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

Date: 13 April 2022

**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 application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1073 and P-1074”, 8 April 2022, ICC-02/05-01/20-667**

**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. On 8 September 2021, Trial Chamber I (“Chamber”) ordered the Prosecution to disclose all evidence it intends to rely on by 5 January 2022 (“Disclosure Deadline”)<sup>1</sup> and to also provide the lists of witnesses and evidence it intends to rely on at trial by the same date (“Lists of Witnesses and Evidence Deadline”).<sup>2</sup>

2. Pursuant to regulation 35 of the Regulations of the Court (“Regulations”) and articles 64(2), 64(6)(f) and 69(3) of the Rome Statute (“Statute”), the Prosecution requests the Chamber to authorise (i) an extension until 8 April 2022 of the lapsed Disclosure Deadline for the newly obtained material of P-1073 and P-1074; (ii) the addition of the newly obtained material of P-1073 and P-1074 to the Prosecution’s list of evidence (“List of Evidence”) and (iii) the addition of P-1073 and P-1074 to the Prosecution’s List of Witnesses.<sup>3</sup>

3. Together, this material relates to core issues in the case, primarily rapes committed in Bindisi and surrounding areas, and will assist the Chamber in its determination of the truth under article 69(3) of the Statute. Moreover, as set out below, an extension of time of the lapsed Disclosure Deadline and Lists of Witnesses and Evidence Deadline will not prejudice the Accused’s right to a fair trial under article 67(1).

## II. CLASSIFICATION

4. Pursuant to regulation 23*bis*(1) of the Regulations, the Prosecution files this request as confidential, since it contains confidential information that identifies Prosecution witnesses. A public redacted version of this request will be filed as soon as practicable.

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<sup>1</sup> First Status Conference, 8 September 2021, [ICC-02/05-01/20-T-013-ENG](#), p. 17, l. 23-25 and p. 18, l. 1-7 and p. 78, l. 1-13.

<sup>2</sup> [First Status Conference](#), p. 78, l. 11-12.

<sup>3</sup> Should this application be granted, the Prosecution intends to request that P-1073’s and P-1074’s evidence be submitted pursuant to rule 68.

### III. SUBMISSIONS

#### **There is good cause to authorise the requested extension of time limits**

*A coup d'état in Sudan and extended COVID-19 restrictions demonstrate good cause and justify the requested extension of the lapsed time limit concerning P-1073 and P-1074*

5. Regulation 35(2) of the Regulations provides that the Chamber “may extend or reduce a time limit if good cause is shown [...]. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

6. The Appeals Chamber has held that “[a] cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”<sup>4</sup>

7. As the *Ntaganda* Trial Chamber held, “additions to a list of witnesses after the relevant deadline may, in principle, be made when the terms of Regulation 35(2) of the Regulations are met or, even where the terms of that regulation have not been met, where to do so would nonetheless be in the interests of justice and the determination of the truth”.<sup>5</sup>

8. As noted in the First Regulation 35 Application,<sup>6</sup> the Prosecution’s efforts to identify and/or conclude interviews of witnesses in Sudan was materially affected by: “(i) the significant disruption to cooperation between the Prosecution and the GoS. In particular, many GoS focal points upon whom the Prosecution relied on to facilitate

<sup>4</sup> *Katanga* “Reasons for the ‘Decision on the Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor’s Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation’”, 27 June 2008, [ICC-01/04-01/07-653](#), para. 5.

<sup>5</sup> *Ntaganda* “Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior record testimony of Witness P-0551”, 19 January 2017, [ICC-01/04-02/06-1733](#), para. 6.

<sup>6</sup> First Regulation 35 Application, paras. 13-16.

its operations in Sudan have been removed from their positions and have not yet been replaced; (ii) the severe disruption to internet services and phone networks in Sudan as a result of the *coup d'état* which has impeded the Prosecution's ability to contact witnesses and conduct interviews remotely; and (iii) the ongoing political and security related instability in Sudan, as well as increased COVID-19 related travel restrictions, which have forced the Prosecution to cease its ongoing investigations in Sudan and prevented any further investigative activities on the ground, including witness interviews, as well as witness security assessments."<sup>7</sup>

9. Under these circumstances and despite best efforts, the Prosecution only became aware of P-1073 and P-1074 as potential witnesses [REDACTED].<sup>8</sup>

10. The Prosecution was therefore not in a position to meet the 5 January deadline due to circumstances out of its control.

