, he resides in [REDACTED].

19. Witness P-0117 provided two statements to the Prosecution, in June 2007 and July 2008.¹⁷ He described the positions and involvement in the conflict of various actors, including Mr Abd-Al-Rahman, Ahmad Harun, and Abdel Raheem Muhammad Hussein. [REDACTED]. According to the Prosecution's latest information, he resides in [REDACTED].

¹⁴ [ICC-02/05-01/20-230-Conf](#), paras. 24 and 28.

¹⁵ Annex 1.

¹⁶ Annex 2.

¹⁷ Annex 3.

20. Witness P-0119 gave a statement to the Prosecution in February to March 2007.¹⁸ He described the killing of detained men in Deleig in 2004. In 2003 to 2007, [REDACTED]. According to the Prosecution's latest information, Witness P-0119 is currently residing in [REDACTED].

21. Witness P-0123 gave two statement to the Prosecution, in April 2007 and October 2017.¹⁹ He described mass executions, torture and rape committed in Mukjar and Bindisi, which he learned about while [REDACTED], and the role of Mr Abd-Al-Rahman and Ahmad Harun in these crimes. He reported to the Prosecution having been threatened in the past, and explained that if people were to find out about his cooperation with the Prosecution, it would be a big problem. He believes that he would be at risk if Mr Abd-Al-Rahman was able to talk to persons in Sudan, since Mr Abd-Al-Rahman has the support of his family, members of the former regime and his tribe. He added that they could resort to kidnapping and assassinations. According to the Prosecution's latest information, Witness P-0123 is currently residing in [REDACTED].

22. Witness P-0129 gave a statement to the Prosecution in July 2007.²⁰ He described the alleged involvement of Ahmad Harun and Mr Abd-Al-Rahman in the planning meetings, attacks, ill-treatment and mass execution of Fur detainees in Mukjar in 2004. At the time of his interview, P-0129 expressed security concerns related to his cooperation with the Court. He explained that if the authorities had his name, they would want to take steps to prevent him from talking to the United Nations or the Court. [REDACTED]. According to the Prosecution's latest information, Witness P-0129 is currently residing in [REDACTED].

23. Witness P-0843 gave a statement to the Prosecution in October 2020.²¹ She described Mr Abd-Al-Rahman's personal background and role in the attacks, in particular his speech in Garsila inciting violence against the Fur before the attack on

¹⁸ Annex 4.

¹⁹ Annex 5.

²⁰ Annex 6.

²¹ Annex 7.

Arawala. She believed that if her cooperation or evidence were known, she could be harmed. P-0843 has received death threats. [REDACTED]. Mr Abd-Al-Rahman and Ja'far Abd-Al-Hakam, in her opinion, have supporters in Darfur and Khartoum. Following the Prosecution's security assessment, [REDACTED].

24. Witness P-0884 gave a statement to the Prosecution in [REDACTED].²² P-0884 described the events in Mukjar in 2003 to 2004, in particular Ahmad Harun's speech and Mr Abd-Al-Rahman's attack on Mukjar and surrounding villages in February 2004. According to the Prosecution's latest information, Witness P-0884 is residing in [REDACTED].

25. Given the above circumstances, disclosing the identities of the Eight Witnesses who reside in Sudan or Chad before implementing mitigation measures may put the witnesses or their family members at risk.

The requested protective measures are necessary

26. The requested redactions to the identities of the Eight Witnesses are necessary. Given their current security situations, less restrictive measures would not be feasible or sufficient in order to protect the witnesses and their family members. Due to factors outside of its control, and despite its best efforts, the Prosecution has not been able to complete all of the necessary individual risk assessments and/or implement the appropriate protective measures for all of the Eight Witnesses.

27. [REDACTED]. The Prosecution is seeking to re-establish contact with many witnesses after years of hibernation, and in some instances, more than a decade. This has proven to be difficult and time-consuming. [REDACTED].

28. The Prosecution has taken reasonable steps to put in place mechanisms to protect potential witnesses and safeguard potential evidence.²³ During the Prosecution's mission to Khartoum in October 2020, the delegation discussed the need for the Government of Sudan to facilitate the Prosecution's operations in Sudan.

²² Annex 8.

²³ See [ICC-02/05-01/20-115](#), para. 31.

Following this mission, the Prosecution submitted to the Sudanese authorities a draft memorandum of understanding on the modalities of cooperation, and is making strenuous efforts to deploy an operational team on the ground in Sudan.²⁴

29. As a result, for the first time, there is an imminent prospect of conducting risk assessments and investigations *in situ* in Darfur.²⁵ [REDACTED].

30. [REDACTED].

31. [REDACTED].

The requested protective measures would cause no prejudice to the accused

32. The requested protective measures for the Eight 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. has disclosed their statements and annexes with only the necessary redactions to information that could reasonably be expected to reveal their identities;
- 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 56 witnesses without identity redactions.

33. Although the Prosecution disclosed interview transcripts of Witness P-0131 with identity redactions on 7 December 2020, it is now in a position to re-disclose his evidence without such redactions. Despite its best efforts, the Prosecution was unable to re-establish contact with this witness in order to allow for disclosure of his identity

²⁴ See [ICC-02/05-01/20-209-Red](#), para. 18.

²⁵ [ICC-02/05-01/20-218-Red](#), paras. 21 and 23, 40-47; [ICC-02/05-01/20-228](#), para. 6.

prior to the 7 December 2020 deadline. The Prosecution will similarly lift identity redactions for each of the Eight Witnesses as soon as practicable and after establishing that such disclosure would not endanger the witnesses and their family members.

34. For ease of reference, the Prosecution has attached the witness statements of the Eight Witnesses with see-through coloured highlights as Annexes 1 to 8. In addition to the standard redactions, for which specific authorisation is not required, Annexes 1 to 8 show the non-standard redactions in pink applied to identifying information under category F. The corresponding statements with redactions are available in eCourt.

35. The chart in Annex 9 outlines the extent of the requested non-standard redactions applied to the information that would reveal their identities in each witness statement and their corresponding annexes. Non-standard redactions have also been applied to all metadata fields in eCourt containing the names of the Eight Witnesses.

V. CONCLUSION

36. For these reasons, the Prosecution requests the Single Judge to authorise the non-disclosure of the identities of the Eight Witnesses.



James Stewart
Deputy Prosecutor

Dated this 6th day of April 2021

At The Hague, the Netherlands