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No.: **ICC-02/05-01/20**
Date: **22 December 2021**

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
Defence response to “Prosecution’s request to authorise
delayed disclosure of witnesses’ identities” of 3 December 2021
(15 December 2021)

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:

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I. INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) opposes the Prosecution’s request that the Trial Chamber authorise the delayed disclosure of the identities of witnesses [REDACTED] until no later than 30 days prior to the commencement of trial.¹

2. The Prosecution has failed to demonstrate the need for delayed disclosure. There is simply no evidence that, were the [REDACTED] witnesses’ identities to be disclosed to the Defence now, an “objectively justifiable risk”² to their safety would result. The Prosecution relies on difficulties it is experiencing in Sudan, but Mr Abd-Al-Rahman should not be prejudiced by a situation over which he has no control. The prejudice would arise from the fact that, as the scheduled start of trial approaches, the Defence needs to have the most complete understanding of the case it needs to meet now. Preparations for trial have intensified. Any delay in disclosure of the [REDACTED] witnesses’ identities would further hinder the Defence’s already significantly impeded ability to investigate the allegations against Mr Abd-Al-Rahman.

3. In accordance with Regulation 23*bis* (2) of the Regulations of the Court, this Response is filed as confidential. The Defence is ready to file a public redacted version of its Response once a public redacted version of the Request is filed.

II. PROCEDURAL HISTORY

4. On 12 May 2021, the Single Judge of Pre-Trial Chamber II authorised the Prosecution to apply redactions to identifying information contained in the statements of witnesses [REDACTED].³ The Single Judge held that:

This authorisation is provisional and subject to review as soon as measures have been put in place to alleviate any identified security risks.⁴

¹ Confidential Redacted Version of “Prosecution’s request to authorise delayed disclosure of witnesses’ identities”, 3 December 2021, ICC-02/05-01/20-527-Conf-Red (“Request”).

² Request, para. 7 i.

³ [Decision on the Prosecutor’s requests for non-disclosure of witness identities](#), 12 May 2021, ICC-02/05-01/20-386 (“Decision of 12 May”).

⁴ [Decision of 12 May](#), Disposition.

5. On 8 September 2021, during the first status conference, the Trial Chamber directed that there was to be a “cut-off date” for disclosure by the Prosecution of evidence on which it intends to rely of 5 January 2022.⁵ The Trial Chamber went on to make the following observation:

Any disclosure of evidence which is to be used as part of the Prosecution case after that date, which we would discourage strongly, and we add to that discouragement this: It may only be used in evidence with the permission of the Trial Chamber. We would obviously expect that any disclosure after 5 January would be accompanied by a full explanation of the reason for the delay.⁶

6. On 3 December 2021, the Prosecution filed the Request, asking that the “cut-off date” for disclosure of the [REDACTED] witnesses’ identities be extended to no later than 30 days prior to the commencement of trial (ie. by Sunday, 6 March 2022).

III. SUBMISSIONS

A. The Prosecution has failed to demonstrate that disclosure of the [REDACTED] witnesses’ identities now would have any impact on any risk to their safety

7. The Prosecution sets out in some detail the various security and logistical factors that mean it cannot ensure protective measures are in place prior to disclosure of the [REDACTED] witnesses’ identities by 5 January 2022:

- (i) over a month after the military coup of 25 October 2021, the situation in Sudan remains volatile;⁷
- (ii) an agreement was reached to reinstate the Prime Minister with a view to forming a new government, but a new government has not yet been formed;⁸
- (iii) the civilian coalition – Forces of Freedom and Change – has rejected the new government agreement;⁹
- (iv) protests by civilians against the coup and the new government agreement continue, and the situation remains unstable;¹⁰
- (v) consequently, [REDACTED];¹¹

⁵ [ICC-02/05-01/20-T-013-ENG](#), 8 September 2021, p.78.

⁶ [ICC-02/05-01/20-T-013-ENG](#), 8 September 2021, p.78.

⁷ Request, para. 10.

⁸ Request, para. 10.

⁹ Request, para. 10.

¹⁰ Request, para. 10.

¹¹ Request, para. 11.

- (vi) [REDACTED];¹²
- (vii) [REDACTED];¹³
- (viii) [REDACTED];¹⁴
- (ix) [REDACTED];¹⁵
- (x) [REDACTED].

8. The Trial Chamber will be provided with an update on the current situation in Sudan and on the Court's activities during the third status conference, scheduled for 17 December 2021.¹⁶ The Defence fully acknowledges the practical difficulties experienced by the Prosecution as a result of the volatile security situation in Sudan. The instability in Sudan has had an even worse impact on the ability of the Defence to carry out investigations on the ground.

