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

**Date: 20 April 2021**

**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**

Decision on the Prosecutor's request for non-disclosure pursuant to article 54(3)(e)  
and applications under 54(3)(f) of the Statute

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

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**Legal Representatives of Victims**

Ms Amal Clooney  
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**Legal Representatives of Applicants**

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**States Representatives**

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**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**JUDGE ROSARIO SALVATORE AITALA**, acting as Single Judge on behalf of Pre-Trial Chamber II (the ‘Chamber’) of the International Criminal Court (the ‘Court’),<sup>1</sup> in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, having regard to article 54(3)(e) and (f) of the Rome Statute (the ‘Statute’), rules 81 and 83 of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 24 of the Regulations of the Court (the ‘Regulations’), issues this Decision on the Prosecutor’s request for non-disclosure of six documents obtained pursuant to article 54(3)(e) and two applications under 54(3)(f) to apply redactions and other conditions to documents obtained under article 54(3)(e).

## **I. PROCEDURAL HISTORY**

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.<sup>2</sup>
2. On 5 March 2021, the Prosecutor submitted a request for the non-disclosure of six documents obtained pursuant to article 54(3)(e) (the ‘Article 54(3)(e) Request’).<sup>3</sup>
3. On 12 March 2021, the Defence submitted a request seeking that the Prosecutor be directed to provide a lesser redacted version of the Article 54(3)(e) Request (the ‘Defence Request’).<sup>4</sup>
4. On 12 and 19 March 2021, the Prosecutor filed applications under article 54(3)(f) of the Statute to apply redactions and other conditions to documents obtained under article 54(3)(e) (the ‘Article 54(3)(f) Applications’).<sup>5</sup>

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<sup>1</sup> [Decision on the designation of a Single Judge](#), 17 March 2021, ICC-02/05-01/20-307.

<sup>2</sup> See, for example, [Decision on the Defence Request to provide written reasoning for two oral decisions](#), 18 August 2020, ICC-02/05-01/20-118, paras 1-4.

<sup>3</sup> Prosecution’s request for non-disclosure of six documents obtained pursuant to article 54(3)(e), ICC-02/05-01/20-293-Conf-Exp. A confidential redacted version was filed on 9 March 2021, see ICC-02/05-01/20-293-Conf-Red.

<sup>4</sup> Requête en vertu des norms 23bis-3 et 24-1 du Règlement de la Cour, ICC-02/05-01/20-299-Conf.

<sup>5</sup> Prosecution’s application under 54(3)(f) to apply redactions and other conditions to documents obtained under article 54(3)(e), 12 March 2021, ICC-02/05-01/20-300-Conf-Exp (the ‘First Article 54(3)(f) Application’); Prosecution’s application under 54(3)(f) to apply redactions and other conditions to documents obtained under article 54(3)(e); 19 March 2021, ICC-02/05-01/20-312-Conf-Exp (the ‘Second Article 54(3)(f) Application’).

5. On 6 April 2021, the Defence filed its response to the Article 54(3)(f) Applications (the ‘Defence Response’).<sup>6</sup>

## II. ANALYSIS

### A. Preliminary matters

6. Before deciding on the substance of the Prosecutor’s requests, the Single Judge will first address the Defence Request to be provided with a lesser redacted version thereof. The Defence argues that the confidential redacted version of the Prosecutor’s Article 54(3)(e) Request and Article 54(3)(f) Applications contain insufficient information and do not permit the Defence to meaningfully respond.<sup>7</sup>

7. It is true that due to the extensive redactions it is difficult to understand parts of the confidential redacted versions of the Article 54(3)(e) Request and Article 54(3)(f) Applications. However, the Single Judge notes that proceedings under article 54(3)(e) of the Statute are essentially *ex parte* in nature.<sup>8</sup> This is because the Defence is, by definition, not permitted to have access to the information as a result of the information provider’s restriction.<sup>9</sup> It is also important to emphasise that the Chamber’s role is limited in that it cannot under any circumstances order disclosure against the will of the information provider. The only issues before the Chamber are (i) whether or not the information that is covered by the article 54(3)(e) agreement is disclosable and, if so, (ii) whether or not the counter-balancing measures that have been taken by the Prosecutor are adequate to ensure that the rights of the suspect are protected and that proceedings are fair.<sup>10</sup> It is the Chamber’s responsibility make these assessments independently of any submissions from the Defence.

