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No.: ICC-02/05-01/20  
Date: 13 October 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 “Prosecution’s Response to ‘Requête en vertu de la norme 23bis-3 du Règlement de la Cour’, ICC-02/05-01/20-1029-Conf”, 11 October 2023, ICC-02/05-01/20-1031**

**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 opposes the Defence's "Requête en vertu de la norme 23 bis-3 du Règlement de la Cour" ("Request").<sup>1</sup> The [REDACTED] the Defence requests to be made public or, alternatively, requests to refer to publicly in its opening statement, cannot be disclosed without the prior approval of the relevant authorities and, if made public, may jeopardise future investigative activities in Sudan. The remainder of the Request is largely repetitive of submissions previously<sup>2</sup> made by the Defence regarding confidential communications between the Court and the Government of Sudan ("GoS"), which was rejected by the Chamber.<sup>3</sup>

## II. CLASSIFICATION

2. This filing is classified as confidential, in accordance with regulation 23bis(2) of the Regulations of the Court, since it is in response to a request of the same classification.

## III. FACTUAL BACKGROUND

3. The Defence seeks to make public confidential communication between the Court and the Government of Sudan, in the form of a [REDACTED].<sup>4</sup> The Defence previously requested<sup>5</sup> the reclassification or the issuance of public redacted versions of five Decisions relating to confidential communication between the GoS and the Court in May 2023, which was rejected by the Chamber.<sup>6</sup>

4. The Defence repeats several arguments, namely that reclassification of the confidential communication is necessary to: (i) bring to the public's knowledge the information on which the Defence relies on, to present the difficulties it faced in

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<sup>1</sup> ICC-02/05-01/20-1029-Conf ("Request").

<sup>2</sup> ICC-02/05-01/20-932-Conf ("First Request")

<sup>3</sup> Email from Trial Chamber I addressed to all parties: RE: The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"): ICC-02/05-01/20-958-Conf+Conf-Anxs - Prosecution's response to "Requête en vertu de la Norme 23bis-3 du Règlement de la Cour", dated 31 May 2023 at 14:51.

<sup>3</sup> First Request, para 14. *See also*, Request, para 10.

<sup>4</sup> ICC-02/05-01/20-848-Conf-Anx1.

<sup>5</sup> First Request.

<sup>6</sup> Email from Trial Chamber I addressed to all parties: RE: The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"): ICC-02/05-01/20-958-Conf+Conf-Anxs - Prosecution's response to "Requête en vertu de la Norme 23bis-3 du Règlement de la Cour", dated 31 May 2023 at 14:51.

preparing its case;<sup>7</sup> (ii) to not deprive the public, in particular the Sudanese public, an aspect essential to their proper understanding of the trial;<sup>8</sup> and (iii) to respect the Accused's right to have the information known publicly, pursuant to article 67(1) of the Statute.<sup>9</sup>

#### IV. SUBMISSIONS

5. The Defence's argument that the Court cannot be bound by confidentiality vis-à-vis the authorities who transmitted the [REDACTED] has no bearing on the level of confidentiality afforded to communications between States and the Court.<sup>10</sup>

6. The ongoing war in Sudan, political instability and current relations between the GoS and the Court<sup>11</sup> do not alter the obligation to maintain confidentiality, pursuant to article 87(3) of the Rome Statute.

7. [REDACTED].<sup>12</sup>

8. It is for this same reason, contrary to the Defence's alternative proposal, that reference to information contained in [REDACTED] cannot be publicly referred to by the Defence in their opening arguments.<sup>13</sup> Public disclosure of [REDACTED] or any information emanating from it still requires the GoS's prior consent or an order from the Chamber, which the Prosecution submits is not warranted.

9. In an email, dated 31 May 2023, the Chamber noted that [REDACTED]:

[REDACTED].<sup>14</sup>

10. To justify its request for reclassification under regulation 23bis(3), the Defence also argue that because it does not expect any [REDACTED] between now and the end

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<sup>7</sup> First Request, para 14. *See also*, Request, para 10.

<sup>8</sup> First Request, para. 16. *See also*, Request, para. 10.

<sup>9</sup> First Request, para. 10. *See also*, Request, para. 10.

<sup>10</sup> Request, para. 8.

<sup>11</sup> Request, para 10.

<sup>12</sup> [REDACTED].

<sup>13</sup> Request, para. 11.

<sup>14</sup> Email from Trial Chamber I addressed to all parties: RE: The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"): ICC-02/05-01/20-958-Conf+Conf-Anxs - Prosecution's response to "Requête en vertu de la Norme 23bis-3 du Règlement de la Cour", dated 05 May 2023 at 14:51.

of trial, the basis for maintaining the confidential classification to the information has “disappeared”.<sup>15</sup> While that may be the case for the Defence, the Prosecution continue to conduct ongoing investigations in the Darfur situation, as well as the possibility of a rebuttal case in the current trial.

11. Although the future [REDACTED] is not a pre-requisite for an effective investigation, communications between the Court and the GoS remain confidential under article 87(3) of the Statute.

12. On balance, the public interest in the information the Defence seeks to have reclassified, which is probative to no factual issue in the case, is low and outweighed by the possible future negative impact on investigations which are ongoing for the Prosecution.

13. The Defence fails to show any justification as to why the Chamber should reclassify or lift redactions to [REDACTED]. There is no prejudice to the Defence if the Request is denied and disclosure of the information does not benefit either the advancement of proceedings or the public.

## V. CONCLUSION

14. For the foregoing reasons, the Prosecution requests the Chamber to reject the Request.



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

Dated this 13<sup>th</sup> day of October 2023

At The Hague, The Netherlands

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<sup>15</sup> Request, paras. 6, 9.