

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **1 March 2022**

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 “Prosecution’s request for in-court protective and special measures”, 25 February 2022, ICC-02/05-01/20-609-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. Pursuant to the Trial Chamber I's ("Chamber") "Directions on the conduct of proceedings" issued on 4 October 2021¹ and in accordance with articles 64 and 68 of the Rome Statute ("Statute") and rules 87 and 88 of the Rules of Procedure and Evidence ("Rules"), the Prosecution requests in-court protective measures for 59 witnesses ("Request").

2. The Prosecution submits that at this stage an objectively justifiable risk² applies to four categories of witnesses: (i) insider witnesses; (ii) crime base witnesses; (iii) witnesses who have been admitted into the ICC protection program ("ICCPP"); and (iv) Prosecution investigators.³

3. In-court protective measures and special measures are required in order to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses that will testify before the Chamber.

4. The measures sought are proportionate and are the least restrictive means necessary to fairly balance Mr Abd-Al-Rahman's right to a fair and public trial against the Court's competing obligation to protect the interests of victims and witnesses who appear before it. Mr Abd-Al-Rahman will not be unfairly prejudiced by the measures requested. The Prosecution further undertakes to monitor the situation and inform the Chamber should the need for protective measures change for any of its witnesses.

II. CLASSIFICATION

5. Pursuant to regulation 23*bis*(1) of the Regulations, this Request is filed as confidential, *ex parte*, only available to the Prosecution and the Victims and Witnesses Section ("VWS"), because it contains sensitive witness-related information. A confidential and public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. Background

6. The trial of Mr Abd-Al-Rahman is due to commence on 5 April 2022. The Prosecution intends to call 102 witnesses to testify live before the Chamber, including rule 68(3) witnesses.

¹ Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), paras. 57-58.

² *Ruto & Sang* Second redaction of Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses', 3 September 2013, [ICC-01/09-01/11-902-Red2](#), para. 13 ("*Ruto & Sang* Decision on In-Court Protective Measures"); *Ntaganda* Decision on request for in-court protective measures relating to the first Prosecution witness, 15 September 2015, [ICC-01/04-02/06-824-Red](#), para. 5-6 ("*Ntaganda* Decision on in-court protective measures").

³ [REDACTED].

The Prosecution seeks identity protection for 59 witnesses and in-court support for eight witnesses.

7. A confidential, *ex parte* Annex A is appended to this Request and contains the list of witnesses for which protective measures are requested, indicating for each witness: (i) the witness code; (ii) name; (iii) in-court protective measures requested; (iv) other support suggested; and (v) key facts and security incidents reported by witnesses upon which the Request is based.

B. The Prosecution requests three types of in-court protective and special measures

8. The Prosecution seeks three general types of in-court protective and special measures for its trial witnesses: 1) measures intended to protect a witness's identity from the public; 2) closed or private session intended to protect particular portions of a witness's testimony from public disclosure; and 3) measures intended to support a witness psychologically before, during, and after testimony.

1) Measures intended to protect a witness's identity from the public

9. The Prosecution requests the use of a pseudonym and face or voice distortion⁴ for 59 witnesses. These measures are sought only where other measures, such as the targeted use of private session, would be inadequate to protect the witness's (or another person's) safety, physical and psychological well-being, dignity, and privacy.

2) Closed or private session intended to protect particular portions of a witness's testimony from public disclosure

10. Private session in the circumstances anticipated by the Prosecution may be characterised as an in-court protective measure under rule 87 or as a special measure under rule 88.

11. The Prosecution will request closed or private session for limited portions of the testimony of most of its witnesses. Such requests will be made orally at the time of testimony. They will occur primarily in two circumstances. First, for all witnesses whose identity is withheld from the public through the use of a pseudonym, face or voice distortion, the Prosecution will request that questioning which might reveal the witness's name or other identifying information be conducted in private session.

⁴ The Prosecution currently requests voice distortion only where there is a concrete reason to believe that public transmission of the witness's voice poses a risk. Consequently, the Prosecution has not requested voice distortion for two witnesses, P-1048 and P-1049, who are Prosecution investigators.