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<sup>6</sup> Réponse aux Requêtes ICC-02/05-01/20-300-Conf-Red et ICC-02/05-01/20-312-Conf-Red, ICC-02/05-01/20-334-Conf.

<sup>7</sup> Defence Request, para. 2; Defence Response, para. 8.

<sup>8</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 21 October 2008, ICC-01/04-01/06-1486, para. 48 (the ‘[Lubanga Article 54\(3\)\(e\) Judgment](#)’).

<sup>9</sup> Moreover, to the extent that the Chamber must assess the disclosability of the information, rule 83 of the Rules prescribes an *ex parte* process for this purpose.

<sup>10</sup> [Lubanga Article 54\(3\)\(e\) Judgment](#), para. 48; Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision on the “Prosecution’s application under article 53\(3\)\(f\) to apply redactions to documents obtained under article 54\(3\)\(e\)”](#), 2 March 2016, ICC-02/04-01/15-410, para. 4.

8. Accordingly, there was no need for the Prosecutor to file confidential redacted versions of the Article 54(3)(e) Request and the Article 54(3)(f) Applications. Although the Prosecutor acted appropriately by informing the Defence of the fact that disclosable documents falling under article 54(3)(e) restrictions had been identified,<sup>11</sup> filing a confidential redacted version of the requests was not the most appropriate medium because it raised the false expectation on the part of the Defence that it was entitled to respond pursuant to regulation 24(1) of the Regulations. For reasons that are further explained below, the Single Judge considers that it would have been sufficient to inform the Chamber and the Defence in the Prosecutor's bi-weekly progress report and disclosure reports. In any event, the Defence is not entitled to receive a lesser redacted version of the Article 54(3)(e) Request or the Article 54(3)(f) Applications.<sup>12</sup>

### **B. The Article 54(3)(e) Request**

9. The Article 54(3)(e) Request pertains to six documents related to P-0128. P-0128 collected information about the situation in Darfur during a series of interviews conducted in 2004. She made handwritten notes of these interviews, which she later typed out. These notes then formed the basis of a report. Both the typed notes<sup>13</sup> and the report<sup>14</sup> are available to the Defence. P-0128 also gave a statement to the Prosecutor in which she essentially provided background information on her working methods and commented on the content of her notes as well as the report.

10. The Prosecutor states that on 2 March 2021, the information-provider declined to lift the restrictions on P-0128's statement and five annexes provided pursuant to article 54(3)(e) of the Statute. The annexes consist of handwritten notes and two maps.

11. As regards P-0128's statement itself, the Prosecutor has determined that paragraphs 46 to 56, relating to the attacks on Bindisi and Mukjar in 2003, and paragraphs 61 to 80, relating to the involvement of the suspect in those events, are

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<sup>11</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [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"](#), 13 October 2006, ICC-01/04-01/06-568, paras 65-67.

<sup>12</sup> Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution request for authorisation of non-disclosure of five documents](#), 11 June 2015, ICC-01/04-02/06-637.

<sup>13</sup> DAR-OTP-0021-0209.

<sup>14</sup> DAR-OTP-0006-0207.

material to the preparation of the Defence pursuant to rule 77 of the Rules. The Single Judge agrees with this assessment.

