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No.: **ICC-02/05-01/20**

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**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 Public Annex**

**Defence’s observations on the “Protocol on the handling of confidential information during investigations and contact between party or participant and witnesses of the opposing party or of a participant”**

**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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**Victims and Witnesses Unit**

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## I. INTRODUCTION

1. Pursuant to the oral decision of Trial Chamber I (“Trial Chamber”) issued during the Status Conference held on 17 December 2021<sup>1</sup>, the Defence of Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) hereby submits its observations on the “Protocol on the handling of confidential information during investigations and contact between party or participant and witnesses of the opposing party or of a participant” (“Protocol”)<sup>2</sup>.

## II. PROCEDURAL HISTORY

2. On 17 August 2020, the Single Judge of Pre-Trial Chamber II issued the “Order on disclosure and related matters” to which the Protocol was appended as Annex 2<sup>3</sup>.

3. In its submissions dated 1 September 2021, filed ahead of the First Status Conference held on 8 September 2021, the former Legal Representatives of Victims indicated that they had no observations on the Protocol<sup>4</sup>.

4. On 3 November 2021, the Defence suggested to add as an item to the agenda of the Second Status Conference the clarification of the Protocol on contact between party or participant and witnesses of the opposing party or of a participant applicable to the case<sup>5</sup>.

5. During the Second Status Conference held on 12 November 2021, the Trial Chamber informed the parties and participants that it was considering issuing a “standardized” Protocol<sup>6</sup> and granted the request of the newly appointed Common

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<sup>1</sup> ICC-02/05-01/20-T-018-CONF-ENG-ET, p. 50, lines 15-19.

<sup>2</sup> Annex 2 to the “Order on Disclosure and Related Matters” (Pre-Trial Chamber II), [ICC-02/05-01/20-116-Anx2](#), 17 August 2020.

<sup>3</sup> *Ibid.*

<sup>4</sup> “Victim’s joint submissions on the matters identified in the “Order scheduling first status conference” (Trial Chamber I), [ICC-02/05-01/20-463](#), 1 September 2021, par. 31.

<sup>5</sup> « *Contribution à l’agenda de la deuxième conférence de mise en état* », [ICC-02/05-01/20-507](#), 3 November 2021, par. 4.

<sup>6</sup> [ICC-02/05-01/20-T-017-Red-ENG](#), p. 29, lines 18-23.

Legal Representative for Victims (“CLRV”) to submit their written observations on the matter<sup>7</sup>.

6. During that same Status Conference, the Defence suggested that the Trial Chamber might circulate a draft Protocol and allow the parties and participants the opportunity to make suggestions on the draft<sup>8</sup>.

7. On 7 December 2021, the CLRV submitted its “Observations on the Protocol on the handling of confidential information during investigations and contact between party or participant and witnesses of the opposing party or of a participant” (“CLRV Observations”)<sup>9</sup>.

8. On 13 December 2021, the Trial Chamber added “Responses to victims’ observations on the ‘Protocol on the handling of confidential information during investigations and contact between party or participant and witnesses of the opposing party or of a participant’” to the agenda of the Third Status Conference<sup>10</sup>.

9. During the Third Status Conference held on 17 December 2021, the Defence informed the Trial Chamber that it had no objections in relation to the CLRV Observations<sup>11</sup>. The Trial Chamber granted<sup>12</sup> the Defence’s request to submit additional observations on the Protocol, inspired from 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 adopted in the *Al Hassan* case (“*Al Hassan Protocol*”)<sup>13</sup>.

### III. SUBMISSIONS

10. The Defence is cognizant of the Trial Chamber’s intention, expressed on several occasions, to adopt a standardized Protocol which could ultimately apply to all cases<sup>14</sup>.

<sup>7</sup> *Ibid*, p. 32, lines 14-19, 25 and p. 33, line 1.

<sup>8</sup> *Ibid*, p. 33, lines 10-23.

<sup>9</sup> [ICC-02/05-01/20-531](#).

<sup>10</sup> “Order setting the agenda for the third status conference”, [ICC-02/05-01/20-533](#), 13 December 2021, par. 4.

<sup>11</sup> ICC-02/05-01/20-T-018-CONF-ENG-ET, p. 34, lines 8-12.

<sup>12</sup> ICC-02/05-01/20-T-018-CONF-ENG-ET, p. 50, lines 15-19.

<sup>13</sup> ICC-02/05-01/20-T-018-CONF-ENG-ET, p. 34, lines 12-22; p. 35, lines 3-4.

<sup>14</sup> [ICC-02/05-01/20-T-017-Red-ENG](#), p. 29, lines 18-23; ICC-02/05-01/20-T-018-CONF-ENG-ET, p. 35, lines 5-7.

11. As pointed out during the Third Status Conference<sup>15</sup>, the Defence respectfully submits that the Trial Chamber might take account of the lessons learned from the *Al Hassan* case, and that the *Al Hassan* Protocol, adopted on 19 March 2020 after lengthy litigation and *inter partes* consultations which resulted in the filing of a joint agreement by the parties, constitutes a solid basis for a standardized protocol<sup>16</sup>.