9. As of 2 December 2021, [REDACTED].¹⁷ France's *Ministère de l'Europe et des affaires étrangères*, the United Kingdom's Foreign, Commonwealth & Development Office, and the Netherlands' *Ministerie van Buitenlandse Zaken* all advise against all travel to the Darfur states, and all but essential travel to *inter alia* Khartoum.¹⁸ The Canadian Government advises against all travel to Darfur and Khartoum,¹⁹ while the United States' State Department advises against all travel for the entire country (travel advisory: level 4).²⁰

10. None of the difficulties mentioned above are related to Mr Abd-Al-Rahman, nor are they matters over which he has the slightest control. This marks a noticeable progress in the OTP's submissions. The Defence notes with satisfaction that the Prosecution no longer tries to allege that persons associated with Mr Abd-Al-Rahman have attempted to threaten witnesses and/or potential witnesses.

¹² Request, para. 11.

¹³ Request, para. 11.

¹⁴ Request, para. 12.

¹⁵ Request, para. 13.

¹⁶ [Order setting the agenda for the third status conference](#), 13 December 2021, ICC-02/05-01/20-533, para. 4.

¹⁷ [REDACTED].

¹⁸ <https://www.diplomatie.gouv.fr/fr/conseils-aux-voyageurs/conseils-par-pays-destination/soudan/#securite>;
<https://www.gov.uk/foreign-travel-advice/sudan>;

<https://www.nederlandwereldwijd.nl/landen/sudan/reizen/reisadvies>, last accessed on 14 December 2021.

¹⁹ <https://travel.gc.ca/destinations/sudan>, last accessed on 14 December 2021.

²⁰ <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/sudan-travel-advisory.html>, last accessed on 14 December 2021.

11. Notwithstanding its difficulties in [REDACTED],²¹ the Prosecution has failed to create - actually did not even try to allege - any link whatsoever between the disclosure of the witnesses' identities to the Defence now and any reasonably fear of increase an "objectively justifiable risk" to their safety in case of disclosure. As the Prosecution itself has stated in the Request, the statements of 112 of the 122 witnesses on its provisional trial witness list have already been disclosed to the Defence without identity redactions.²² Yet the Prosecution has not suggested in the Request that this disclosure has resulted in any increased risk to their safety, much less any concrete examples of harm or of any complaints of any contact, direct or otherwise, by anyone associated with Mr Abd-Al-Rahman. Absent such evidence, there is no demonstrated need for the requested delayed disclosure. If any risks to witnesses exist, they exist independent of the disclosure of the witnesses' identities to the Defence. There is simply no evidence that, were the [REDACTED] witnesses' identities to be disclosed to the Defence now, this would have any impact on the "objectively justifiable risk" to their safety. Consequently, there is no valid reason to delay such disclosure.

B. The Prosecution has failed to explain why the [REDACTED] New Witnesses have only recently been interviewed

12. The Prosecution argues that witnesses [REDACTED] ("New Witnesses") have only recently been interviewed.²³ The Prosecution is silent on the question of when contact was first made with the New Witnesses, most notably whether it was before or after the confirmation of charges hearing.²⁴ The subject matter of the New Witnesses' evidence is by no means new. It is not related to a new issue that would have arisen from the confirmation of charges. Establishing Mr Abd-Al-Rahman's identity, that the nickname "*Ali Kushayb*" is his, or his alleged interactions with members of the GoS were all issues raised in the initial joint warrant of arrest delivered as early as 2007. The Prosecution has failed to justify why the New

²¹ Request, paras 15-16.

²² Request, para. 30 c.

²³ Request, para. 8.

²⁴ ICC-02/05-01/20-T-007-Red-ENG, 24 May 2021; ICC-02/05-01/20-T-008-Red-ENG, 25 May 2021; ICC-02/05-01/20-T-009-Red-ENG, 26 May 2021.

Witnesses were interviewed only recently and/or why no security assessment was undertaken or protective measures were put in place since 2007 and, in any case, before the coup of 25 October 2021. The Trial Chamber is respectfully invited to assess whether the Prosecution has acted with sufficient expeditiousness with respect to these New Witnesses, such that it can now legitimately claim that delayed disclosure to the Defence is a proportionate remedy.