12. The Single Judge has carefully analysed the statement as well as the alternative sources containing the same information that have already been disclosed to the Defence. For the reasons that follow, the Single Judge considers that the counter-balancing measures are adequate for the purposes of the confirmation proceedings. First and foremost, witness P-0128 is not a first-hand witness to any of the facts alleged against Mr Abd-Al-Rahman. The probative value of her statement is thus fairly limited. To the extent that P-0128's statement contains information that is not reflected in the typed notes, this information does not reveal additional relevant facts and it is also not essential to understanding the information contained in the typed notes. The non-disclosure of P-0128's statement therefore does not jeopardise the Defence's ability to prepare itself.

13. As regards the handwritten notes, they are not always easy to decipher but do not appear to contain more or different information compared to the typed notes. The Single Judge therefore determines that they are not disclosable.

### **C. The Article 54(3)(f) Applications**

14. In relation to the Article 54(3)(f) Applications, the Single Judge is of the view that the Prosecutor's approach is confused and to some extent misguided. As already noted, when the information-provider conditions lifting restrictions on disclosure on maintaining certain redactions or other restrictions, then it is not within the Chamber's power to alter this. It is therefore not for the Chamber to 'authorise' such redactions or any other restrictions, as erroneously requested by the Prosecutor. The Chamber's only task is to ensure that such redactions or other restrictions do not unduly prejudice the Defence. If, on the other hand, the information-provider agreed to lift all article 54(3)(e) restrictions without such preconditions and merely expressed a *preference* for certain redactions to be maintained or for particular documents to remain confidential, then the Chamber regains its authority to assess whether there are compelling reasons for those redactions or other restrictions. Moreover, in such instances, the Prosecutor has to provide adequate justification for non-standard redactions.

15. Unfortunately, it is not always clear from the Article 54(3)(f) Applications whether or not the information-providers made the lifting of the disclosure restrictions

conditional upon maintaining certain redactions or other restrictions. For example, in relation to P-0021, the Prosecutor asserts in the First Article 54(3)(f) Application that the person provided a statement without article 54(3)(e) restrictions but that the information-provider *requested* the application of two standard redactions.<sup>15</sup> However, in the Prosecutor's eleventh progress report it was indicated that the Prosecutor was still in the process of discussing the 'lifting of restrictions in relation to the material of [P-0021]' but that the information-provider had 'agreed, in principle, to the disclosure [...] with minimal redactions applied to the material of P-0021'.<sup>16</sup> Unless these statements pertain to different documents, which is impossible to ascertain from the Prosecutor's submissions, this appears to contradict the First Article 54(3)(e) Application.

16. For the sake of caution, the Chamber will treat the redactions to P-0021's statement as article 54(3)(e) restrictions. In any event, the redactions applied to P-0021's statement are standard redactions to protect the identity of investigators and third persons at risk on account of the activities of the Court, which are not subject to the Chamber's prior approval.<sup>17</sup> However, if the redactions were not mandated by the information-provider, the Prosecutor shall inform the Chamber and the Defence at once. The latter may then approach the Prosecutor directly should it consider that the redactions are unwarranted or should be lifted as a result of changed circumstances.

17. As regards the information-provider's *request* that 'the material for both P-0021 and P-0738'<sup>18</sup> not be made public in order to allow the organisation and its staff to do their work safely and securely,<sup>19</sup> the Single Judge understands that this is not an article 54(3)(e) restriction and may thus be subject to the Chamber's review in the future. For now, the Single Judge sees no reason to deny the information-provider's request.

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<sup>15</sup> First Article 54(3)(f) Application, para. 8

<sup>16</sup> Annex 2 to Prosecution's eleventh progress report on the evidence review, translation and disclosure process, 5 February 2021, ICC-02/05-01/20-278-Conf-Exp-Anx2, para. 3.

<sup>17</sup> [Chambers Practice Manual](#).

<sup>18</sup> The First Article 54(3)(f) Application is unclear as to whether this refers only to the statements of P-0021 and P-0378 or equally to the 14 documents mentioned in paragraph 7. It would have been much more preferable if the Prosecutor had provided clear lists with all the ERN's.

<sup>19</sup> First Article 54(3)(f) Application, para. 10.

