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No. ICC-02/05-01/20

Date: 12 May 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(*'ALI KUSHAYB'*)**

Public

Decision on the Prosecutor's requests for non-disclosure of witness identities

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

The Office of the Prosecutor

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II (the ‘Chamber’) of the International Criminal Court (the ‘Court’),¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, pursuant to article 68(1) of the Rome Statute (the ‘Statute’), and rules 76(1), 81(4) of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the Prosecutor’s requests for non-disclosure of witness identities.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.²
2. On 17 August 2020, the Single Judge issued an order on the time limit for applications for the authorisation of the non-disclosure of witness identities and/or of entire items of evidence.³ Following a number of postponement requests by the Prosecutor,⁴ the Chamber set the final time limit for such applications on 26 February 2021.⁵

¹ [Decision on the designation of a Single Judge](#), 17 March 2021, ICC-02/05-01/20-307.

² See e.g. [Decision on the Defence Request to provide written reasoning for two oral decisions](#), 18 August 2020, ICC-02/05-01/20-118, paras 1-4.

³ [Order on disclosure and related matters](#), ICC-02/05-01/20-116.

⁴ [Prosecution urgent request for an extension of time](#), 9 September 2020, ICC-02/05-01/20-149-Conf-Exp. Confidential redacted and public redacted versions were notified on 10 September 2020 (ICC-02/05-01/20-149-Conf-Red and ICC-02/05-01/20-149-Red2, respectively); [Corrected Version of “Prosecution’s request to postpone the confirmation hearing”](#), 16 September 2020, ICC-02/05-01/20-157-Conf-Exp, 17 September 2020, ICC-02/05-01/20-157-Conf-Exp-Corr. A confidential redacted version and a public redacted version were notified on the same day (ICC-02/05-01/20-157-Conf-Red-Corr and ICC-02/05-01/20-157-Corr-Red, respectively); [Prosecution’s Second Non-disclosure Request to postpone the confirmation hearing and related deadlines](#), 3 December 2020, ICC-02/05-01/20-218-Conf. A public version was notified on 4 December 2020 (ICC-02/05-01/20-218-Red).

⁵ [Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines](#), 2 November 2020, ICC-02/05-01/20-196, p. 20; [Decision on the Prosecutor’s Second Non-disclosure Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), 18 December 2020, ICC-02/05-01/20-238, p. 15.

3. On 18 December 2020, the Prosecutor submitted a request for the Single Judge to authorise the non-disclosure of eight witnesses' identity (the 'First Non-disclosure Request').⁶
4. On 1 January 2021, the Defence submitted its response to the First Non-disclosure Request (the 'First Response').⁷
5. On 8 January 2021, the Prosecutor withdrew the non-disclosure request concerning Witness P-0091.⁸
6. On 15 January 2021, the Defence submitted observations on the lesser redacted version of the First Non-disclosure Request (the 'Complement to First Response').⁹
7. On 26 February 2021, the Prosecutor submitted another request for the Single Judge to authorise the non-disclosure of eighteen witnesses' identity (the 'Second Non-

⁶ Prosecution's first request for the authorisation of non-disclosure of witness identities, ICC-02/05-01/20-242-Conf-Exp (with nine annexes), *referring to* P-0085, P-0091, P-0117, P-0119, P-0123, P-0129, P-0843 and P-0884. Confidential and public redacted versions are also available (ICC-02/05-01/20-242-Conf-Red and ICC-02/05-01/20-242-Red3, respectively). A confidential lesser redacted version was submitted on 12 January 2021 (ICC-02/05-01/20-242-Conf-Red2), following the Single Judge's instructions to the Prosecutor to provide submissions on the Defence request for redactions to be lifted from paragraphs 11 and 15 of the First Non-disclosure Request, *see* Email from the Chamber sent on 8 January 2021 at 14:49. *See also* Email from the Office of the Prosecutor sent on 12 January 2021 at 12:30. On 13 January 2021, pursuant to the request of the Defence, the Single Judge authorised it to submit additional observations to the lesser redacted version of the First Non-disclosure Request, *see* Email from the Defence sent on 12 January 2021 at 16:56 and Email from the Chamber sent on 13 January 2021 at 9:15.

⁷ Réponse à la Requête ICC-02/05-01/20-242-CONF-RED, ICC-02/05-01/20-246-Conf (notified on 4 January 2021).

