

Original: **English**No.: ICC-02/05-01/20
Date: **11 September 2023****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 Request for an Order Prohibiting Disclosure
of some Defence Witnesses’ Identities to [REDACTED]
(ICC-02/05-01/20-1007-Conf, 28 August 2023)****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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INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman hereby requests the Honourable Trial Chamber I (the “Chamber”) to order the non-disclosure of some Defence witnesses’ identities to [REDACTED], pursuant to article 68 (1) of the Rome Statute, and Rules 81 (4) and 87 (3) (b) of the Rules of Procedure and Evidence (the “Rules”). In the provisional list of Defence witnesses submitted on the same day as the present application, this measure is sought with respect of Defence witnesses [REDACTED]. These are the witness currently residing in Sudan and those of Sudanese nationality. The Defence will request the extension of this measure to other witnesses in the same situation who may be added to the provisional list of Defence witnesses in the future. For the avoidance of doubt, a further motion seeking more general protective measures will be filed shortly.

2. The Defence submits that all Defence witnesses who come from Sudan and/or their family are at risk if [REDACTED], have knowledge of their cooperation with the Court by giving their testimony. [REDACTED] The Defence requested, and obtained, [REDACTED] are not informed of its witnesses’ identity or of their interaction with the Court.¹ In order to preserve that benefit, a measure of non-disclosure of their identities to third parties, most importantly [REDACTED], issued by the Chamber is necessary.

3. The Defence emphasises its intention to disclose to the Chamber, the Prosecution and Legal Representative of Victims all information on their witnesses: identities, statements and related materials. The present submission is not about seeking to delay the disclosure process. Its aim is to seek a very specific protective measure consisting of the non-disclosure of the identities of all Sudanese Defence witnesses to [REDACTED].

¹ [REDACTED].

CLASSIFICATION

4. Pursuant to Regulation 23*bis* (2) of the Regulations of the Court, the Defence files this notification as confidential, as it refers to Decisions and Requests with the same classifications. A public redacted version will be registered in due course.

PROCEDURAL BACKGROUND

5. On 7 July 2023, following the Defence's request for postponement of the presentation of its case, the Chamber amended a second time the deadlines for the commencement of the Defence case and ordered the Defence to file its provisional witness list on 28 August 2023 and its definitive list on 18 September 2023.²

APPLICABLE LAW

6. Pursuant to article 68(1) of the Statute and Rules 81(4) and 87 (1) and (3) (b) of the Rules, the Court shall take all the necessary measures to protect the safety, physical and psychological well-being of victims and witnesses, assuring the confidentiality of their personal details. As a protective measure, Rule 87(3)(b) of the Rules provides that Chambers can order *"that the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party"*.

7. The *"Protocol on Handling Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant"* ("the Protocol") provides in its paragraph 11 that *"a party or participant may disclose the identity of [a] witness to a third party if such disclosure is directly and specifically necessary for the preparation or presentation of it case."*³ The present application seeks an exception to that provision, prohibiting the disclosure of the identity of Sudanese Defence witnesses to [REDACTED].

8. Other Chambers of the Court have found that the non-disclosure of the identity of witnesses to third parties was necessary, appropriate and proportionate, as long as the identity of the witnesses was known to the non-calling party and did not prejudice

² ICC-02/05-01/20-990-Conf.

³ ICC-02/05-01/20-691-Anx, par. 11.

its procedural rights.⁴ This measure has been granted in the past for the benefit of Prosecution⁵ and Defence witnesses alike.⁶ In the case of Prosecution witnesses, this measure was granted without the concerned Chamber even needing to hear from the Defence in response to the Prosecution's application.⁷

SUBMISSIONS

(i) *The requested measure is necessary, appropriate and proportionate*

9. Sudan is not a State Party to the Court. On 26 August 2008, Sudan sent a communication to the UN Secretary-General asserting that it has no legal obligation arising from its signature of the Rome Statute on 8 September 2000.⁸ This declaration was made after the referral of the Situation in Darfur, Sudan to the Court by UNSC Resolution 1593. No State, and in particular none of the States which had voted in favour of UNSC Resolution 1593, objected. As a result, Sudan's refusal to be bound by any obligation towards the Court notwithstanding the clear terms of Resolution 1593 remains validly submitted, registered by the appropriate registering authority designated under Article 125 of the Rome Statute, and unopposed.