18. Similarly confusing is the Prosecutor's treatment of P-0032's statement and the materials this witness provided. According to the Prosecutor, P-0032 agreed to lift the article 54(3)(e) restrictions with the caveat that his identity not be disclosed. This condition implies that all identifying information must be redacted from P-0032's statement and 24 other documents. Despite these redactions being a precondition of the information-provider to allowing the lifting of article 54(3)(e) restrictions, the Prosecutor included witness P-0032 in the second non-disclosure application.<sup>20</sup> This seems to have been in error, since the Chamber has no authority to authorise or reject these redactions, given that they appear to have been imposed by the information-provider pursuant to article 54(3)(e) of the Statute. The Single Judge will assess the impact of the redactions below.

19. In relation to several documents provided by the United Nations and the European Union Satellite Centre the situation is less ambiguous: the lifting of 54(3)(e) restrictions was conditional upon maintaining certain redactions and/or confidentiality.<sup>21</sup> In some instances, the information-provider did not want to be identified as the source of the documents. One information-provider imposed a restriction on use and imposed redactions only for the public version of the documents. In relation to P-0109, the information-provider demanded the non-disclosure of their identity but appears to have accepted the possibility of lifting this restriction when this is "strictly necessary".<sup>22</sup> The Single Judge understands this to mean that the Court would still have to revert to the information-provider prior to the actual lifting of the restriction, but that the latter is, in principle, open to consider the possibility if compelling grounds exist. At this point in time, there are no compelling reasons to reveal P-0109's identity.

20. In sum, the Single Judge concludes that the Chamber has no authority to either authorise or disapprove the redactions or other restrictions in any of the concerned documents. All that is left for the Chamber to decide is whether these redactions or other restrictions cause undue prejudice to the Defence or the overall fairness of these proceedings. However, before doing so, the Single Judge will first address the main arguments raised by the Defence.

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<sup>20</sup> Prosecution's second request for the authorisation of non-disclosure of witness identities, 26 February 2021, ICC-02/05-01/20-287-Conf-Exp, para. 18.

<sup>21</sup> Second Article 54(3)(f) Application, para. 1.

<sup>22</sup> Second Article 54(3)(f) Application, para. 5.

### *1. Defence objections*

21. In the Defence Response, two specific objections are raised.

22. First, the Defence argues that the Court is not bound by article 54(3)(e) restrictions in relation to statements or information provided by individuals when these restrictions are imposed by their employers instead of by the individuals themselves.<sup>23</sup> However, the Defence does not put forward any legal basis for this argument and the Single Judge cannot discern one either. On the contrary, it seems uncontroversial that when the information-provider is an organisation, it is for this organisation to decide whether or not to enter into an article 54(3)(e) agreement, even if the information provided takes the form of a statement by one of its employees. Conversely, if the information-provider is an individual who entered into an article 54(3)(e) agreement in his or her personal capacity, then such an agreement would be binding on the Court even if the individual's employer did not require any restrictions. It is not for the Court to second-guess the relationship between the individual and their employer or who the proprietor of the information is. Even if the Chamber were to find that it was inappropriate for the Prosecutor to enter into an article 54(3)(e) agreement with a particular organisation rather than with a specific individual, this would still not entitle the Chamber to set aside such agreement. The Defence objection is therefore rejected.

23. Second, the Defence argues that the Chamber should treat the restrictions imposed by the United Nations with great caution because of alleged violations by the United Nations of the Statute.<sup>24</sup> According to the Defence, restrictions imposed by the United Nations should be rejected for this reason, unless sufficient justification for them is offered. This argument must fail, because the validity of article 54(3)(e) agreements is not conditional upon the observance by the parties of other obligations they may have towards each other outside of the article 54(3)(e) agreement. Moreover, information-providers are not under any obligation to justify the restrictions they impose under article 54(3)(e) of the Statute. The Prosecutor is under no obligation to enter into an article 54(3)(e) agreement and probably should refrain from doing so when the information-provider's conditions for providing the information are deemed

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<sup>23</sup> Defence Response, para. 6.