⁸ Prosecution's withdrawal of non-disclosure request concerning Witness P-0091, ICC-02/05-01/20-250-Conf. *See also* Email from the Office of the Prosecutor sent on 7 January 2021 at 13:44; Email from the Chamber sent on 8 January 2021 at 9:47.

⁹ Complément de Réponse à la Requête ICC-02/05-01/20-242-CONF-RED, ICC-02/05-01/20-257-Conf.

disclosure Request’).¹⁰ The Prosecutor also provided updates regarding the security situation of seven witnesses.¹¹

8. On 19 March 2021, the Prosecutor withdrew the non-disclosure request concerning Witnesses P-0039 and P-0843.¹²

9. On 26 March 2021, the Single Judge issued a decision setting a time limit for the Defence to respond to the Second Non-disclosure Request.¹³

10. On 30 March 2021, the Prosecutor withdrew the non-disclosure request concerning Witnesses P-0129 and P-0877.¹⁴ The Prosecutor also provided updates on the disclosure related to two witnesses.¹⁵

11. On 6 April 2021, the Defence submitted its response to the Second Non-disclosure Request (the ‘Second Response’).¹⁶

¹⁰ Prosecution’s second request for the authorisation of non-disclosure of witness identities, ICC-02/05-01/20-287-Conf-Exp (with nineteen annexes), *referring to* Witnesses P-0008, P-0020, P-0032, P-0034, P-0037, P-0039, P-0046, P-0053, P-0076, P-0087, P-0103, P-0105, P-0118, P-0188, P-0581, P-0643, P-0877 and P-0892. Confidential and public redacted versions are also available (ICC-02/05-01/20-287-Conf-Red and ICC-02/05-01/20-287-Red2). On 2 March 2021, the Defence submitted a request related to the Second Non-disclosure Request, indicating that it was not in a position to respond to it before evaluating the impact which a memorandum of understanding (the ‘MOU’) between the Office of the Prosecutor and the Sudanese authorities would have on witness protection. To that end, the Defence asked the Chamber to order the Prosecutor to register the MOU in the case record and to suspend the time limit to respond to the Second Non-disclosure Request; *see* Requête aux fins d’enregistrement d’un document dans le dossier de l’affaire, d’extension de délai et de reclassification, ICC-02/05-01/20-289-Conf. On 4 March 2021, the Single Judge temporarily suspended the Defence’s time limit for its response to the Second Non-disclosure Request; *see* Email from the Chamber sent on 4 March 2021 at 12:37. On 13 April 2021, the Prosecutor provided updates regarding Witness P-0643, *see* [Public Redacted Version of “Prosecution’s request for variation of time limits for the newly collected materials, and third request for the authorisation of non-disclosure of witness identities”, 13 April 2021, ICC-02/05-01/20-341-Conf-Exp](#), 15 April 2021, ICC-02/05-01/20-341-Red2; a confidential redacted version is also available (ICC-02/05-01/20-341-Conf-Red).

¹¹ Second Non-disclosure Request, paras 52-56, *referring to* Witnesses P-0123, P-0843, P-0884, P-0085, P-0117, P-0119, P-0129.

¹² Prosecution’s withdrawal of non-disclosure requests concerning Witnesses P-0039 and P-0843, ICC-02/05-01/20-310-Conf.

¹³ Decision on the Defence request to have an MOU registered in the record of the case and on reclassification of filings (the ‘[MOU Decision](#)’), ICC-02/05-01/20-323.

¹⁴ Prosecution’s withdrawal of non-disclosure requests concerning Witnesses P-0129 and P-0877, and provision of updates concerning Witnesses P-0188 and P-0065 (the ‘Third Withdrawal Request’), ICC-02/05-01/20-328-Conf.

¹⁵ Third Withdrawal Request, paras 7-9, *referring to* Witnesses P-0188 and P-0065.

¹⁶ Réponse à la Requête ICC-02/05-01/20-287-Conf-Red, ICC-02/05-01/20-333-Conf.

II. ANALYSIS

A. Applicable law

12. The Single Judge recalls that, pursuant to article 68(1) of the Statute, the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. For that reason, rule 81(4) of the Rules allows for the non-disclosure of a witness' identity prior to the commencement of trial when it is necessary in order to protect the safety and privacy of the witness.¹⁷ The Single Judge further recalls the Chamber's responsibility to balance the different interests at stake so as to ensure that the proceedings are fair and expeditious, and that they are conducted with full respect to the rights of the suspect and with due regard to the protection of victims and witnesses.