12. Second, regardless of whether a witness's identity is withheld from the public, the Prosecution may, on a case-by-case basis, request private or closed session to address specific facts which are particularly private or sensitive, [REDACTED]. Such testimony raises a higher than normal risk of subjecting the witness to traumatisation or re-traumatisation if broadcasted publicly, due to the social stigma which such testimony may trigger, as well as intense emotions that the witness may feel.

3) Measures intended to provide psychological support to a witness

13. The Prosecution suggests that eight witnesses may benefit from special measures in the form of the presence of a support person during the witness's testimony and/or the availability of mental health care before, during, and after the witness's testimony.⁵ This is because these witnesses were either victims of crimes of sexual violence, eye-witnesses to crimes perpetrated against family members, or witnesses who have displayed a medical need for special measures. The special measures are intended to minimise the impact of testimony by providing psychological and emotional support to the witness.

14. The Prosecution recognises that the Registry is in some ways best positioned to determine when supportive special measures are necessary, and which measures are most appropriate. In this case, the Registry will be the only organ of the Court in contact with witnesses during their travel to The Hague, during breaks in their testimony, and in the immediate aftermath of their testimony. The Prosecution therefore limits itself in this application to identifying witnesses it believes, based on the information currently available to it, may benefit from additional support.

C. Protective and special measures are required because the political and security situation in Sudan is fluid

15. The Court's jurisprudence establishes that evidence of direct threats is not required to establish the existence of an objectively justifiable risk.⁶ In addition, Trial Chambers in *Ntaganda*,⁷ and *Ruto and Sang* have held that "the security situation in a particular territory may be pertinent when considered in relation to the circumstances of a particular witness."⁸

⁵ [REDACTED].

⁶ *Ruto & Sang Decision on In-Court Protective Measures*, para. 14.

⁷ *Ntaganda Decision on in-court protective measures*, para. 5.

⁸ *Ruto & Sang Decision on In-Court Protective Measures*, para. 14

16. In 2019, a popular uprising in Sudan led to Sudanese President Omar Hassan Ahmad Al Bashir (“Al Bashir”) being arrested and replaced by a transitional government comprised of military and civilian members.

17. As the Chamber has previously been informed of,⁹ on 25 October 2021 a *coup d’état* overthrew the joint civilian-military government in place. Several civilian officials including Prime Minister Hamdok were removed from their position. On 21 November 2021, Prime Minister Hamdok was reinstated. However, on 2 January 2022 he resigned.

18. These political changes have had a direct impact on the security situation in Sudan. Since the military coup, over 70 civilians have been killed and hundreds more injured in protests that have taken place throughout the country.¹⁰ The region of Darfur, which had already suffered from an increase in violence while the transitional government was in power, saw large-scale inter-communal clashes and the looting of former and current United Nations bases after the coup.¹¹

19. [REDACTED].¹² [REDACTED]. [REDACTED].

20. The security situation in Sudan [REDACTED] are reasons to grant protective measures in this case.

⁹ [REDACTED].

¹⁰ SCHLEIN, L., “UN calls on Sudan’s Military to End its Killing Spree of Protests”, *VOA*, 18 January 2022. Available at: <https://www.voanews.com/a/un-calls-on-sudan-s-military-to-end-its-killing-spree-of-protesters/6401918.html> [Last accessed 24/02/2022].