<sup>24</sup> Defence Response, para. 9.

unreasonable. However, after such an agreement has been concluded, it is no longer possible for the Court to question whether it was wise or appropriate to do so.

## *2. Assessment of potential prejudice resulting from restrictions*

24. As a preliminary matter, the Single Judge emphasises that it is not the case that the Prosecutor must submit all instances of article 54(3)(e) redactions and other restrictions to the Chamber.<sup>25</sup> Given the limited time and resources of the Chamber, its involvement must be limited to matters that genuinely require judicial attention. Many of the redactions and other restrictions imposed by the information-providers do not give rise to concern, either because the affected documents are of limited relevance or probative value or because the redacted information does not negatively impact their intelligibility. In these instances there is no need for judicial oversight.

25. Accordingly, if the Prosecutor determines that the imposed redactions or other restrictions do not affect the intelligibility of the affected document and do not conceal relevant information, such documents can be disclosed to the Defence straight away, without involving the Chamber. Similarly, if the Prosecutor has determined that certain redactions do conceal information that is relevant for the Defence but has identified fully adequate counter-balancing measures there is, in principle, no need for the Prosecutor to seize the Chamber before disclosing the documents with the redactions demanded by the information-provider.<sup>26</sup>

26. In both instances, the Chamber and the Defence should simply be informed about the fact that the redactions are mandated by the information-provider and, where applicable, indicate which counter-balancing measures are made available to the Defence. As previously noted, this can be done in the progress reports and disclosure notifications. It is important that the information provided to the Chamber is clear, precise and complete so as to allow the Chamber to monitor the disclosure process and

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<sup>25</sup> Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the defence application for additional disclosure relating to a challenge on admissibility](#), 2 December 2009, ICC-01/05-01/08-632, para. 22.

<sup>26</sup> [Lubanga Article 54\(3\)\(e\) Judgment](#), para. 44.

evaluate the potential effect of withholding information from the Defence on the fairness of the proceedings.<sup>27</sup>

27. The Defence may request the Chamber to review specific redactions and/or counter-balancing measures that were not approved by the Chamber if it is of the view that certain particular redactions may be concealing significant information or if there are grounds to question the adequacy of the counter-balancing measures. If the Chamber determines that the Defence should have the redacted information or that the counter-balancing measures are insufficient, it will give the Prosecutor an opportunity to propose new or additional counter-balancing measures or may ask that the information-provider be approached again to consider the possibility of lifting or varying specific restrictions.<sup>28</sup>

28. The Prosecutor must only seize the Chamber in relation to redactions or other restrictions (short of complete non-disclosure) imposed by information-providers pursuant to article 54(3)(e) of the Statute when (i) there is uncertainty about whether or not certain information that is subject to article 54(3)(e) restrictions must be disclosed to the Defence<sup>29</sup> and/or (ii) the Prosecutor is uncertain about the adequacy of the available counter-balancing measures. The latter may be the case, for example, when the available analogous evidence provides similar but not identical information to the facts mentioned in the restricted material.<sup>30</sup>

29. Turning now to the documents in question, the Single Judge notes that the Prosecutor asserts in both Article 54(3)(f) Applications that “[n]one of the redactions or conditions affect information that is subject to rule 77 or article 67(2). Where redactions are required, the redactions are minimal and do not impact the Defence’s ability to comprehend the substance of the underlying documents”.<sup>31</sup>

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<sup>27</sup> [Lubanga Article 54\(3\)\(e\) Judgment](#), para. 47, referring to ECHR (Grand Chamber) judgment of 16 February 2000 in the case of *Rowe and Davis v. United Kingdom* (Application no. 28901/95); ECHR judgment of 16 February 2000 in the case of *Jasper v. United Kingdom* (Application no. 27052/95).