13. The Appeals Chamber has determined that 'it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial'.¹⁸ In making this determination, the Appeals Chamber emphasised the specific nature of the confirmation of charges stage, which, pursuant to article 61(7) of the Statute, is designed to 'determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'.¹⁹ In this regard, the Appeals Chamber has set out the factors to be taken into account by a Pre-Trial Chamber when considering a request by the Prosecutor pursuant to rule 81(4) of the Rules to authorise the non-disclosure of a witness' identity as follows:

- i. There must be an objectively justifiable risk to the safety of the person concerned which arises from disclosing the information to the Defence, as opposed to disclosing it to the general public. The Chamber must consider, *inter alia*, whether the risk of prejudice could be overcome by

¹⁷ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence' (the '[Lubanga Non-disclosure Judgment](#)'), 13 October 2006, ICC-01/04-01/06-568, paras 34-35.

¹⁸ Appeals Chamber, *The Prosecutor v. Germain Katanga*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'" (the '[Katanga Redaction Judgment](#)'), 13 May 2008, ICC-01/04-01/07-475, para. 68.

¹⁹ [Katanga Redaction Judgment](#), para. 68.

ruling that the information should be kept confidential between the parties;

- ii. The identified risk can only be overcome or reduced by non-disclosure of the information and there is no less intrusive measure, short of non-disclosure, that is available and feasible in the circumstances; and
- iii. Taking into consideration the nature and content of the non-disclosed information, the Chamber must assess whether withholding it from the Defence would result in the confirmation hearing, viewed as a whole, to be unfair to the suspect.²⁰

14. In assessing whether there is a risk of safety to witnesses, the Chamber has taken into account the following factors:

- (i) the witness' personal circumstances;²¹ (ii) whether there are currently protection or security measures in place for the witness; (iii) the relevant security situation in the area where the witness or his/her family currently reside; (iv) whether the witness or his/her family members have received any threats on account of his/her (perceived) involvement with the Court; (v) whether the witness him/herself has undertaken any activity to endanger his/her personal safety; and (vi) whether the witness consented that his/her identity be disclosed to the Defence (without prejudice to the Chamber's *proprio motu* assessment whether to disclose such identity).²²

²⁰ [Katanga Redaction Judgment](#), paras 71-73; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (the '[Lubanga Rule 81 Judgment](#)'), 14 December 2006, ICC-01/04-01/06-773, paras 21, 33-34. See also Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests (the '[Ruto Redaction Decision](#)'), 29 June 2011, ICC-01/09-01/11-145-Conf-Red, paras 27-29; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga*, [Public Redacted Version of the "Eighth Decision on Redactions"](#), 9 June 2008, ICC-01/04-01/07-568, para. 29.

²¹ In this respect, the Court has held that '[t]he subjective fear of a witness is of relevance to the Chamber in considering whether an objectively justifiable risk exists but is not, in itself, determinative'. Trial Chamber V(b), *The Prosecutor v. Uhuru Muigai Kenyatta*, [Public redacted version of Decision on prosecution application for delayed disclosure of witness identities](#), 21 December 2012, ICC-01/09-02/11-580-Conf-Exp, 21 December 2012, ICC-01/09-02/11-580-Red2, para. 31.

²² *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the 'Prosecution's Urgent Request for the Non-Disclosure of Witness Identities'](#), 3 February 2020, ICC-01/14-01/18-273-Red2, para. 27; *The Prosecutor v. Bosco Ntaganda*, Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests (the '[Ntaganda Redaction Decision](#)'), 3 July 2014, ICC-01/04-02/06-117-Red3, para. 34.

15. This assessment has to be conducted on an individual case-by-case basis.²³ It is subject to change in light of changing circumstances and must, for this reason, be kept under constant review.²⁴

B. Preliminary issues

16. The Single Judge first notes the Defence's submission that the Prosecutor has made unfounded allegations regarding alleged 'associates' of Mr Abd-Al-Rahman, and asks that the Prosecutor be directed to refrain from making such claims in the future.²⁵ In the Defence's view, while the Prosecutor referred to the Chamber's decision on Mr Abd-Al-Rahman's detention (the 'Detention Review Decision')²⁶ in support of the First Non-disclosure Request, this decision was still pending before the Appeals Chamber at the time and should therefore not have been relied upon.²⁷ The Single Judge finds the Defence's argument unpersuasive and notes that the Appeals Chamber has since confirmed the Detention Review Decision.²⁸ Moreover, the Single Judge stresses that the standard of proof in relation to factual allegations that are relevant for assessing risk in the context of non-disclosure of witnesses' identity pursuant to rule 81(4) of the Rules is not high.²⁹ It is also not necessary to identify the individuals who may pose a threat or to determine their exact relationship to the suspect. Accordingly, the Single Judge rejects the Defence's request.

