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

Corrected version of "Prosecution's request for an extension of time to disclose materials of seven witnesses and a report pursuant to regulation 35 of the Regulations of the Court", 21 December 2021, ICC-02/05-01/20-541-Red2

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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. Pursuant to regulation 35 of the Regulations of the Court (“Regulations”) and articles 64(2), 64(6)(f) and 69(3) of the Rome Statute (“Statute”), the Prosecution requests that Trial Chamber I (“Chamber”) extend the time limit to disclose: (i) materials relating to seven witnesses¹ (the “Seven Witnesses”); and (ii) a report [REDACTED] on 14 December 2021.

2. On 8 September 2021, the Chamber ordered the Prosecution to disclose all evidence which it intends to rely on by 5 January 2022 (“Disclosure Deadline”).² However, a *coup d’état* in Sudan on 25 October 2021 and renewed travel restrictions imposed as a result of the ongoing COVID-19 pandemic, have impacted the Prosecution’s ability to disclose the materials relating to the Seven Witnesses by the Disclosure Deadline. Furthermore, [REDACTED] Report will not be available until after the Disclosure Deadline.

3. These developments, which are beyond the Prosecution’s control, constitute good cause and justify the reasonable extension of time requested for disclosure of these materials.

4. Specifically, the Prosecution requests an extension of the Disclosure Deadline until 31 January 2022 to: (i) disclose the Arabic translation of the witness statement of P-0990 and the Arabic transcript and English translation of an interview of P-0999, [REDACTED]; (ii) obtain and disclose the Arabic original and English translation of P-1018’s [REDACTED]; and (iii) disclose the [REDACTED] Report.

5. The Prosecution further requests an extension of the Disclosure Deadline until 28 February 2022 to: (i) [REDACTED] of P-0916; (ii) [REDACTED] for P-0878 and P-0921; and (iii) [REDACTED] of P-1047.

¹ P-0990, P-0999, P-1018, P-0916, P-0878, P-0921 and P-1047.

² *Prosecutor v. Abd-Al-Rahman (“Ali Kushayb”)*, Status Conference, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 17, l. 23-25 and p. 18, l. 1-7 and p. 78, l. 1-13.

6. The anticipated evidence of the Seven Witnesses and the [REDACTED] Report relates to core issues in the case and will assist the Chamber in its determination of the truth under article 69(3) of the Statute. Moreover, as set out below, an extension of time will not cause any prejudice to the Accused's right to a fair trial under article 67(1).

II. CLASSIFICATION

7. Pursuant to regulation 23*bis*(1) of the Regulations, the Prosecution files this request as confidential, *ex parte*, only available to the Prosecution, because it contains sensitive witness-related information. The Prosecution will file a confidential redacted version and public redacted version as soon as practicable.

III. SUBMISSIONS

There is good cause to extend the time limit for the disclosure of the materials of the Seven Witnesses and the [REDACTED] Report

A coup d'état in Sudan and renewed COVID-19 restrictions demonstrate good cause and justify an extension of the time limit for the disclosure of the materials of the Seven Witnesses

8. Regulation 35(2) of the Regulations provides that the Chamber "may extend or reduce a time limit if good cause is shown." The Appeals Chamber has held that "[a] cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations."³

9. As the Ntaganda Trial Chamber held, "additions to a list of witnesses after the relevant deadline may, in principle, be made when the terms of Regulation 35(2) of the Regulations are met or, even where the terms of that regulation have not been met,

³ *Prosecutor v. Katanga and Ngudjolo Chui*, "Reasons for the 'Decision on the Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation'", 27 June 2008, ICC-01/04-01/07-653, para. 5.

where to do so would nonetheless be in the interests of justice and the determination of the truth”.⁴

10. As noted in the Prosecution’s recent request to authorise delayed disclosure of witnesses’ identities (“Delayed Disclosure Request”),⁵ on 25 October 2021, Sudan experienced a *coup d’état* during which Prime Minister Hamdok and numerous other officials from the Government of Sudan (“GoS”) were removed from their positions and internet access was suspended across the country.

