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TRIAL CHAMBER I

**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 response to ‘Defence Request for an Order Prohibiting Disclosure of some Defence Witnesses’ Identities [REDACTED]”, 4 September 2023, ICC-02/05-01/20-1009-Conf

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution agrees not to disclose the identities of Defence witnesses [REDACTED]. This is consistent with the Prosecution's position previously communicated to the Defence,¹ as well as its obligations under article 68(1) of the Rome Statute [REDACTED]. The Prosecution therefore would not oppose the issuance of an order to that effect, should the Chamber consider it necessary.

2. However, the Prosecution does oppose the issuance of an order that would prohibit the disclosure of the identities of some Defence witnesses [REDACTED] ("Request").² The Prosecution opposes a request for an order of this nature on the grounds that such a broad prohibition could unduly constrain its investigations in preparation for the Defence case.

II. CLASSIFICATION

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this response is filed as confidential since it responds to a filing with the same classification.

III. SUBMISSIONS

4. The Prosecution agrees not to disclose Defence witness identities [REDACTED],³ [REDACTED].⁴ However, in the Request, the Defence requests more broadly that the Chamber issue an order for non-disclosure of witness identities [REDACTED].⁵ The Defence further requests that the Chamber make an exception to the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant ("Protocol"),⁶ namely the provision that allows for the disclosure of the identity of a witness by a non-calling party or participant to a third party "if such disclosure is directly and specifically necessary for the preparation or presentation of

¹ [REDACTED].

² [ICC-02/05-01/20-1007-Conf](#) ("Request").

³ [Request](#), para. 17.

⁴ [Request](#), paras. 1-2.

⁵ [Request](#), paras. 1-2, 18.

⁶ [ICC-02/05-01/20-691-Anx](#) ("Protocol").

its case”.⁷ The Defence argues that an exception to this provision is necessary, appropriate and proportionate under the present circumstances.⁸

5. The Prosecution submits that an order that prohibits disclosure of witness identities [REDACTED] is not necessary or appropriate in light of the Prosecution’s duty to conduct an independent investigation into the credibility of Defence witnesses and the veracity of their accounts pursuant to article 54(1) of the Statute. In exercise of this duty, the Prosecution may need to communicate the identities of Defence witnesses, [REDACTED]. As agreed, [REDACTED], the Prosecution will not provide the identities of Defence witnesses [REDACTED].⁹ [REDACTED]. Any order unduly restricting the Prosecution’s ability to conduct such inquiries could potentially prejudice its investigations.

6. Consistent with the Protocol, the Prosecution will ensure that any such disclosure during its investigations is “directly and specifically necessary for the preparation or presentation of its case”.¹⁰ [REDACTED].¹¹ Furthermore, in accordance with the standard practices, the Prosecution will take all necessary and appropriate precautions [REDACTED] to ensure that it does not endanger any witness. These practices include, when required, informing the Victims and Witnesses Section of the Prosecution’s intention to disclose any witness identities and consulting with it on any specific measures that may be necessary.¹²

7. Thus far, these standard practices in the Protocol have been sufficient for the protection of all witnesses in the Darfur situation.¹³ The Defence has not provided concrete information that would suggest that their witnesses are not adequately protected by the existing measures¹⁴ [REDACTED].¹⁵ Accordingly, there is

⁷ [REDACTED].

⁸ [Request](#), paras. 9-15.

⁹ [REDACTED].

¹⁰ [Protocol](#), para. 11.

¹¹ [REDACTED].

¹² [Protocol](#), paras. 11, 14.

¹³ [Request](#), para. 14. [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

[REDACTED]¹⁶ and no reason to issue an order that could unnecessarily restrict the conduct of investigations in line with the Protocol.¹⁷

8. Therefore, for the aforementioned reasons, the Prosecution opposes any order for the non-disclosure of Defence witness identities [REDACTED], given that such an order could potentially limit its legitimate investigative activities.

IV. CONCLUSION

9. The Prosecution respectfully submits this response to clarify its position and oppose the Request for an order of non-disclosure of some Defence witness identities [REDACTED].



Karim A. A. Khan KC
Prosecutor

Dated this 12th day of September 2023

At The Hague, The Netherlands

¹⁶ [REDACTED].

¹⁷ [REDACTED].