12. The Defence submits that the *Al Hassan* Protocol can assist in strengthening certain provisions of the Protocol. There are a number of amendments which might bring clarity to various provisions of the draft Protocol, thereby preventing unnecessary litigation between parties and participants and contributing to ensuring the efficiency of the proceedings. Further, the Defence notes that the adoption of these amendments are in conformity with a pre-existing Chamber's practice since most of these amendments were also already present in the Protocol adopted by Pre-Trial Chamber II in the *Yekatom and Ngaïssona* case on 22 March 2019<sup>17</sup> and confirmed by Trial Chamber V on 8 October 2020<sup>18</sup>. This might therefore meet the desirability for standardization and predictability of practice as previously indicated by the Trial Chamber.

13. Consequently, the Defence respectfully submits 9 amendments to the Protocol for the Trial Chamber's consideration. The amendments to existing provisions and the proposed new provisions are identified in underlined bold in the Annex appended to this filing.

14. Amendment to paragraph 4(f) refines the scope of applicability of the Protocol insofar as it clarifies when a person can be considered as a witness by

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<sup>15</sup> ICC-02/05-01/20-T-018-CONF-ENG-ET, p. 34, lines 12-22; p. 35, lines 3-4.

<sup>16</sup> Decision on 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', the 'Dual Status Witness Protocol', and related matters', [ICC-01/12-01/18-674](#), 19 March 2020. Several protocols were addressed in this Decision but the Defence is focusing on the *Al Hassan* Protocol, referred to in the aforementioned decision as the Contact Protocol, see Annex 2, [ICC-01/12-01/18-674-Anx2](#).

<sup>17</sup> Annex A to the "Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses" (Pre-Trial Chamber II), [ICC-01/14-01/18-156-AnxA](#), 22 March 2019. Amendments to par. 4(f), former par. 9- albeit not entirely, and 20 and newly added par. 5 – albeit not entirely, 31 – albeit not entirely, 40, and 41 of the Protocol mirror the wording of the related paragraphs in the protocol on related matters adopted in Pre-Trial case.

<sup>18</sup> "Decision on Protocols at Trial" (Trial Chamber V), [ICC-01/14-01/18-677](#), 8 October 2020, par. 1.

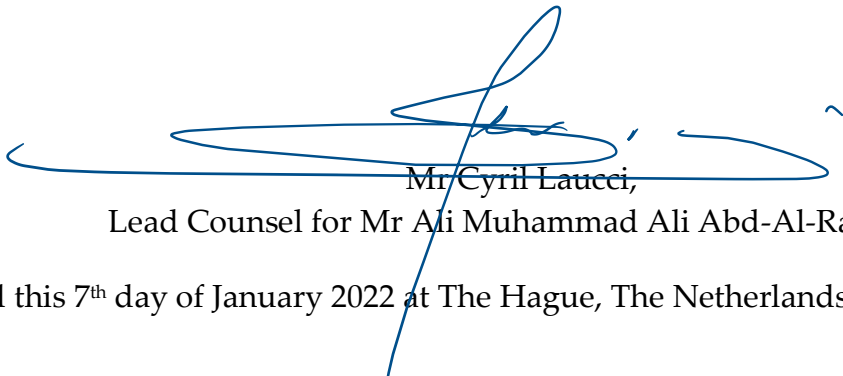
parties or participants for the specific purpose of this Protocol. This proposed amendment is essential to apprehend the full scope of applicability of the Protocol.

15. Amendments to former paragraphs 20, 28, and the newly added paragraphs 40 and 41 are designed to reflect an existing practice between the parties whereby *inter partes* communication is strongly encouraged, especially in cases of inadvertent disclosure. They further reflect the approach most desired by the Trial Chamber thus far<sup>19</sup> and guarantee the efficiency of the proceedings. In addition, these amendments, along with the newly added paragraph 5, aim at guaranteeing the utmost respect for confidentiality in the proceedings and of upholding obligations stemming from the Code of Professional Conduct for Counsel.

16. Former paragraph 9 and the newly added paragraphs 40 and 41 aim at strengthening the framework for the protection of witnesses.

17. Finally, the amendment to former paragraph 33 is essential to guarantee equality of arms between the parties. The Defence submits that, absent this amendment, the Defence may incur undue financial burdens due its limited means compared to those of the Prosecution and respectfully invites the Trial Chamber to consider the approach of balance and equality between the parties as adopted in the *Al Hassan* Protocol on the matter. In any case, the Legal Aid policy on the basis of which the Defence is working provides no corresponding funds to meet such additional expenses, which makes that the Defence would not be in a position to honour these.

18. The Defence thanks the Trial Chamber for the opportunity to submit these additional observations on the Protocol to assist its deliberations on the matter.



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

Dated this 7<sup>th</sup> day of January 2022 at The Hague, The Netherlands

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<sup>19</sup> [ICC-02/05-01/20-T-013-ENG](#), p. 4, line 1-11, 25, p. 5, lines 1-2, 13-19, p. 59, lines 24-25, and p. 60, line 1; [ICC-02/05-01/20-T-017-Red-ENG](#), p. 27, lines 1-3.