



Original: English

No.: ICC-02/05-01/20  
Date: 27 September 2023

**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 ‘Demande de  
reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter  
appel de la Décision ICC-02/05-01/20-1013-Conf’”,  
15 September 2023, ICC-02/05-01/20-1016-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 respectfully requests that the Chamber reject the Defence request for reconsideration or, alternatively, leave to appeal (“Request”)<sup>1</sup> the Chamber’s decision rejecting a request for an order of non-disclosure of some Defence witness identities [REDACTED] (“Decision”).<sup>2</sup> The standards for both reconsideration and leave to appeal are not met in the Request.

## II. CLASSIFICATION

2. Pursuant to Regulation 23bis(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

*The standard for reconsideration of the Decision is not met*

3. The standard for reconsideration of the Decision has not been met. As previously noted by the Chamber, reconsideration is exceptional and should only take place if a “clear error of reasoning” has been demonstrated or if it is necessary to do so to prevent an injustice.<sup>3</sup> This reconsideration should be conducted on the “same matter, in light of facts as they existed at the time the previous decision was rendered”.<sup>4</sup> The Defence has neither demonstrated that there was a clear error of reasoning nor has it shown that reconsideration of the Decision would be necessary to prevent injustice.

4. First, the Defence argues that reconsideration of the Decision is necessary because the primary responsibility for taking appropriate measures to protect witnesses pursuant to article 68(1) of the Rome Statute falls to the Chamber within its

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<sup>1</sup> Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1013-Conf, [ICC-02/05-01/20-1014-Conf](#) (“Request”).

<sup>2</sup> Decision on the Defence’s Request for an order prohibiting disclosure of some Defence witnesses’ identities [REDACTED], [ICC-02/05-01/20-1013-Conf](#) (“Decision”), p. 7. *See also* Defence Request for an Order Prohibiting Disclosure of some Defence Witnesses’ Identities to [REDACTED], [ICC-02/05-01/20-1007-Conf](#) (“Defence Non-Disclosure Request”).

<sup>3</sup> Decision on the Defence’s request for reconsideration or, alternatively, leave to appeal the oral ruling maintaining the disclosure deadline and start of the Defence case, [ICC-02/05-01/20-1015](#) (“Reconsideration Decision”), para. 8 (*citing* [ICC-02/05-01/20-650-Conf](#), para. 10).

<sup>4</sup> Decision on the Defence’s request for reconsideration of the Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s “Decision on the Defence ‘*Exception d’incompétence*’ (ICC-02/05-01/20-302)”, [ICC-02/05-01/20-993](#), para. 33.

article 64(2) authority. According to the Defence, because the Chamber did not consult with the Victims and Witnesses Section (“VWS”) on this decision related to witness security, as required under rule 87(1) of the Rules of Procedure and Evidence (“Rules”), this amounted to a clear error of reasoning.<sup>5</sup>

5. The Prosecution observes that rule 87(1) relates to the discretionary power of the Chamber to order measures to protect a victim, witness or another person at risk and does not impose any restrictions on the exercise of this power. According to rule 87(1), the Chamber may consult with VWS in doing so, as appropriate, but it is not mandated to do so. Moreover, in the two examples cited by the Defence in which there has been an order for the non-disclosure of witness identities to third parties in the Darfur situation, and as noted by the Defence itself, it does not appear that the Pre-Trial Chamber consulted with the other Party to the proceedings before issuing the order, much less VWS.<sup>6</sup> The Chamber committed no error in this regard.

6. Second, the Defence enumerates “Eight Findings” that it argues render the current circumstances exceptional enough to warrant reconsideration of the Decision.<sup>7</sup> Despite what the Defence contends, the so-called “Eight Findings” are not “undisputed facts”,<sup>8</sup> as they continue to be repeatedly rejected by the Chamber and disputed by the Prosecution.<sup>9</sup> The Prosecution, therefore, will not respond to each individual factor in the “Eight Findings”, because all of these arguments are duplicative and have been addressed in full in previous responses.<sup>10</sup> Nothing about the “Eight Findings” is exceptional,<sup>11</sup> [REDACTED], in which the current protective measures proved to sufficient.<sup>12</sup>

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<sup>5</sup> [Request](#), paras. 5, 8.

<sup>6</sup> [Request](#), para. 6 (“*Cette mesure responsable tombe tellement sous le bon sens qu’elle avait été accordée sans discussion et sans consultation de la Partie adverse dans d’autres affaires devant la Cour, [...]*.” (citing [ICC-02/05-02/09-117-Red](#); [ICC-02/05-02/09-137-Red](#))).

<sup>7</sup> [Request](#), para. 5.

<sup>8</sup> [Request](#), fn. 5 (“*les Huit Constats*”).

<sup>9</sup> [REDACTED].