10. The Cooperation Agreement between the Court and Sudan signed on 10 May 2021 ("the Cooperation Agreement")⁹ is not registered with the United Nations Secretariat and has not been published by it. It has been kept confidential, in spite of the Defence's repeated requests to make it public.¹⁰ Article 102(1) of the United Nations Charter provides that: "*Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it*". The Defence's submissions in relation to the legal effect of that Cooperation Agreement have not

⁴ *The Prosecutor v. Bahar Idriss Abu Garda*, [ICC-02/05-02/09-117-Red](#), Public Redacted Version of "Decision on Prosecutor's Application for Protective Measures dated 22 September 2009", 9 October 2009 ("[ICC-02/05-02/09-117-Red](#)"), p. 3; *The Prosecutor v. Bahar Idriss Abu Garda*, [ICC-02/05-02/09-137-Red](#), Public Redacted Version of "Decision on Prosecutor's Application for Protective Measures dated 22 September 2009", 9 October 2009 ("[ICC-02/05-02/09-137-Red](#)"), p. 4.

⁵ [ICC-02/05-02/09-117-Red](#), p. 4, Order (ii).

⁶ [ICC-02/05-02/09-137-Red](#), p. 4, Order (ii).

⁷ [ICC-02/05-02/09-117-Red](#), p. 3.

⁸ Organisation des Nations Unies, [Collection des Traités, Chap. XVIII.10](#), "Sudan".

⁹ ICC-02/05-01/20-481-Conf-AnxA.

¹⁰ E.g. ICC-02/05-01/20-532-Conf and its public redacted version [ICC-02/05-01/20-532-Red](#), par. 11(iv).

been submitted to the Appeals Chamber and are thus not finally resolved. Pending their final resolution, the non-disclosure of the witnesses' identity to [REDACTED] is a necessary, appropriate and proportionate protective measure to avoid endangering the Defence witnesses in Sudan.

11. Even assuming, without admitting, that the Cooperation Agreement would be valid, [REDACTED].¹¹ [REDACTED]¹² There is evidence on the record of the regular use of illegal arrests, forced disappearances, extra-judicial detention, torture and/or extra-judicial killings by [REDACTED].¹³ [REDACTED] Like the Defence's submissions on the legal value of the Cooperation Agreement mentioned above, the Defence's submissions in relation to the impact of [REDACTED] on the security of witnesses have not been submitted to the Appeals Chamber and are thus not finally resolved. Pending their final resolution, the non-disclosure of the witnesses' identity to [REDACTED] is a necessary, appropriate and proportionate protective measure to avoid endangering the Defence witnesses in Sudan.

12. To date, there is no law on cooperation with the Court in Sudan, as required under Articles 87(5)(a) and 88 of the Rome Statute. Treaties, international agreements, international customary law, and resolutions of the UN Security Council are not sources of law directly applicable in Sudan under its Constitution.¹⁴ Sudan has submitted to the Court that pre-existing criminalisation of cooperation with the Court had been abolished [REDACTED].¹⁵ The [REDACTED], however, makes no mention of the abolition of any offence of cooperation with the Court. The crimes of treason, espionage and related offences remain in force and unamended under Articles 50 to 57 of the Sudan Criminal Act¹⁶. Like the Defence's submissions on the legal value of the Cooperation Agreement and the implications of [REDACTED] mentioned above, the Defence's submissions in relation to the ongoing incrimination of cooperation with

¹¹ ICC-02/05-01/20-481-Conf-AnxA, art. 32(1).

¹² ICC-02/05-01/20-619-Conf-Exp, par. 24.

