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

Date: **18 July 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-1034”, 12 July 2022, ICC-02/05-01/20-713-Conf

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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”)¹ 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”).²

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 22 July 2022³ of the lapsed Disclosure Deadline for P-1034’s newly obtained material; (ii) the addition of P-1034’s newly obtained material to the Prosecution’s list of evidence (“List of Evidence”) and (iii) the addition of P-1034 to the Prosecution’s List of Witnesses.

3. Together, this material relates to core issues in the case, primarily the identity of Mr Abd-Al-Rahman and his leadership role in the course of the attack on Bindisi and surrounding areas on or about 15 and 16 August 2003, 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), especially as P-1034’s newly obtained material relates not only to the Prosecution’s case but also to discrete aspects of the Defence’s case.⁴

¹ 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.

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

³ Witness statement and annexes disclosed on 7 July 2022. English translations of annexes 6 and 7 (DAR-OTP-0224-0868 and DAR-OTP-0224-0870) have been requested and will be disclosed no later than 15 July 2022. The Arabic translation of the statement will be disclosed as soon as practicable, with an expected disclosure date of 22 July 2022.

⁴ P-1034, DAR-OTP-0224-0832 at 0836-0837, paras. 23-30 and at 0858, para. 160.

II. CLASSIFICATION

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

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-1034

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.”⁵

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,

⁵ *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.

where to do so would nonetheless be in the interests of justice and the determination of the truth”.⁶

8. As noted in the First Regulation 35 Application,⁷ 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 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.”⁸

9. The Prosecution obtained the contact details of P-1034 in the course of the interview of another prosecution witness⁹ – which took place from [REDACTED] 2021. The Prosecution subsequently screened P-1034 on [REDACTED] 2021,¹⁰ [REDACTED] before the *coup d’état* with the aim of obtaining a witness statement from him shortly thereafter. During November 2021,¹¹ in the aftermath of the *coup d’état*, the Prosecution was not able to reach P-1034, despite a number of efforts. At this stage, this lead was therefore de-prioritised, given the finite number of interview opportunities the Prosecution was able to pursue during this period, due to the reasons set out in paragraph 8 above.

⁶ *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.

⁷ [First Regulation 35 Application](#), paras. 13-16.

⁸ [First Regulation 35 Application](#), para. 14 (fn. omitted).

⁹ [REDACTED].

¹⁰ DAR-OTP-0221-0989.

¹¹ Investigators made attempts in November 2021 to reach P-1034 via telephone without success.

10. [REDACTED] placed renewed focus on P-1034, including in particular the evidence given during cross-examination [REDACTED].¹² Following the testimony of P-0922 the Prosecution resumed its activities to contact P-1034. [REDACTED].

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.¹³ 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”).¹⁴

12. Following the same reasoning provided by the Chamber in its Decision,¹⁵ the Prosecution applies now for the extension of the lapsed Disclosure Deadline for the disclosure and addition of P-1034’s newly obtained material to the List of Evidence. The Prosecution also requests that P-1034 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 these circumstances, the Prosecution took the decision to deprioritise its efforts to interview P-1034. However, as set out above, [REDACTED] and

¹² See e.g., P-0922, who testified on 10 May 2022 ([ICC-02/05-01/20-T-039-CONF-ENG ET 10-05-2022 1-77 NB T](#), page 46, l. 4-20). See also P-0922, DAR-OTP-0222-0312 at 0319, para. 27 and at 0321, para. 39 and at 0323-0324, paras. 43, 48.

¹³ [First Regulation 35 Application](#), paras. 32, 34-35, 39.

¹⁴ 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.

¹⁵ [Regulation 35 Decision](#), para. 8.

the renewed focus this placed on the significance of P-1034, the Prosecution resumed its efforts to interview this witness.

14. 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"¹⁶ 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

15. 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. P-1034 will provide the Chamber with critical evidence regarding the crimes committed in Bindisi and surrounding areas on or about 15 and 16 August 2003 and the individual criminal responsibility of the Accused regarding the same. Furthermore, P-1034 also provides evidence relevant to the Defence's case, such as the origin of the alias Kushayb and the issue of the presence of rebels in Bindisi prior to the charged attack.¹⁷

Overview of witness

16. P-1034, a crime-base witness from Bindisi, [REDACTED].¹⁸ P-1034, also [REDACTED].¹⁹ P-1034 provides evidence in relation to the forced recruitment of certain community members by rebel movements in Kodoom and Bindisi²⁰ and the attack on the Bindisi police station prior to the charged attack.²¹ P-1034 describes the

¹⁶ *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.

¹⁷ P-1034, DAR-OTP-0224-0832 at 0836-0837, paras. 23-30 and at 0858, para. 160.

¹⁸ P-1034, DAR-OTP-0224-0832 at 0835-0836, paras. 15-19.

¹⁹ P-1034, DAR-OTP-0224-0832 at 0836-0837, paras. 21-22, 27.

²⁰ P-1034, DAR-OTP-0224-0832 at 0836-0838, paras. 23-31.