<sup>28</sup> See, e.g., Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Public redacted version of the "Second Decision on Article 54\(3\)\(e\) documents"](#), 26 October 2012, ICC-02/05-03/09-407-Red.

<sup>29</sup> Article 67(2) of the Statute and Rule 83 of the Rules.

<sup>30</sup> See e.g. Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision on the "Prosecution's Provision of 56 Documents Collected under Article 54\(3\)\(e\)"](#), 6 February 2014, ICC-01/04-02/06-247.

<sup>31</sup> First Article 54(3)(f) Application, para. 14; Second Article 54(3)(f) Application, para. 12.

30. As indicated, this should ordinarily be the end of the matter and suggests that there was no need for the Chamber to be involved. However, the Single Judge has noted that one of the documents contains a redaction which appears to concern the suspect directly. In particular, DAR-OTP-0128-3997 contains a redacted passage providing information about an individual identified as ‘Ali Kosheib’ (‘also known as Ali Mohammed Ali’). Given the Defence’s position in relation to the identification of Mr Ali Mohammed Ali Abd-Al-Rahman as ‘Ali Kushayb’, the Single Judge would have expected the Prosecutor to have identified this passage as requiring counter-balancing measures. Regrettably, this was not done. Nevertheless, in this particular instance, the Chamber has located other documents that have already been disclosed to the Defence, which contain almost all the information mentioned in the redacted passage.<sup>32</sup> The information also does not appear to be contested.<sup>33</sup> The Single Judge therefore concludes that this redaction does not prejudice the Defence. The Single Judge stresses, however, that it is not the Chamber’s responsibility to verify whether redactions imposed under article 54(3)(e) of the Statute conceal disclosable information, much less to identify counter-balancing measures. The Chamber expects more diligence from the Prosecutor in this regard.

31. As regards P-0032’s statement,<sup>34</sup> the Single Judge is concerned that the large number of redactions sometimes make it difficult to fully understand certain parts of the statement. The fact that the witness’ identity is redacted also makes it harder to assess the probative value of some of the information provided, which may be prejudicial to the Defence. However, the Single Judge notes that the Prosecutor only refers to P-0032’s testimony twice in the Pre-Confirmation Brief.<sup>35</sup> On both occasions, P-0032’s statement is one of several exhibits in relation to factual allegations that do not implicate Mr Abd-Al-Rahman by name. The statement itself does not appear to incriminate Mr Abd-Al-Rahman personally and relates mainly to broader contextual aspects of the case. Significantly, none of the potentially exonerating information the

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<sup>32</sup> DAR-OTP-0204-0592-R01, at 0599, para. 30; DAR-OTP-0122-0010; DAR-OTP-0122-0010 (transcript: DAR-OTP-0202-0215 at 0217, line 47).

<sup>33</sup> DAR-OTP-0216-0127 (transcript: DAR-OTP-0215-6963, at 6966, line 67); DAR-OTP-0216-0128 (transcript: DAR-OTP-0215-6974 at 06979, line 112).

<sup>34</sup> DAR-OTP-0100-0075-R01.

<sup>35</sup> Prosecution’s Pre-Confirmation Brief, 16 April 2021, ICC-02/05-01/20-346-Conf-AnxA, paras 35 and 39.

Prosecutor has identified is unduly affected by the redactions. The Single Judge therefore considers it unproblematic to maintain the redactions for the purposes of the confirmation proceedings.

32. For the remainder of the redactions and other restrictions, the Single Judge has not identified any concerns.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**TAKES NOTE** of the redactions and other restrictions imposed by the information-providers mentioned in the Article 54(3)(e) Request and the Article 54(3)(f) Applications;

**CONFIRMS** that none of these redactions or other restrictions affect the rights of the defence; and

**REJECTS** the Defence Request.

Done in both English and French, the English version being authoritative.



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**Judge Rosario Salvatore Aitala**  
**Single Judge**

Dated this Tuesday, 20 April 2021

At The Hague, The Netherlands