17. The Single Judge also notes the Defence's request to issue a warning to the Prosecutor for what it alleges was an abuse of trust and a violation of Chapter 4

²³ [Lubanga Non-disclosure Judgment](#), paras 1, 36, 39; *Ruto Redaction Decision*, paras 27-29; [Ntaganda Redaction Decision](#), para. 34.

²⁴ See e.g. [Ntaganda Redaction Decision](#), para. 34. See also n. 36.

²⁵ First Response, p. 8. See paras 11-15. See also Second Response, para. 7.

²⁶ First Response, para. 11, referring to Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence, 11 December 2020, ICC-02/05-01/20-230-Conf. See paragraphs 28-30 of this decision on detention review.

²⁷ First Response, para. 11, referring to [Acte d'appel de la décision ICC-02/05-01/20-230-Red](#), 16 December 2020, ICC-02/05-01/20-234 (notified on 17 December 2020).

²⁸ [Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 \(2\) of the Rules of Procedure and Evidence'](#), 5 February 2020, ICC-02/05-01/20-279-Red. A confidential version is also available (ICC-02/05-01/20-279-Conf).

²⁹ See e.g. Trial Chamber II, *The Prosecutor v. Germain Katanga*, [Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they Might Currently Exert on Victims and Witnesses](#), 18 December 2008, ICC-01/04-01/07-800-tENG, paras 8-9.

Section 5 of the Code of Conduct for the Office of the Prosecutor.³⁰ In particular, the Defence claims that the Prosecutor improperly applied redactions to paragraphs 11 and 15 of the First Non-disclosure Request and alleges that they were applied to create an ‘illusion’ according to which abnormal events involving Mr Abd-Al-Rahman were taking place that created insecurity for certain witnesses.³¹ Although the Single Judge agrees with the Defence that the Prosecutor should have demonstrated more discernment before applying these redactions, there is no indication that the Prosecutor acted in bad faith. Accordingly, the Single Judge rejects the Defence’s request.

18. Lastly, the Single Judge notes the Defence’s contention that the Prosecutor should not be allowed to benefit from its own violation of the Statute to request an exception to the principle of full disclosure.³² In particular, the Defence contends that the Prosecutor is primarily responsible for creating the risk that certain security elements in the transitional government of Sudan may pose to witnesses residing in Sudan because the Prosecutor launched investigations in Sudan without first concluding an agreement pursuant to article 4(2) of the Statute.³³

19. The Single Judge notes that this assertion is based upon arguments made previously by the Defence (the ‘Article 4(2) Request’).³⁴ This request will be dealt with in due time. For the purposes of this decision, the only question that is before the Chamber is whether disclosing the witnesses’ identity will expose them to an unacceptable risk that cannot be mitigated otherwise than by withholding their identity from the Defence. Even if it could be argued that the Prosecutor did not do enough to limit the risk to which witnesses are now exposed, it would be unconscionable to deliberately expose them to serious risks on account of shortcomings or mistakes made by the Court in the past. Moreover, the Defence’s suggestion that had the Prosecutor concluded a special agreement pursuant to article 4(2) of the Statute there would have been no risk from the abovementioned security elements is entirely speculative. Indeed,

³⁰ Complement to First Response, p. 11. *See* para. 9. *See also* Second Response, para. 7.

³¹ Complement to First Response, para. 9. *See also* Second Response, para. 7.

³² Complement to First Response, para. 18.

³³ Complement to First Response, paras 15-18, *referring to* [Requête en vertu des Articles 4-2 et 68-1 du Statut](#), 14 December 2020, ICC-02/05-01/20-231-Red. A confidential *ex parte* version is also available (ICC-02/05-01/20-231-Conf-Exp); Second Response, para. 12.