11. On 11 November 2021, a new Sovereignty Council was appointed and on 21 November 2021 an agreement was reached reinstating Prime Minister Hamdok with a view to forming a new government. However, widespread protests against the *coup d’état* and the agreement to form a new government continue.⁶ As the Prosecution has previously communicated to the Chamber, the situation in Sudan remains volatile.⁷

12. Moreover, on 26 November 2021, the World Health Organisation announced the discovery of a new variant of the COVID-19 virus⁸ which has resulted in additional cross-border travel restrictions and raised serious concerns regarding the health implications of travel for both witnesses and members of the Prosecution’s staff.

13. As set out in the Delayed Disclosure Request, [REDACTED].⁹ These developments have significantly impacted the Prosecution’s ability to complete its

⁴ *Prosecutor v. Ntaganda*, “Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior record testimony of Witness P-0551”, 19 January 2017, ICC-01/04-02/06-1733, para. 6.

⁵ *Prosecutor v. Abd-Al-Rahman (“Ali Kushayb”)*, “Prosecution’s request to authorise delayed disclosure of witnesses’ identities” (“Delayed Disclosure Request”), 3 December 2021, ICC-02/05-01/20-527-Conf-Exp, para. 10.

⁶ Walsh, D. “Sudan’s Top General Entrenches Military Coup, Frustrating Western Efforts”, *New York Times*, 11 November 2021, available at: <https://www.nytimes.com/2021/11/11/world/africa/sudan-military-coup.html> [Last accessed 15/12/2021]; Abdelaziz, K. and Elthahir, N., “Analysis: Sudan’s military rulers draw on Bashir-era veterans to tighten grip”, *Reuters*, 11 November 2021, available at: <https://www.reuters.com/world/africa/sudans-military-rulers-draw-bashir-era-veterans-tighten-grip-2021-11-11/> [Last accessed 15/12/2021]; AA/IF, Chief Justice appointed, *Sudan News Agency*, 25 November 2021. Available at: <https://suna-sd.net/read?id=726888> [Last accessed 15/12/2021].

⁷ [REDACTED].

⁸ World Health Organization. “Classification of Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern. 26 November 2021. Available at: [https://www.who.int/news/item/26-11-2021-classification-of-omicron-\(b.1.1.529\)-sars-cov-2-variant-of-concern](https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern) [Last accessed 16/12/2021].

⁹ Delayed Disclosure Request, para. 11.

investigative activities and meet the Disclosure Deadline in relation to the material of the Seven Witnesses.

14. The specific challenges faced by the Prosecution in meeting this deadline include: [REDACTED].¹⁰

15. These circumstances are beyond the Prosecution's control, and attempts to mitigate the effects of these developments [REDACTED].

16. On 11 December 2021 Prosecution staff took the exceptional decision to deploy to Sudan [REDACTED]. As a consequence of this mission, the Prosecution is now in a position [REDACTED] disclose all outstanding materials by 28 February 2022.

The unexpected delay to the [REDACTED] demonstrates good cause and justifies an extension of the time limit for the disclosure of the [REDACTED] Report

17. Further to discussions between the Prosecution, the Defence, the Registry, [REDACTED], it was agreed that the [REDACTED] would take place on 19 November 2021. On this basis, the [REDACTED] Report by mid-December 2021.

18. However, on 18 November 2021, the day before the scheduled [REDACTED]. Accordingly, the [REDACTED] was rescheduled to the next available date, 14 December 2021.

19. On 14 December 2021 the [REDACTED] was carried out. However, the [REDACTED] Report until late January 2022.

The requested extension of the Disclosure Deadline for the materials of the Seven Witnesses and the [REDACTED] Report is reasonable under the circumstances

20. Together, the reasons set out above, which were beyond the Prosecution's control, constitute good cause and "objectively provide justification for the inability of

¹⁰ [REDACTED].

[the Prosecution] to comply with [its disclosure] obligations”.¹¹ The Prosecution has made every effort to mitigate the factors referred to above. As a result, the requested extensions of the Disclosure Deadline are reasonable under these circumstances.

The Seven Witnesses and the [REDACTED] Report provide critical evidence that is required to determine the truth

21. It is in the interests of justice and consistent with the Chamber’s functions under articles 64(2) and 69(3) of the Statute to grant the Prosecution’s request for an extension of the Disclosure Deadline. The evidence from the Seven Witnesses and the [REDACTED] Report will provide the Chamber with critical evidence regarding the charged crimes and the individual criminal responsibility of the Accused, as set out below.