¹¹ United Nations Security Council Report of the Secretary-General on the Situation in the Sudan and the activities of the United Nations Integrated Assistance Mission in Sudan, [S/2021/470](https://www.un.org/News/Press/docs/2021/11/S/2021/470.html) (2021). OSMAN, M., “Deadly Darfur Attack Just Days After Last Peacekeepers Leave”, *Human Rights Watch*, 22 January 2021. Available at: <https://www.hrw.org/news/2021/01/22/deadly-darfur-attack-just-days-after-last-peacekeepers-leave> [Last accessed 24/02/2022]; FIDH / ACJPS, “Delays and Dilemmas: New Violence in Darfur and Uncertain Justice Efforts within Sudan’s Fragile Transition”, 30 November 2021. Available at: https://www.fidh.org/IMG/pdf/fidh_report_sudan2021.pdf [Last accessed 24/02/2022]. DAHIR, A., “Violence in Sudan’s Darfur Region Dims Hopes of a Long-Sought Peace”, *The New York Times*, 19 January 2021. Available at: <https://www.nytimes.com/2021/01/19/world/africa/sudan-darfur-violence.html> [Last accessed 24/02/2022]; “Curfew in North Darfur capital after WFP, UNAMID looting”, *Radio Dabanga*, 30 December 2021. Available at <https://www.dabangasudan.org/en/all-news/article/curfew-in-north-darfur-capital-after-wfp-unamid-looting> [Last accessed 25/02/2022]; ELTHAIR, N., “More than 15,000 people displaced in renewed Darfur violence U.N. says”, *Reuters*, 27 January 2022. Available at <https://www.reuters.com/world/africa/more-than-15000-people-displaced-new-darfur-violence-un-says-2022-01-27/> [Last accessed 25/02/2022]; “Deadly clashes erupt in Sudan’s Darfur region”, *Aljazeera*, 6 February 2022. Available at <https://www.aljazeera.com/news/2022/2/6/deadly-clashes-erupt-in-sudans-darfur-region> [Last accessed 25/02/2022]; AFP, “Violence in Sudan’s Darfur lays bare deepening crisis”, *France24*, 19 February 2022. Available at <https://www.france24.com/en/live-news/20220219-violence-in-sudan-s-darfur-lays-bare-deepening-crisis> [Last accessed 25/02/2022]; HAQ, F. Statement attributable to the Spokesperson for the Secretary-General - on the looting of a logistics base of the former United Nations-African Union Mission in Darfur, *United Nations*, 25 December 2021. Available at <https://www.un.org/sg/en/node/261330> [Last accessed 25/02/2022].

¹² On 10 May 2021, the transitional government signed an agreement with the Court in relation to the case of Mr Abd-Al-Rahman. On 12 August 2021, it signed a memoranda of understanding with the Office of the Prosecutor designed to facilitate cooperation in relation to all other suspects.

D. There is an objectively justifiable risk to witnesses

21. There is an objectively justifiable risk to witnesses. The vast majority of Prosecution witnesses [REDACTED].¹³ Many are also well known in their local communities. As set out in Annex A to this Request, witnesses have informed the Prosecution [REDACTED]. Witnesses have also registered concerns about providing evidence with some making their cooperation contingent upon being provided anonymity.

22. The reported experiences of witnesses demonstrate that in addition to the security situation, witnesses in this case face risks which require protection.

E. Witnesses for whom protective measures are requested

1) Insider witnesses residing in Sudan

23. The Prosecution requests in-court protective measures in the form of pseudonyms, face and voice distortion for 13 insider witnesses. [REDACTED].¹⁴

24. Evidence provided by insider witnesses will concern sensitive information about the close coordination between the former Government of Sudan, GoS Forces¹⁵ and Militia/*Janjaweed* [REDACTED].¹⁶ [REDACTED].¹⁷ There may also be a risk from [REDACTED] who fear being associated with the conflict in Darfur as well as associates of Mr Abd-Al-Rahman and those opposed to the Court generally.

25. In-court protective measures are required for insider witnesses to ensure that they can give evidence freely without fear for their personal safety and without compromising their security. The protective measures sought will also enable these witnesses to provide full accounts of the events at issue and contribute to the truth-seeking mission of the Court.

2) Crime base witnesses residing in Sudan

26. The Prosecution requests in-court protective measures in the form of pseudonyms, face and voice distortion for 22 crime base witnesses. The vast majority of witnesses in this category

¹³ The Prosecution requests in-court protective measures for 59 witnesses. 54 witnesses reside in Sudan [REDACTED]. Of the 5 witnesses residing outside of Sudan, 2 (P-1048 and P-1049) of these are Prosecution investigators. The remaining 3 [REDACTED].

¹⁴ [REDACTED].

¹⁵ The GoS forces included the Sudanese Armed Forces, also known as the Sudanese People's Armed Forces, the Popular Defence Forces, the Central Reserve Forces, the Popular Police Forces and the Sudanese Police.

¹⁶ [REDACTED].

¹⁷ 34th report of the ICC Prosecutor in relation to the Darfur situation in Sudan, pursuant to UNSC Resolution 1593 (2005), presented at the 8984th meeting of the United Nations Security Council, 17 January 2022, [S/PV.8948](#), p. 2-4.