³⁴ Complement to First Response, paras 15-16, 18, *referring to* [Requête en vertu des Articles 4-2 et 68-1 du Statut](#), 14 December 2020, ICC-02/05-01/20-231-Red. A confidential *ex parte* version is also available (ICC-02/05-01/20-231-Conf-Exp); Second Response, para. 12.

the risk does not emanate from the Prosecutor. The latter's role is limited to identifying potential threats and taking measures, in conjunction with the VWU, to mitigate those threats as much as possible. It may well be that the conclusion of agreements with States can play a significant role in this regard, but doing so cannot be a precondition to all investigative activity, as the Defence submissions seem to imply. Accordingly, the Single Judge rejects the Defence's arguments and will now assess the situation of the individual witnesses.

C. Submissions

First Non-disclosure Request

20. Noting the Prosecutor's withdrawal of the non-disclosure request in relation to P-0091, P-0843 and P-0129, the following analysis concerns the remaining five witnesses: P-0085, P-0117, P-0119, P-0123 and P-0884 (the 'Five Witnesses').

21. The Single Judge notes that the Prosecutor intends to rely on the evidence of the Five Witnesses for the confirmation of charges against Mr Abd-Al-Rahman.³⁵ According to the Prosecutor, the current security situation of the Five Witnesses 'does not allow for the disclosure of their identities' and therefore the Prosecutor seeks to 'delay the disclosure of their identities by applying non-standard redactions to [the] witness statements and related materials'.³⁶ The Defence submits that the First Non-disclosure Request should be rejected and requests the disclosure of all information in the Prosecutor's possession in relation to the Five Witnesses.³⁷

Second Non-disclosure Request

22. The Single Judge notes the Prosecutor's withdrawal of the request in relation to P-0039 and P-0877. The Single Judge also notes that it appears from the Prosecutor's first application under article 54(3)(f) of the Statute that P-0032 provided his statement pursuant to article 54(3)(e) of the Statute. Accordingly, the Chamber has decided on the redactions applied to P-0032's statement in its decision on that request.³⁸ As a result,

³⁵ First Non-disclosure Request, para. 10.

³⁶ First Non-disclosure Request, para. 10.

³⁷ Complement to First Response, p. 11.

³⁸ [Decision on the Prosecutor's request for non-disclosure pursuant to article 54\(3\)\(e\) and applications under 54\(3\)\(f\) of the Statute](#), 20 April 2021, ICC-02/05-01/20-354, paras 18, 31.

the following analysis concerns the fifteen remaining witnesses: P-0008, P-0020, P-0034, P-0037, P-0046, P-0053, P-0076, P-0087, P-0103, P-0105, P-0118, P-0188, P-0581, P-0643 and P-0892 (the ‘Fifteen Witnesses’).

23. The Single Judge notes that the Prosecutor intends to rely on the evidence of eleven of the Fifteen Witnesses for the confirmation of charges against Mr Abd-Al-Rahman.³⁹ The remaining four witnesses were cited in the applications under article 58 of the Statute relating to this case and are as such disclosable, but the Prosecutor does not intend to rely upon their evidence for the confirmation hearing.⁴⁰ According to the Prosecutor, the current security situation of the Fifteen Witnesses ‘do[es] not allow for the disclosure of their identities’ and, as such, the Prosecutor seeks to ‘delay the disclosure of their identities by applying non-standard redactions to [the] witness statements and related materials’.⁴¹ The Defence submits that the Second Non-disclosure Request should be rejected, requesting the Single Judge to (i) reject the First Non-disclosure Request and the Second Non-disclosure Request; and (ii) order the disclosure of all the information in the Prosecutor’s possession related to the witnesses referred to in these requests upon which the Prosecutor intends to rely at the confirmation of charges hearing. In particular, the Defence wishes to be apprised of the States in which the witnesses provided their testimony as well as in which States they have resided since their first interaction with the Office of the Prosecutor.⁴²

D. Individual assessment

24. The Single Judge notes the Prosecutor’s assertion that the Victims and Witnesses Unit concurs with the risk assessments informing both requests.⁴³

25. In light of the above requests and the available information, the Single Judge deems it convenient to divide the twenty witnesses in two different groups: (i) witnesses with whom the Office of the Prosecutor has been unable to re-establish contact and for whom no recent risk assessment is available; and (ii) witnesses who are currently

³⁹ Second Non-disclosure Request, para. 9, *referring to* P-0008, P-0020, P-0034, P-0087, P-0103, P-0105, P-0118, P-0188, P-0581, P-0643 and P-0892.