<sup>10</sup> See e.g. Prosecution’s response to “Note for the Record in relation to Paragraph 10 of the Decision on the Second Application for Postponement of the Defence Case (ICC-02/05-01/20-990-CONF)”, [ICC-02/05-01/20-997-Conf](#).

<sup>11</sup> [REDACTED].

<sup>12</sup> [Prosecution’s Non-Disclosure Response](#), para. 7.

7. Of particular note among these “Eight Findings”, the Defence alleges that the Prosecution has changed its position with respect to the proposed order for non-disclosure. The Prosecution wishes to correct these misrepresentations regarding its *inter partes* agreement not to disclose Defence witness identities [REDACTED] on 21 August 2023,<sup>13</sup> and its subsequent response to the Defence request for an order of non-disclosure on 4 September.<sup>14</sup> The Prosecution position has been consistent throughout its communications on this issue.

8. The distinction between an agreement not to disclose Defence witness identities [REDACTED], as agreed by the Prosecution, and disclosure [REDACTED], as formulated in the Defence request for the order,<sup>15</sup> is indeed a large one.<sup>16</sup> Additionally, [REDACTED] on 21 August 2023<sup>17</sup> and a telephone call to the Prosecution, the lead counsel for the Defence made clear that his concern [REDACTED]. Thus, the Prosecution understood and agreed to the proposition that it would not, as a matter of course, disclose the identities of Defence witnesses [REDACTED]. The Prosecution did not make further assurances [REDACTED].

9. Further, [REDACTED] on 21 August 2023 prior to the Defence request for an order,<sup>18</sup> the Defence did not state that they would be seeking 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”).<sup>19</sup> As indicated in its written submissions on 4 September, the Prosecution believes the Protocol and other standard measures to be sufficient to address the security concerns of witnesses.<sup>20</sup>

10. Third, the Defence argues that the Chamber exhibited a clear error of reasoning when it determined that the requested order for non-disclosure amounted to a

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<sup>13</sup> [REDACTED].

<sup>14</sup> [Prosecution’s Non-Disclosure Response](#).

<sup>15</sup> [Defence Non-Disclosure Request](#).

<sup>16</sup> [Request](#), paras. 6-7.

<sup>17</sup> [Annex](#).

<sup>18</sup> [Annex](#), p. 1.

<sup>19</sup> 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, [ICC-02/05-01/20-691-Anx](#).

<sup>20</sup> [Prosecution’s Non-Disclosure Response](#), para. 7.

“blanket prohibition” on the Prosecution’s investigation of Defence witnesses.<sup>21</sup> The Defence’s proposed alternative means of investigation are simply inadequate given, in particular, that [REDACTED] prospective Defence witnesses [REDACTED].<sup>22</sup> [REDACTED].<sup>23</sup>

11. [REDACTED].<sup>24</sup> [REDACTED].

12. Finally, the Defence contends that reconsideration of the Decision is necessary to prevent an injustice to Defence witnesses, [REDACTED] and to Mr Abd-Al-Rahman who has the right to call witnesses in his defence pursuant to articles 67(1)(b) and (e) of the Statute. The Defence makes further erroneous claims regarding the supposedly deleterious effects of maintaining the current standards for investigation pursuant to the Protocol. These factors, according to the Defence, violate the equality of arms between the Parties.<sup>25</sup> [REDACTED].<sup>26</sup> The Chamber has also left open the possibility for the Defence to make further requests for specific protective measures on a case-by-case basis.<sup>27</sup>

13. As regards the Defence allegation that it has been *de facto* deprived [REDACTED],<sup>28</sup> this argument is not relevant or accurate in any respect. [REDACTED].<sup>29</sup> [REDACTED].<sup>30</sup> [REDACTED].

*The standard for leave to appeal the Decision is not met*

14. The standard for leave to appeal the Decision has also not been met. The Prosecution refers to the applicable legal framework for deciding a request for leave to appeal under article 82(1)(d) of the Statute as set out by the Chamber in its previous

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<sup>21</sup> [Request](#), para. 8(i).

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [Request](#), para. 7.

<sup>26</sup> [Prosecution’s Non-Disclosure Response](#), para. 7.

<sup>27</sup> [Decision](#), para. 16.

<sup>28</sup> [Request](#), paras. 7(iii), 8(iii).

<sup>29</sup> Decision on the Defence’s Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf-Red](#), paras. 31-41.

<sup>30</sup> [Request](#), para. 8(iii). [REDACTED].

decisions.<sup>31</sup> The Defence advances three purported issues to justify its alternative request for leave to appeal the Decision (“Purported Issues”), summarised as follows:

- a. Did the Chamber fail to fulfil its obligation to protect Defence witnesses under articles 64(2) and 64(6)(e) of the Statute by rejecting the measure of protection sought by the Defence (“First Purported Issue”);
- b. Did the Chamber violate rule 87(1) of the Rules by not consulting VWS on the requested protection measure before deciding on the request (“Second Purported Issue”); and
- c. Is the Decision consistent with the principle of equality between the Parties because it authorises the Prosecution to investigate while the Defence has been *de facto* deprived [REDACTED] (“Third Purported Issue”).<sup>32</sup>

15. The Purported Issues identified by the Defence do not constitute appealable issues within the meaning of article 82(1)(d) of the Statute, affect the fair and expeditious conduct of the proceedings or materially advance the proceedings. Leave to appeal is not justified as these Purported Issues represent mere disagreement with the Chamber’s findings and proper exercise of discretion.