²¹ P-1034, DAR-OTP-0224-0832 at 0840-0841, paras. 47, 53.

arrival of police and Central Reserve Forces officers, including P-0921, into Bindisi around noon on or about 15 August 2003, and explains [REDACTED].²² He saw smoke rising from the nearby villages of Merly, Seder and Drangal approximately two hours later²³ and describes attackers setting houses on fire, looting and shooting in Bindisi town on or about 15 and 16 August 2003.²⁴

17. P-1034 also provides an account of Ali Kushayb's leadership role during the attack²⁵ and states that [REDACTED].²⁶ Having known Ali Kushayb [REDACTED], P-1034 provides detailed information in relation to the identification of the Accused – including the origin of Mr Abd-Al-Rahman's alias, Kushayb²⁷ – and the pharmacy he owned in Garsila.²⁸

18. P-1034's statement includes the following seven annexes: (i) Annex 1, an annotated satellite image labelled "North Bindisi, West Darfur, Sudan";²⁹ (ii) Annex 2, an annotated satellite image labelled "North Bindisi, Sudan";³⁰ (iii) Annex 3, an annotated satellite image labelled "South Bindisi, West Darfur, Sudan";³¹ (iv) Annex 4, a witness colour chart;³² (v) Annex 5, an annotated satellite image labelled "Garsila, West Darfur, Sudan";³³ (vi) Annex 6, a copy of a Zalingei police report [REDACTED];³⁴ and (vii) [REDACTED], referred to by the witness during the interview ("associated material").³⁵

²² P-1034, DAR-OTP-0224-0832 at 0842-0843, paras. 60-66.

²³ P-1034, DAR-OTP-0224-0832 at 0843-0844, para. 68.

²⁴ P-1034, DAR-OTP-0224-0832 at 0847-0848, paras. 87-89, 92, 94-95.

²⁵ P-1034, DAR-OTP-0224-0832 at 0844-0845, paras. 69, 72-74.

²⁶ P-1034, DAR-OTP-0224-0832 at 0845, para. 74.

²⁷ P-1034, DAR-OTP-0224-0832 at 0858, para. 160.

²⁸ P-1034, DAR-OTP-0224-0832 at 0857-0858, paras. 155-167.

²⁹ DAR-OTP-0224-0863.

³⁰ DAR-OTP-0224-0864.

³¹ DAR-OTP-0224-0865.

³² DAR-OTP-0224-0866.

³³ DAR-OTP-0224-0867.

³⁴ DAR-OTP-0224-0868.

³⁵ DAR-OTP-0224-0870.

19. P-1034's statement and associated material were disclosed to the Defence on 7 July 2022.³⁶ The Arabic translation of the statement will be disclosed as soon as practicable, with an expected disclosure date of 22 July 2022.

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

20. P-1034's account is highly relevant and will assist the Chamber in determining the truth in this case. P-1034's evidence is critical as he provides direct evidence of Mr Abd-Al-Rahman's identity – including the origin of his alias – and leadership over the Militia/*Janjaweed* and Government of Sudan ("GoS") Forces during the attack on Bindisi and surrounding areas on or about 15 and 16 August 2003. In addition, P-1034 provides a detailed account of rebel operations in Bindisi prior to the charged attack. Given the importance of this evidence, the Chamber should hear the account of this witness and the Defence should have an opportunity to cross-examine him.

21. Finally, P-1034 is mentioned by several Prosecution witnesses³⁷ [REDACTED],³⁸ who also provides core evidence on the criminal responsibility of the Accused during the attack on Kodoom, Bindisi and surrounding areas on or about 15 and 16 August 2003.

22. To mitigate any prejudice to the Defence, the Prosecution would call this witness to testify at a later date in the trial. The later appearance of the witness will mitigate any potential prejudice to the Accused³⁹ and ensure consistency with the Prosecution's duty to establish the truth under article 54, the rights of the victims under

³⁶ English translations of annexes 6 and 7 (DAR-OTP-0224-0868 and DAR-OTP-0224-0870) have been requested and will be disclosed no later than 15 July 2022. The content of such documents, in any event, is described in the witness' statement.

³⁷ See e.g., P-0922, who testified on 10 May 2022 ([ICC-02/05-01/20-T-039-CONF-ENG ET 10-05-2022 1-77 NB T](#), page 46, l. 4-20) and also at DAR-OTP-0222-0312 at 0319, para. 27 and at 0321, para. 39 and at 0323-0324, paras. 43, 48; P-0012, DAR-OTP-0119-0503 at 0523, para. 87; P-0589, DAR-OTP-0223-0005 at 0018, paras. 73-74; P-0986, DAR-OTP-0222-0437 at 0456-0457, para. 92. P-1034 may also be the individual referred to by P-0011, DAR-OTP-0088-0219 at 0235-0236, paras. 97-98 and by P-0015, DAR-OTP-0088-0187 at 0198, para. 54.

³⁸ P-0878, DAR-OTP-0215-9919 at 9956-9957, DAR-OTP-0219-3062 at 3069, para. 32, DAR-OTP-0224-0071 at 0075, para. 17.

³⁹ See Decision on the Prosecution's fifth application seeking the authorisation to add two witnesses pursuant to Regulation 35, 2 May 2022, [ICC-02/05-1/20-681-Red](#), para. 16.

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

23. For the reasons outlined above, the Prosecution respectfully requests that the Chamber extend the lapsed Disclosure Deadline for the newly obtained material relating to P-1034, as set out above. The Prosecution also requests the Chamber's authorisation to add the same witness to its List of Witnesses and his statement and associated material to its List of Evidence.



Karim A. A. Khan QC

Prosecutor

Dated this 18th day of July 2022

At The Hague, The Netherlands