⁴⁰ Second Non-disclosure Request, para. 9, *referring to* P-0037, P-0046, P-0053 and P-0076.

⁴¹ Second Non-disclosure Request, para. 10.

⁴² Second Response, para. 6 and p. 11. *See* First Response, para. 17 and p. 8.

⁴³ First Non-disclosure Request, para. 11; Second Non-disclosure Request, para. 13.

located in a place where the Court has not yet been able to put in place adequate protection measures.

1. First group: Witnesses for whom no recent risk assessment is available

26. The Single Judge notes that the Prosecutor has not been able to re-establish contact with the following witnesses: P-0008, P-0034, P-0037, P-0046, P-0053, P-0076, and P-0085. The Single Judge further notes the Prosecutor's submission that efforts are being made 'through multiple intermediaries and extensive liaison with domestic authorities' to locate the witnesses and that in relation to one of them the Office of the Prosecutor is working to put in place protective measures in anticipation of when contact will be re-established.⁴⁴

27. Given that the Prosecutor is unaware of the witnesses' current location, it has not been possible to conduct a risk assessment. Under these circumstances, it would be irresponsible to disclose their identity since doing so would expose the witnesses and/or their families to an unknown risk.

28. In terms of the potential prejudice to the suspect's rights caused by non-disclosure of the seven witnesses, the Single Judge notes that the Prosecutor does not rely on four of them (P-0037, P-0046, P-0053, P-0076) for the purpose of the confirmation decision. As for the remaining three witnesses (P-0008, P-0034, and P-0085), most of the information they provide that is relied upon by the Prosecutor is corroborated by other witnesses whose identities have been disclosed to the Defence. Accordingly, non-disclosure of the witnesses' identity from this group does not unduly prejudice the rights of the Defence.

29. The authorisation to withhold the witnesses' identity from this group is provisional and must be re-evaluated as soon as the Prosecutor has located them and carried out a thorough risk assessment. The Chamber expects the Prosecutor to continue making all reasonable efforts to re-establish contact before the start of the confirmation hearing. If the Prosecutor does not succeed in locating the witnesses by that time, the Chamber will not rely on their evidence for the purpose of the confirmation decision.

⁴⁴ First Non-disclosure Request, para. 30.

2. *Second group: Witnesses at risk due to their current location*

30. Under this heading, the Single Judge will evaluate witnesses P-0020, P-0087, P-0103, P-0105, P-0117, P-0118, P-0119, P-0123, P-0188, P-0581, P-0643, P-0884, and P-0892. According to the Prosecutor, they are all at risk by virtue of where they currently reside. The Single Judge understands that this assessment is mainly based on the fact that the Court has still not been able to put in place adequate measures to contain and manage possible risks. Some witnesses also mention that they have received threats in the past. Disclosing the identity of the witnesses in this category before the Court has put in place adequate protective measures against potential threats would pose an objectively justifiable risk to them. Under these circumstances, it would be irresponsible to reveal the witnesses' identity and it does not appear feasible to sufficiently mitigate the risks by way of alternative measures. However, the Single Judge is encouraged by the Prosecutor's affirmation that efforts are underway to remedy this situation, at which point it will be possible to make more individualised risk assessments, which might allow for further disclosure.⁴⁵

31. This leaves the question whether the non-disclosure of the identities of the witnesses unduly prejudices the rights of the Defence. The Single Judge notes, in this regard, that eleven of the thirteen witnesses in this category implicate Mr Abd-Al-Rahman or 'Ali Kushayb' by name. In principle, the Defence should know the identity of all incriminating witnesses, especially the ones who testify about the acts and conduct of the suspect. The Single Judge observes, however, that in a majority of cases the evidence from these witnesses is not the only evidence relied upon by the Prosecutor. This reduces the potential impact of the non-disclosure of the witnesses involved. As regards P-0105, P-0188, P-0643, and P-0892, who appear to be the only sources of incriminating evidence in relation to a limited number of specific allegations involving Mr Abd-Al-Rahman personally, the Single Judge assesses them to be of relatively minor significance when viewed in the context of the Prosecutor's case as a whole.

⁴⁵ First Non-disclosure Request, paras 28-29. *See also* para. 30.

32. Accordingly, considering the limited purpose of the confirmation hearing,⁴⁶ the Single Judge finds that, on balance, non-disclosure of a relatively small number of witness identities does not unduly affect the fairness of the proceedings. Indeed, the Chamber is not required to systematically examine the credibility of each witness for the purpose of confirmation.⁴⁷ There is thus less of a need for the Defence to know the identity of all witnesses. Moreover, the Single Judge is of the view that the redactions as such do not make the statements unintelligible.