16. The Defence contends that there are five errors of fact, three errors of law and one procedural error that underpin the Purported Issues.<sup>33</sup> The Defence further argues that the Purported Issues affect the fair conduct of the proceedings because they interfere with Mr Abd-Al-Rahman’s right to have witnesses appear in his defence under articles 67(1)(b) and 67(1)(e) of the Statute and violate the principle of equality under article 67(1).<sup>34</sup>

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<sup>31</sup> [Reconsideration Decision](#), para. 9 (citing [ICC-02/05-01/20-525](#), paras. 10-14).

<sup>32</sup> [Request](#), para. 10.

<sup>33</sup> [Request](#), para. 11.

<sup>34</sup> [Request](#), paras. 12-13.

17. Regarding the First Purported Issue, the Defence merely disagrees with the Chamber's proper exercise of discretion in determining what protection measures are appropriate for witnesses, consistent with its role under article 64 of the Statute.

18. Regarding the Second Purported Issue, no part of rule 87(1) of the Rules, or rule 87(3) which formed the basis for the original request for an order of non-disclosure, dictates that the Chamber *must* consult with VWS before reaching a decision regarding witness security. The Defence has not provided an adequate basis for arguing this alleged error of law and procedure, and instead, seemingly contradicts itself regarding the ability of the Chamber to issue orders without outside consultation.<sup>35</sup>

19. Regarding the Third Purported Issue, the alleged inequality between the Prosecution and the Defence both does not arise from the Decision and does not articulate an appealable error of law or fact. The concept of "*de facto* deprivation" [REDACTED] is abstract, speculative and, as noted above, neither accurate nor relevant to the issue of non-disclosure of witness identities.<sup>36</sup> There is no inequality between the Parties and the Request is tantamount to a request for an unreasonable restriction on the Prosecution's ability to investigate Defence witnesses in its efforts to establish the truth, pursuant to article 54(1)(a) of the Statute.

20. The Prosecution further submits that the Chamber already took due consideration of all relevant facts and law identified by the Defence in the Request. Following the Defence request for an order of non-disclosure, and the subsequent Prosecution response, the Chamber raised the topic for discussion among the Parties during the status conference on 5 September 2023.<sup>37</sup> The Chamber provided ample opportunity for each Party to explain its position with respect to the requested order in light of its duties and responsibilities under the Statute, Rules and Protocol.

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<sup>35</sup> See above, para. 5, fn. 6.

<sup>36</sup> See above, para. 13.

<sup>37</sup> [ICC-02/05-01/20-T-125-CONF-ENG ET](#), ("Status Conference"), 13:10-25:4.



21. In the Decision, the Chamber took into consideration the scope of prospective witnesses for whom the order might apply [REDACTED].<sup>38</sup> Regarding the alleged prejudice to Mr Abd-Al-Rahman, to the contrary, as observed by the Chamber in the Decision, subjecting the Prosecution to a blanket prohibition on investigation that was not placed upon the Defence “unduly impinges on the fairness of the proceedings”.<sup>39</sup> The Chamber’s decision not to issue an order for non-disclosure has therefore allowed the trial to proceed more fairly and expeditiously.

22. Furthermore, the Request is premature as the Defence has additional avenues to pursue before resorting to an appeal, including by seeking special protective measures on a case-by-case basis. Thus, the Request would not materially advance the proceedings and would only create unnecessary delay. The Defence has indicated that it will further request the suspensive effect of the Decision under article 82(3) of the Statute if appeal is permitted.<sup>40</sup> As a result, either the Prosecution will be indefinitely prohibited from conducting investigation into Defence witnesses until the Appeals Chamber reaches a decision, or the trial will be forced to come to a complete halt. Both of these outcomes cannot be permitted, particularly given that, as noted by the Chamber, there has been an adjournment of the trial since February 2023 and Mr Abd-Al-Rahman remains in custody.<sup>41</sup>

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<sup>38</sup> [Decision](#), paras. 12-13.

<sup>39</sup> [Decision](#), para. 14.

<sup>40</sup> [Request](#), para. 13.

<sup>41</sup> [Reconsideration Decision](#), para. 17; [Status Conference](#), 35:9-20.

#### IV. CONCLUSION

23. For the foregoing reasons, the Prosecution respectfully requests that the Chamber reject the Request in its entirety.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 27<sup>th</sup> day of September 2023

At The Hague, The Netherlands