¹³ DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376; ICC-02/05-01/20-977-Conf-Anx2: DAR-OTP-00004296-R01, 22 May 2023.

¹⁴ DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1st July 1998, art. 49(d), 64, 65, 73(1)(d), 90(4), 98(1)(f).

¹⁵ ICC-02/05-01/20-397-Conf, par. 9.

¹⁶ DAR-OTP-0021-0296: Sudan Criminal Act 1991, Articles 50 to 57.

the Court in Sudan have not been submitted to the Appeals Chamber and are thus not finally resolved. Pending their final resolution, the non-disclosure of the witnesses' identity to [REDACTED] is a necessary, appropriate and proportionate protective measure to avoid endangering the Defence witnesses in Sudan.

13. The outbreak of the violent armed conflict that rampages Sudan since 15 April 2023 makes the possibility for the Defence to conduct its investigations and obtain testimonies from witnesses in Sudan even more challenging. [REDACTED]¹⁷ [REDACTED].

14. At the Status Conference hearing held on 5 July 2023, the Prosecution stated, regarding its own witnesses, that there is no dispute, no disagreement on protective measures, because of the risk should the testimonies of the Prosecution witnesses become known, [REDACTED].¹⁸

15. The non-disclosure of the identity of witnesses to third parties, including [REDACTED], was precisely found necessary, appropriate and proportionate and was ordered in another case related to the Situation in Sudan, at a time when the situation with respect to the security of witnesses was much less critical than it has become now.¹⁹ Already then, the Court had found that disclosure of the witnesses' identity would place them in considerable danger.²⁰ Non-disclosure to third parties granted in the past in another Sudan case has become even more necessary in the present case since (i) [REDACTED] the Cooperation Agreement on 10 May 2021, (ii) [REDACTED],²¹ and (iii) a violent armed conflict rampages the country since 15 April 2023.

(ii) *The requested measure does not prejudice the non-calling participants*

16. As mentioned earlier, the Defence does not apply for delayed disclosure of the identity of its witnesses to the Prosecution and/or the Common Legal Representatives

¹⁷ [REDACTED]

¹⁸ [REDACTED].

¹⁹ [ICC-02/05-02/09-117-Red](#); [ICC-02/05-02/09-137-Red](#).

²⁰ [ICC-02/05-02/09-137-Red](#), p. 3.

²¹ [REDACTED].

of Victims. The requested measure is limited to prohibiting the disclosure of their identity to [REDACTED] in the context of their investigations.

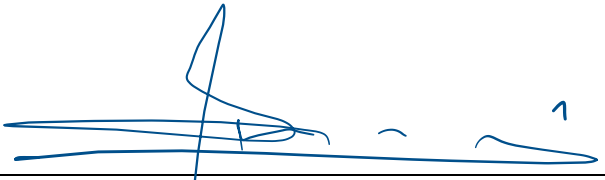
17. Although the requested measure had been granted by the Court without consulting the non-calling party in the past,²² the Defence has enquired *inter partes* with the Prosecution whether the requested measure would cause them a problem in their operations and whether the Prosecution intended to oppose it.²³ [REDACTED]²⁴ The Defence hereby conveys its utmost appreciation for the Prosecution's understanding of the situation and acceptance of the requested measure.

CONCLUSION

18. For the above reasons, the Defence respectfully requests the Chamber to grant the Defence request for an order prohibiting the Prosecution, the LRV and the Registry from disclosing the identity of all Defence witnesses, [REDACTED], to [REDACTED].

19. A further request for more general protective measures – in-court and otherwise – including the use of pseudonyms, and the extension of the measure requested in the present application to other Defence witnesses will be submitted in due course.

Respectfully submitted,



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

Dated this 28th day of August 2023, At The Hague, The Netherlands.

²² [ICC-02/05-02/09-117-Red](#), p. 3.

²³ Email from the Defence to the Prosecution, dated 21 August 2023, 16h56.

²⁴ [REDACTED]