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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 WITH CONFIDENTIAL ANNEX

Public redacted version of "Defence request for in-court protective measures"

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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I. INTRODUCTION

1. This is a request by the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) for in-court protective measures for [REDACTED] Defence witnesses, filed pursuant to articles 64(2) and 68(1), (2) and (4) of the Rome Statute (“Statute”) and rules 86 and 87 of the Rules of Procedure and Evidence (“Rules”).¹ At this stage, the Defence does not envisage making an application for special measures under rule 88.

2. It is submitted that an objectively justifiable risk exists *vis-à-vis* the [REDACTED] witnesses concerned and that the protective measures sought are necessary to protect their safety, physical and psychological well-being, dignity and privacy, and, where applicable, that of their families.² A schedule setting out the witnesses’ pseudonyms, names, in-court protective measures sought, and details supporting the requested measures regarding each witness is found in the Annex.

3. It is further submitted that the protective measures sought are proportionate and are the least restrictive means necessary to fairly balance Mr Abd-Al-Rahman’s right to, and the victims’ and OTP’s legitimate interest in, a public trial against the Court’s obligation to protect the interests of victims and witnesses who appear before it.

4. The Defence underscores that the details of its [REDACTED] witnesses are based on its provisional list of witnesses³ and reiterates that this provisional list is subject to change, whether by inclusion [REDACTED] or removal of names.⁴

¹ Confidential redacted version of the Decision on in-court protective measures, ICC-02/05-01/20-645-Conf-Red, 25 March 2022 (“First Protective Measures Decision”), para. 7. A public redacted version was filed on 25 April 2022: [ICC-02/05-01/20-645-Red2](#). See also Second Decision on in-court protective measures, ICC-02/05-01/20-705-Conf, 16 June 2022 (“Second Protective Measures Decision”), para. 3. A public redacted version was filed on the same day: [ICC-02/05-01/20-705-Red](#).

² First Protective Measures Decision, para. 9.

³ Submission of Provisional List of Defence witnesses, ICC-02/05-01/20-1006-Conf, 28 August 2023.

⁴ In all the circumstances, the Trial Chamber has allowed the Defence to make disclosure on a rolling basis: T-125, 5 September 2023, pp 32-33 and 35.

II. CLASSIFICATION

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this request and annex are filed as confidential because they contain sensitive information about defence witnesses. Were the request and annex to be filed publicly in an unredacted form, the relief requested would be rendered redundant. A confidential and public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

6. The Defence seeks protective measures to: (i) shield Defence witnesses' identities from the public by the use of pseudonyms, and face and voice distortion; and (ii) protect portions of Defence witnesses' testimony from the public in circumstances where the nature and detail of that testimony may reveal a witness's identity by the use of closed or private session.

7. The Defence would respectfully propose following the Trial Chamber's practice to date by which a request for closed or private session is made orally at the time of a witness's testimony when questions and/or the answers to those questions might reveal the witness's name or other identifying information.

8. In addition, the Trial Chamber may permit a justified request for closed or private session to be made orally, on a case-by-case basis, when specific facts of a particularly private or sensitive nature are to be adduced during testimony that raise a higher than normal risk of subjecting the witness to traumatisation or re-traumatisation if broadcast publicly due, for example, to a witness's emotional state.

A. The current security situation in Sudan

9. In the First Protective Measures Decision, the Trial Chamber took account of the Prosecution's submission that:

the security situation in Sudan, and particularly in Darfur, since the military coup on 25 October 2021, [REDACTED].⁵

10. In its First Protective Measures Request, the Prosecution argued that:

The Court's jurisprudence establishes that evidence of direct threats is not required to establish the existence of an objectively justifiable risk. In addition, Trial Chambers in *Ntaganda*, 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."⁶

...

As the Chamber has previously been informed of, 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.⁷

...

The security situation in Sudan [REDACTED] are reasons to grant protective measures in this case.⁸

11. The Prosecution argued that there was an "objectively justifiable risk" to its witnesses in Sudan [REDACTED].⁹ The Prosecution's request for protective measures was granted, at least in part, on the strength of its arguments regarding the security situation in Sudan. If that security situation justified the granting of protective measures to Prosecution witnesses in March and June 2022, it is submitted that *a fortiori* the security situation in Sudan justifies the granting of the same protective measures for Defence witnesses in September 2023. The security situation in Sudan has dramatically deteriorated since the outbreak of a brutal armed conflict between Sudan's *de facto* leader, Abdel Fattah al-Burhan and the Sudanese Armed Forces on one side, and Mohammed Hamdan Dagalo ("Hemedti") and his Rapid Support Force

⁵ First Protective Measures Decision, para. 13, citing Prosecution's request for in-court protective and special measures, ICC-02/05-01/20-609-Conf-Exp, 25 February 2022 ("First Protective Measures Request"), paras 18-19. A public redacted version was notified on 1 March 2022, [ICC-02/05-01/20-609-Red2](#).

⁶ First Protective Measures Request, para. 15 (internal footnotes omitted).

⁷ First Protective Measures Request, para. 17 (internal footnotes omitted).

⁸ First Protective Measures Request, para. 20 (internal footnotes omitted). *See also* Prosecution's second request for in-court protective measures, ICC-02/05-01/20-697-Conf, 31 May 2022 ("Second Protective Measures Request"), para. 15 (public redacted version notified on 1 June 2022, [ICC-02/05-01/20-697-Red](#)).

⁹ First Protective Measures Request, para. 21.