Materials subject to the requested extension of the Disclosure Deadline until 31 January 2022

- ***Witness statement of P-0990***

22. P-0990, [REDACTED].¹²

23. [REDACTED]. [REDACTED],¹³ [REDACTED]. The Arabic translation of the statement will be disclosed as soon as possible, and no later than 31 January 2022.

- ***Witness statement of P-0999***

24. P-0999, [REDACTED]¹⁴

25. [REDACTED] The Prosecution will disclose the transcript of the interview in Arabic and an English translation and related materials no later than 31 January 2022.

26. [REDACTED] ***of P-1018***

¹¹ *Prosecutor v. Katanga and Ngudjolo Chui*, “Reasons for the ‘Decision on the Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor’s Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation’”, 27 June 2008, ICC-01/04-01/07-653, para. 5.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

27. P-1018, [REDACTED].

28. [REDACTED]. The Arabic transcript and English translation of the interview will be disclosed by the Disclosure Deadline. [REDACTED].¹⁵

29. During the interview [REDACTED]. The Prosecution requests until 31 January 2022 to translate [REDACTED] into English and disclose it.

- *The [REDACTED] Report*

30. The [REDACTED] Report will include information on [REDACTED] the Defence is aware that the [REDACTED] Report will not be completed until January 2022.

Witnesses in relation to the requested extension of the Disclosure Deadline until 28 February 2022

- *Witness statement of P-0916*

31. P-0916, [REDACTED].

32. [REDACTED]. The Prosecution intends to disclose the identity of the witness, the witness statement and related materials in English as well as the Arabic translations as soon as practicable and no later than 28 February 2022.

- *Witness statement of P-0878*

33. P-0878, [REDACTED]. [REDACTED],¹⁶ [REDACTED],¹⁷ [REDACTED]¹⁸ [REDACTED].

34. [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

35. [REDACTED]. The Prosecution will then disclose the witness statement in English and the Arabic translation as soon as practicable and no later than 28 February 2022.

- *Witness statement of P-0921*

36. P-0921, [REDACTED].¹⁹

37. [REDACTED]. The Prosecution will then disclose his witness statement and the Arabic translation as soon as practicable and no later than 28 February 2022.

- *Witness statement of P-1047*

38. P-1047, [REDACTED].²⁰ [REDACTED].

39. [REDACTED]. The Prosecution intends to disclose the identity of the witness, the witness statement and related materials in English and the Arabic translation as soon as practicable and no later than 28 February 2022.

The requested extension is not prejudicial to the Accused's right to a fair trial

40. The requested extension of the Disclosure Deadline is limited only to materials related to the Seven Witnesses and the [REDACTED] Report, which the Prosecution has not been able to disclose earlier due to circumstances which are outside of its control.

41. The Accused's rights under article 67, including in particular 67(1)(a) and (b), will not be materially impacted on the basis that the Prosecution: (i) will disclose the above mentioned materials for the Seven Witnesses and the [REDACTED] Report on a rolling basis, as soon as practicable; (ii) will call the Seven Witnesses to testify at a later stage of trial, if necessary; (iii) intends to disclose the identity,²¹ witness statement and related materials for P-0990 in English prior to the Disclosure Deadline; and (iv)

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

has already disclosed, or will disclose by the Disclosure Deadline, the identities, witness statements and screening notes set out above.

42. These measures will mitigate any potential prejudice to the Accused and ensure consistency with the Prosecution's duty to establish the truth under article 54, the rights of the victims under article 68, and the Chamber's duty to conduct a fair and expeditious trial, with full respect for the rights of the accused and due regard for the protection of victims and witnesses, under article 64(2) of the Statute.

IV. CONCLUSION

43. For the reasons outlined above, the Prosecution respectfully requests that the Chamber extend the Disclosure Deadline for the materials relating to the Seven Witnesses and the [REDACTED] Report, as set out above. In addition, the Prosecution also requests permission to add these items to its list of evidence, and to add witnesses P-0916, P-0990, P-0999 and P-1047 to its list of witnesses, once the necessary disclosure is complete.



Karim A. A. Khan QC

Prosecutor

Dated this 23rd day of December 2021

At The Hague, The Netherlands