33. Nevertheless, the Chamber will exercise caution when evaluating the statements of anonymous witnesses and take into consideration whether the information contained therein is corroborated or supported by other evidence tendered into the case file.⁴⁸ In so doing, the Chamber will take account of the fact that the Defence's ability to challenge the evidence of anonymous witnesses is impaired.⁴⁹

34. In light of the above, the Single Judge authorises the Prosecutor to withhold the witnesses' identity from the public and the Defence for now and to apply redactions to identifying information contained in their statements, as proposed in the annexes to the First and Second Non-disclosure Request. This authorisation extends to any translations of the witnesses' statements and the metadata linked to the evidence. This authorisation is provisional and subject to review as soon as measures have been put in place to alleviate any identified security risks.

35. In relation to the Prosecutor's request to authorise the non-disclosure of a video relating to witness P-0581⁵⁰ and a letter addressed to P-0087,⁵¹ the Single Judge notes that neither item was made available to the Chamber for review. Under these

⁴⁶ [Katanga Redaction Judgment](#), para. 68.

⁴⁷ Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges (the '[Abu Garda Confirmation Decision](#)'), 8 February 2010, ICC-02/05-02/09-243-Red, para. 41.

⁴⁸ [Abu Garda Confirmation Decision](#), para. 52; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras 159-160.

⁴⁹ [Lubanga Rule 81 Judgment](#), para. 51.

⁵⁰ Second Non-disclosure Request, para. 11, referring to DAR-OTP-0124-0715. See also Annex 16 to the Prosecution's second request for the authorisation of non-disclosure of witness identities, 26 February 2021, ICC-02/05-01/20-287-Conf-Exp-Anx16, pp. 12-13. The Prosecutor indicates that the translation of the transcript of this video is pending, and will be disclosed in due course. Second Non-disclosure Request, para. 11, n. 22.

⁵¹ Second Non-disclosure Request, para. 11, referring to DAR-OTP-0118-0768.

circumstances, the Chamber is not in a position to assess the potential prejudice non-disclosure would cause. The Prosecutor is therefore ordered to file both items as soon as possible and the Chamber reserves its decision until such time.

36. Finally, the Single Judge sees no reason to accede to the Defence's request to be informed of the current places of residence of the witnesses or of the locations where their statements were taken.⁵² The Defence does not *a priori* need this information in order to prepare for the confirmation hearing.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence's request that the Prosecutor be directed to refrain from making claims such as the ones presented at paragraphs 12-14 of the First Non-disclosure Request;

REJECTS the Defence's request to issue a warning to the Prosecutor;

REJECTS the Defence's request for information regarding the locations as to where witness statements were taken and where the witnesses are located;

GRANTS the First Non-disclosure Request;

GRANTS IN PART the Second Non-disclosure Request related to the Fifteen Witnesses;

AUTHORISES the Prosecutor to apply redactions to identifying information contained in the witnesses' statements, as proposed in the annexes to the First and Second Non-disclosure Request. This authorisation extends to any translations of their statements and the metadata linked to the evidence. This authorisation is provisional and subject to review as soon as measures have been put in place to alleviate any identified security risks;

DECIDES that if the Prosecutor does not succeed in locating the witnesses from the First group before the start of the confirmation hearing, the Chamber will not rely on their evidence for the purpose of the confirmation decision;

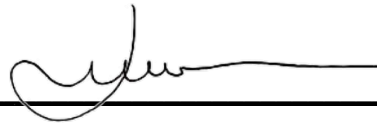
ORDERS the Defence to keep the information disclosed confidential and to ensure that it is not passed on to third parties or the public;

⁵² Complement to First Response, paras 13, 15-16, 18; Second Response paras 11-12.

ORDERS the Prosecutor to file documents DAR-OTP-0124-0715 and DAR-OTP-0118-0768 by no later than **Tuesday, 18 May 2021, at 16:00 hours**; and

INSTRUCTS the Defence to file public redacted versions of the First Response, Complement to First Response and Second Response.

Done in both English and French, the English version being authoritative.



Judge Rosario Salvatore Aitala
Single Judge

Dated this Wednesday, 12 May 2021

At The Hague, The Netherlands