C. The Defence will suffer prejudice to its preparations for trial if delayed disclosure is authorised

13. The Prosecution relies on the fact that the Single Judge of the Pre-Trial Chamber found that the evidence of [REDACTED] was of “*relatively minor significance*” when the Prosecution’s case as a whole is considered.²⁵ The Prosecution relies on the finding of the Single Judge that, as a consequence, “*withholding the disclosure of their identity would not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.*” The admittedly limited relevance of a witness’ statement is a factor pleading against its delayed disclosure. If a statement is of relatively minor significance and the Prosecution cannot protect its author adequately and in a timely manner, it is submitted that the only appropriate solution is for the Prosecution to say that it no longer relies on that evidence. In light of its low relevance, such a solution would not be unduly prejudicial to the Prosecution’s case, whereas delayed disclosure of the witness’ identity is prejudicial to the Defence’s preparation of the case for trial. If the Prosecution is not in a position to disclose the identities of [REDACTED] by 5 January 2022 as ordered by the Trial Chamber, they should simply be removed from the Prosecution’s witness list.

14. With respect to the New Witnesses, in contrast, the Prosecution positively relies on its own assessment of their importance. It submits that they [REDACTED] who “provide crucial incriminating evidence, which will be relied upon at trial.”²⁶

15. [REDACTED]²⁷ [REDACTED]²⁸ The “crucial” evidence to be provided by [REDACTED] cannot be assessed by the Defence since his individual circumstances

²⁵ Request, para. 23.

²⁶ Request, para. 14.

²⁷ Request, para. 14.

have been redacted. As mentioned above, the Prosecution does not bother to provide a mere beginning of justification as to why these allegedly key witnesses were contacted in 2021 only after the confirmation of charges and not as of 2007, when the reasons of their alleged relevance were already fully known.

16. There is no doubt that withholding the identities of all [REDACTED] witnesses will prejudice the preparations of the Defence. Although the Defence is in possession of their statements, the full relevance and import of those statements flow from the identity of their authors. The Defence is already ham-strung in its ability to carry out investigations ahead of the start of trial. The Defence is doing its best to investigate based on its research and analysis of open-source material and by cross-referencing information with other material that has been disclosed. A key aspect of the limited inquiries the Defence can undertake relates to investigations into prospective witnesses themselves. This cannot be achieved when the identities of witnesses are withheld.

17. As the date of the start of the trial approaches and Defence preparations intensify, any delays in the Defence's ability to investigate and prepare for cross-examination inevitably creates prejudice. While it is acknowledged that the Prosecution proposes to call these witnesses at a later stage in the trial,²⁹ the Defence is not in a position to know what that means in concrete terms and needs to get an holistic view of the Prosecution's case prior to the beginning of the trial in order to define its strategy accordingly.

18. The time given to the Defence for its preparation for trial cannot be used as the sole variable in response to the difficulties reported by the Prosecution. The principal of fair trial requires that solutions shall be found not only in limiting the time and possibilities allowed to the Defence – who faces the exact same difficulties as the Prosecution, if not worse³⁰ –, but also on OTP's side. When evidence is assessed as of low relevance – like for [REDACTED] –, a more appropriate solution is

²⁸ Request, para. 21.

²⁹ Request, para. 30 d.

³⁰ Unlike the OTP, [REDACTED]. No request for judicial assistance from the Defence has been responded to date, whereas the Registry highlighted that the Sudanese authorities were cooperating on other requests from the Court (ICC-02/05-01/20-496, par. 23).

to set it aside, with low prejudice on the Prosecution's case. When evidence was collected inexcusably late with no justification – like for the New Witnesses -, then it should be set aside as well without the Defence having to bear the consequences of the Prosecution's late action.

D. *The requested delayed disclosure is not the appropriate answer to the Prosecution's predicament*

19. No one knows when the difficulties experienced by the Prosecution (and indeed by the Defence as well) will be resolved to such an extent that [REDACTED]. Consequently, there is absolutely no guarantee that delaying the disclosure of the [REDACTED] witnesses' identities until March 2022 will allow the Court to complete the relevant risks assessments and to put in place any protective measures. This has already been tried at pre-trial stage for some witnesses, including Witnesses [REDACTED], without success, as the Prosecution's Request now demonstrates. The Court has [REDACTED]. The Defence should not be prevented from preparing for trial without any guarantees that such delay will give a chance to complete what could not be done so far. This would mean sacrificing the sole right of the Defence to have adequate time for its preparation for no actual benefit, in breach of the guarantees of fair trial protected under the Rome Statute.

IV. REMEDY

20. For the foregoing reasons, the Defence respectfully submits that the request for delayed disclosure be denied, and that the Prosecution be ordered to disclose the identities of the [REDACTED] witnesses by 5 January 2022.



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

Dated this 22nd day of December 2021

At The Hague, The Netherlands