[REDACTED].¹⁸ Some witnesses are also well known in their local communities which poses additional risks.¹⁹

27. Only two witnesses in this category reside [REDACTED]. However, their particular circumstances justify protective measures being applied because of demonstrable risks to their immediate family members.

28. [REDACTED].

29. [REDACTED].

30. In-court protective measures for witnesses in this category will ensure that they can give evidence freely without fear for their personal safety and without compromising their security or the security of their family members. Moreover, since witnesses in this category were victims of crimes, withholding their identities from the public will allow them to avoid recounting their experiences again (or facing questions, remarks, condolences, or even derision or abuse) to members of the public, friends, colleagues, or even family members, who learn about those experiences as a result of the witnesses' testimony.

3) *Witnesses in the Court's protection program ("ICCP")*

31. The Prosecution seeks protective measures for [REDACTED] witnesses who have been admitted into the ICCPP. All of these witnesses are in the Court's protection programme because of risks to their personal safety which have been objectively assessed by the VWS. The in-court protective measures sought will ensure that the witnesses can give evidence without fear for their personal safety and without compromising the protection they have been afforded under the terms of the ICCPP.

32. Granting protective measures for this category of witnesses is also consistent with the Court's jurisprudence which has held that "[i]f any of [the ICCPP witness] identities were to become known, the whole purpose of their protection which has been afforded to the witnesses would be undermined, and they, together with their families would be at risk for an indefinite period of time. The accused has been given the full identifying details for these and is able, therefore, to deal with their evidence without restriction."²⁰

¹⁸ See above, paras. 15-21.

¹⁹ See above, paras. 22-23.

²⁰ *Lubanga* Status Conference, 16 January 2009, [ICC-01/04-01/06-T-104-ENG ET](#), p. 4, l. 4 –18. See also, more recently, *Yekatom & Ngaiisona* Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses, 19 April 2021, [ICC-01/14-01/18-906-Red2](#), paras. 52-53.

4) *Prosecution Investigators*

33. Witnesses P-1048 and P-1049 are current Prosecution staff members. The Prosecution requests in-court protective measures in the form of the use of pseudonyms, face distortion and the use of private session for these witnesses.

34. [REDACTED].

35. Granting protective measures for this category of witnesses is also consistent with the Court's jurisprudence. Prosecution staff members working in the field and investigations have regularly been granted protective measures in order to avoid risks and to protect ongoing investigations.²¹

F. The requested measures are consistent with the rights of the Mr Abd-Al-Rahman

36. Although the Prosecution requests that the identities of 59 witnesses be withheld from the public, the impact on the public nature of the proceedings is mitigated and justified in the circumstances of this case. First, the measures requested are needed to ensure that the witnesses are able to provide unfettered evidence, and in so doing, assist the Court in establishing the truth. Moreover, the measures will not prejudice Mr Abd-Al-Rahman in any way. Mr Abd-Al-Rahman will have the same opportunity and ability to question these witnesses as if their identities were publicly known and the Defence are not prevented from conducting its own enquiries to test the prospective evidence. Second, although the public will not know the identities of the affected witnesses, most of their testimony will be given in public session. Under the requested measures, closed or private session will be used only for limited portions of testimony to protect the identities of witnesses or information that is particularly private or sensitive and therefore likely to affect the physical and psychological well-being, dignity, or privacy of the witness if broadcast publicly.

²¹ *Abu Garda* Confirmation of charges hearing, 20 October 2009, [ICC-02/05-02/09-T-13-ENG CT WT 20-10-2009 12/101 NB PT](#), p. 11, Ins. 13-29. *See also*, *Al Hassan* Public redacted version of First decision on in-court protective measures, 5 January 2021, [ICC-01/12-01/18-1019-Red2](#), para. 15; *Gicheru* Decision on the Prosecution Request for In-Court Protective Measures, 3 February 2022, [ICC-01/09-01/20-276-Red](#), para. 25.

IV. CONCLUSION

37. For the foregoing reasons, the Prosecution requests the in-court protective measures for 59 witnesses and in-court support for eight witnesses.



Karim A. A. Khan QC
Prosecutor

Dated this 1st day of March 2022
At The Hague, The Netherlands