*The requested extension of time-limits is reasonable under the circumstances*

11. On 16 December 2021, the Prosecution filed in advance of the Disclosure Deadline its request to extend the Disclosure Deadline in light of its challenges in securing the interviews of witnesses, explaining the reasons for seeking such an extension.<sup>9</sup> The Chamber, however, ruled that the application was "premature" at that time in relation to witnesses whose testimony had not yet been obtained (the "Decision"),<sup>10</sup>

12. Following the same reasoning provided by the Chamber in its Decision,<sup>11</sup> the Prosecution applies now for the extension of the lapsed Disclosure Deadline for the disclosure and addition of material related to witnesses P-1073 and P-1074 to the List

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<sup>7</sup> First Regulation 35 Application, para. 14 (fn. omitted).

<sup>8</sup> The Prosecution interviewed P-1073 from 25 to 28 March 2022 and P-1074 from 30 March 2022 to 1 April 2022.

<sup>9</sup> First Regulation 35 Application, paras. 32, 34-35, 39.

<sup>10</sup> Decision on the Prosecution's request for an extension of time limit to disclose and add items to its list of evidence and list of witnesses" ("Regulation 35 Decision"), 24 December 2021, ICC-02/05-01/20-545-Conf, para. 8.

<sup>11</sup> Regulation 35 Decision, para. 8.

of Evidence. The Prosecution also requests that P-1073 and P-1074 be added to its List of Witnesses, which is justifiable on the same basis.

13. The Prosecution has made every effort to mitigate the effects of both the ongoing pandemic and the regime change in Sudan. However, these circumstances as set out above, were beyond the Prosecution's control and limited the Prosecution's investigative activities and presence in Sudan as well as its ability to contact actual and potential witnesses. In the Prosecution's submissions, these circumstances constitute good cause and "objectively provide justification for the inability of [the Prosecution] to comply with [its disclosure] obligations".<sup>12</sup> As a result, the requested extension of the lapsed Disclosure Deadline and Lists of Witnesses and Evidence Deadline are reasonable under these circumstances.

### **The witnesses provide critical evidence that is required to determine the truth**

14. It is in the interests of justice and consistent with the Chamber's functions under articles 64(2) and 69(3) of the Statute to grant the Prosecution's request for an extension of the Disclosure Deadline and Lists of Witnesses and Evidence Deadline. Witnesses P-1073 and P-1074 will provide the Chamber with critical evidence regarding [REDACTED] in Bindisi and surrounding areas on or about 15 and 16 August 2003 and the individual criminal responsibility of the Accused. [REDACTED].

#### Overview of witnesses

- **P-1073**

15. P-1073, a crime-based witness from Bindisi, [REDACTED]. She describes that, on 15 August 2003,<sup>13</sup> while she was hiding [REDACTED], Bindisi, they saw an open-back land cruiser with seven men on board.<sup>14</sup> P-1073's mother told her that the person

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<sup>12</sup> *Katanga* Reasons for the "Decision on the 'Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation'", 27 June 2008, [ICC-01/04-01/07-653](#), para. 5.

<sup>13</sup> P-1073, DAR-OTP-0222-5026 at 5130, para. 21.