("RSF") on the other side on 15 April 2023. The Chamber has been addressed in detail on the security situation in Sudan.¹⁰

B. Witnesses [REDACTED]

12. [REDACTED] Defence witnesses [REDACTED].¹¹ Since [REDACTED] has been under the control of the RSF.¹² Some witnesses have expressed their fears that [REDACTED].¹³ Given [REDACTED] there are valid reasons to consider these fears to be well-founded. It is the Defence's understanding that, were these witnesses to be denied protective measures, they would withdraw their cooperation.

13. A number of [REDACTED].¹⁴ [REDACTED]. As an armed force of the Government of Sudan ("GoS"), [REDACTED]. [REDACTED]. They have fled and been hiding [REDACTED]. The risk to the lives of any [REDACTED] would be compounded were [REDACTED] to be made public. [REDACTED] expressed particular concerns for the lives and wellbeing of family members [REDACTED].

¹⁰ eg T-116 [Private session], 19 April 2023, pp 12-14; DAR-D31-00000127; T-124 [Closed *ex parte* session], 5 July 2023, pp 1-6; DAR-D31-00000164. See also Courrier International, [Exactions. Au Soudan, le conflit s'étend et les centres de détention secrets pullulent](#), 27 September 2023; People's Daily News, [Sudanese army, paramilitary forces exchange violent artillery shelling around army's general command](#), 26 September 2023; Japan Today, [Genocide fears in Darfur attracting little attention: Have nations abandoned their responsibility to protect civilians?](#), 22 September 2023; Reuters, [How Arab fighters carried out a rolling ethnic massacre in Sudan](#), 22 September 2023; Radio Tamazuj, [Panic south of Sudan's capital as RSF paramilitaries advance](#), 15 September 2023; Sudan Tribune, [Sudanese army resumes bombing RSF sites in Nyala of South Darfur](#), 14 September 2023; UN News, [Sudan's Worsening Violence, Humanitarian Crisis Could Foreshadow Civil War, Senior Officials Warn Security Council, Calling for Urgent Action to End Conflict](#), 13 September 2023; BBC, [Sudan conflict: Dozens killed in attack on Khartoum market, medics say](#), 10 September, 2023.

¹¹ [REDACTED].

¹² DAR-D31-00000164, p. 12, from African Centre for Justice and Peace Studies, [Sudan: At least 1000 people have been killed, several others injured and thousands displaced in Darfur region as the armed conflict between RSF and SAF continues](#), 21 June 2023.

¹³ eg [REDACTED].

¹⁴ eg [REDACTED].

C. Former [REDACTED]

14. [REDACTED]. They are expected to provide evidence as insider witnesses. The testimony they will provide is particularly sensitive and will focus on matters regarding GoS policy and practices. The Defence adopts the arguments advanced by the Prosecution in its First Protective Measures Request:

[REDACTED]. There may also be a risk from [REDACTED] who fear being associated with the conflict in Darfur as well as [...] those opposed to the Court generally.¹⁵

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.¹⁶

15. The Defence recalls that the Trial Chamber granted protective measures *vis-à-vis* Prosecution insider witnesses.¹⁷ The Trial Chamber is respectfully urged to grant the same measures to similarly positioned Defence witnesses.

D. Witnesses in the ICC Protection Programme, or whose applications are pending

16. Protective measures are sought for [REDACTED] Defence witnesses: (i) who are definitively in the ICCPP;¹⁸ (ii) who are provisionally in the ICCPP;¹⁹ or (iii) whose applications for inclusion to the ICCPP are pending.²⁰ In-court protective measures are necessary not only to ensure that these witnesses can give evidence without fear for their personal safety, but also because testifying without the benefit of protective measures would compromise the protection they have been afforded, or that they seek, under the terms of the ICCPP.

¹⁵ First Protective Measures Request, para. 24 (internal footnotes omitted). The Defence does not accept that insider witnesses, or any other witnesses, are at any risk whatsoever from associates of Mr Abd-Al-Rahman.

¹⁶ First Protective Measures Request, para. 25.

¹⁷ First Protective Measures Decision, paras 15-30.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

17. As the Prosecution rightly noted in its First Protective Measures Request:

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."²¹

18. Here, the Prosecution has been given the full identifying details for these Defence witnesses and is able to deal with their evidence without restriction. The Defence recalls that the Trial Chamber granted protective measures *vis-à-vis* Prosecution ICCPP witnesses.²² The Trial Chamber is respectfully urged to grant the same measures to Defence ICCPP witnesses.

E. All defence witnesses

19. Submissions made in the "Defence Request for an Order Prohibiting Disclosure of some Defence Witnesses' Identities to the Sudanese Authorities"²³ are incorporated by reference. It is worth highlighting that there is no dispute between the Prosecution and the Defence regarding the risks to [Prosecution] witnesses should the GoS learn of their testimony:

[REDACTED].²⁴

20. It is submitted that there is no principled reason why precisely the same considerations do not and should not apply to the Defence witnesses.

²¹ First Protective Measures Request, para. 32, citing *Lubanga* Status Conference, [ICC-01/04-01/06-T-104-ENG ET](#), 16 January 2009, p. 4; *Yekatom & Ngaïssona* Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses, [ICC-01/14-01/18-906-Red2](#), 19 April 2021, paras. 52-53.

²² First Protective Measures Decision, para. 62.

²³ ICC-02/05-01/20-1007-Conf, 28 August 2023, paras. A public redacted version was notified on 11 September 2023, [ICC-02/05-01/20-1007-Red](#).

²⁴ T-123 [Private session], 5 July 2023, p. 14.

F. CONCLUSION AND RELIEF

21. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber grant the protective measures for the [REDACTED] Defence witnesses identified.



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

Dated this 13th day of October 2023

At The Hague, The Netherlands