<sup>14</sup> P-1073, DAR-OTP-0222-5026 at 5131, para. 24.

standing in the back and facing the front of the vehicle was Ali KUSHAYB.<sup>15</sup> P-1073 states that the land cruiser vehicle was followed by many Militia/*Janjaweed* who were pillaging livestock and goods and burning houses.<sup>16</sup> P-1073 further gives evidence that [REDACTED].<sup>17</sup> [REDACTED].<sup>18</sup> [REDACTED].<sup>19</sup> [REDACTED].<sup>20</sup> [REDACTED].<sup>21</sup>

16. P-1073's statement includes the following two annexes: (i) Annex A, a witness colour chart referred to by the witness during the interview,<sup>22</sup> and (ii) Annex B, a headdress board, referred to by the witness during the interview ("associated material").<sup>23</sup> P-1073's statement and associated material were disclosed together with the Arabic translation of the statement on 5 April 2022,<sup>24</sup> shortly after the conclusion of the witness interview.

- **P-1074**

17. P-1074 is a crime-based witness from Bindisi and will provide evidence on the attack on Bindisi and surrounding areas corroborating the accounts of other crime-base witnesses.<sup>25</sup> More importantly, she will describe how, [REDACTED].<sup>26</sup> [REDACTED].<sup>27</sup>

18. P-1074's statement includes the following three annexes: (i) Annex A, a witness colour chart referred to by the witness during the interview,<sup>28</sup> (ii) Annex B, a headdress board referred to by the witness during the interview,<sup>29</sup> and (iii) [REDACTED]<sup>30</sup>

<sup>15</sup> P-1073, DAR-OTP-0222-5026 at 5131, para. 24.

<sup>16</sup> P-1073, DAR-OTP-0222-5026 at 5131, para. 26.

<sup>17</sup> P-1073, DAR-OTP-0222-5026 at 5131, para. 27.

<sup>18</sup> P-1073, DAR-OTP-0222-5026 at 5131, para. 28.

<sup>19</sup> P-1073, DAR-OTP-0222-5026 at 5131-5132, para. 29.

<sup>20</sup> P-1073, DAR-OTP-0222-5026 at 5132, para. 30.

<sup>21</sup> P-1073, DAR-OTP-0222-5026 at 5132, para. 31.

<sup>22</sup> DAR-OTP-0222-5037.

<sup>23</sup> DAR-OTP-0222-5038.

<sup>24</sup> P-1073, DAR-OTP-0220-3512.

<sup>25</sup> P-1074, DAR-OTP-0224-0441 at 0446-0447, paras. 23-29.

<sup>26</sup> P-1074, DAR-OTP-0224-0441 at 0447-0448, paras. 34-36.

<sup>27</sup> P-1074, DAR-OTP-0224-0441 at 0448, para. 36.

<sup>28</sup> DAR-OTP-0224-0457 at 0457.

<sup>29</sup> DAR-OTP-0224-0458 at 0458.

<sup>30</sup> DAR-OTP-0224-0461; DAR-OTP-0224-0462; DAR-OTP-0224-0463.

("associated material"). P-1074's statement and associated material will be disclosed on 8 April 2022.<sup>31</sup>

*The requested extension is not prejudicial to the Accused's right to a fair trial*

19. P-1073's and P-1074's accounts are relevant and will assist the Chamber in determining the truth in this case. Their evidence is critical [REDACTED]. They should therefore be afforded an opportunity to be heard in court. The Prosecution is prepared to call these witnesses later in trial, so as to mitigate any potential prejudice to the Defence.

20. The later appearance of these witnesses will mitigate any potential prejudice to the Accused and ensure consistency with the Prosecution's duty to establish the truth under article 54, the rights of the victims under article 68, and the Chamber's duty to conduct a fair and expeditious trial, with full respect for the rights of the accused and due regard for the protection of victims and witnesses, under article 64(2) of the Statute.

#### IV. CONCLUSION

21. For the reasons outlined above, the Prosecution respectfully requests that the Chamber extend the lapsed Disclosure Deadline for material relating to P-1073 and P-1074, as set out above. The Prosecution also requests the Chamber's authorisation to add these two witnesses to its List of Witnesses and add their statements and associated material to its List of Evidence.



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**Karim A. Khan QC**  
**Prosecutor**

Dated this 13<sup>th</sup> day of April 2022

At The Hague, The Netherlands

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<sup>31</sup> The Arabic translation of the statement will be disclosed as soon as practicable and no later than 14 April 2022.