Cour
Pénale
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International
Criminal
Court

Original: **French**

No.: **ICC-02/05-01/20**
Date: **2 November 2021**

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. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN
("ALI KUSHAYB")

PUBLIC DOCUMENT

Motion under Rule 64(1) of the Rules of Procedure and Evidence

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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INTRODUCTION

1. The present motion ("Motion") is submitted in line with what the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman ("Mr Abd-Al-Rahman") set out in its observations on the first status conference[1] and at that hearing.[2]

2. This motion builds on the arguments which the Defence raised at the pre-trial phase in its 1st motion to exclude evidence ("1st Motion").[3] The arguments concern the inadmissibility of items of evidence – *viz.* witness statements from the Office of the Prosecutor ("OTP") – that do not comply with the Court's rules on the protection of confidential information, specifically the obligation, laid down by section 7 of the administrative instruction instituting the "ICC Information Protection Policy" ("Policy")[4] of 19 June 2007,[5] to ensure that confidential information is marked as such. Although the Honourable Pre-Trial Chamber II noted, with regret, that this violation had occurred,[6] it rejected the 1st Motion on the ground that that the risk it posed was speculative at the confirmation of charges phase, which is based largely on written statements that are not exposed to interference on account of their lack of markings.[7] Since that rejection was confined to the particular circumstances of the pre-trial phase, the Defence is bringing the same motion, on a different basis, before the Honourable Trial Chamber I, as an unresolved matter requiring the Chamber's consideration before the trial commences.

3. Given the page limit for the filing of this motion, the Defence incorporates and refers to the fuller version of its arguments set out in its 1st Motion.[8] The Defence remains at the disposal of the Honourable Trial Chamber I to expand on the arguments advanced here, at the next status conference.

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[1] ICC-02/05-01/20-461-Corr, para. 41, point (v).
[2] ICC-02/05-01/20-T-013-Red-FRA, p. 11, line 22 to p. 12, line 23.
[3] ICC-02/05-01/20-322.
[4] Administrative Instruction ICC/AI/2007/001, 19 June 2007.
[5] The Defence's submissions apply in every respect to witness statements taken before 19 June 2007: although the marking obligation did not exist when they were taken, the statements should have been brought into line with the Policy and marked when it entered into force.
[6] ICC-02/05-01/20-402, para. 42.
[7] ICC-02/05-01/20-402, para. 43.
[8] ICC-02/05-01/20-322.

TIMING OF THE SUBMISSION OF THE MOTION

4. Rule 64(1) of the Rules of Procedure and Evidence ("RPE") provides: "An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber." It is the Defence's understanding, to be confirmed by the Honourable Trial Chamber I, that rule 64(1) of the RPE specifies the latest time when a challenge to the admissibility of evidence may be made. However, as the Defence construes it, rule 64(1) of the RPE does not prohibit challenging the admissibility of evidence earlier if the challenging party already has the relevant information on which the challenge is based. The Court has held that the time specified by rule 64(1) for challenging the admissibility of evidence is merely the "last moment" to do so,[9] and the parties are encouraged to raise such challenges earlier.[10]

APPLICABLE LAW

5. The Defence adverts to its survey of the relevant applicable law at paragraphs 4 to 21 of its 1st Motion.[11] Crucially, for the purposes of the present motion, article 64(6)(c) of the Statute lists "the protection of confidential information" as one of the functions of the Honourable Trial Chamber I.

SUBMISSIONS

6. All of the witness statements received from the OTP are classified as confidential pursuant to regulation 14(b) of the Regulations of the Registry ("RoR"), which corresponds to section 5.10 of the Policy. The metadata used in Ringtail confirm that they are so classified. The Defence has, at all times, been careful to regard and treat them as such. Yet none of the witness statements received is marked "confidential" or "[ICC] confidential" as required by section 7.2 of the Policy.

7. The overwhelming majority[12] of the statements bear the English marking "RESTRICTED [OTP]", which corresponds to [the French] "*restreint [BdP]*", a marking

[9] *Lubanga*, 20 March 2008, ICC-01/04-01/06-1235, para. 36; *Lubanga*, 13 June 2008, ICC-01/04-01/06-1399, para. 18; *Katanga and another*, 13 March 2009, ICC-01/04-01/07-956, paras. 36-37.
[10] *Mbarushimana*, 27 July 2011, ICC-01/04-01/10-318, p. 4; *Mbarushimana*, 16 August 2011, ICC-01/04-01/10-378, para. 19.
[11] ICC-02/05-01/20-322, paras. 4-21.
[12] The Defence has identified at least three exceptions: documents DAR-OTP-0219-0152, DAR-OTP-0219-0241-R01 and DAR-OTP-0215-5129-R01 are marked "Confidential". These exceptions confirm that the OTP is aware of, and capable of discharging, its marking obligation.

governed by section 5.7 of the Policy. Others are unmarked. The "*restreint [BdP]*" marking does not comply with the marking obligation under section 7.2 of the Policy: it corresponds to a lower – and hence less protected – level of classification of Court documents and information, a level with no counterpart in the classification of judicial documents under regulation 14 of the RoR and whose use in respect of judicial documents and records of the Court is expressly ruled out by section 5.7 of the Policy. Whether the OTP's witness statements are marked "RESTRICTED [OTP]" or are not marked at all, the rules on the protection, and specifically the marking, of classified Court information have therefore not been observed.

8. The Defence respectfully submits that, in both cases, the marking of these confidential witness statements as "RESTRICTED [OTP]", or the failure to mark them, as the case may be, does not comply with the requirements of section 7.2 of the Policy. The Ringtail metadata cannot compensate for or remedy the improper marking of witness statements: section 7.2 of the Policy refers to "all copies" of documents, not just those available in a particular software application. Furthermore, access to documents through Ringtail is strictly for internal use by the Court, the parties and the participants, all of whom have a duty of confidentiality. The extra layer of protection of confidentiality afforded by the Ringtail metadata therefore operates at a stage where confidentiality is least at risk, and does nothing to change the risk of dissemination posed to documents when they are not accessed through Ringtail, for example by simple unauthorized acquisition of the electronic and/or hard copies of those documents outside Ringtail, before or after they are entered into Ringtail.

9. The violation of section 7.2 of the Policy is longstanding. It is also no secret, having been the subject of intense discussion, in public, both within the Court[13] and beyond.[14] Despite its serious consequences – for the protection of the integrity of the

[13] *Gbagbo and Blé Goudé*: ICC-02/11-01/15-810-Red, paras. 18-19; ICC-02/11-01/15-815, paras. 7-14; ICC-02/11-01/15-T-122-FRA, p. 3, line 8 to p. 10, line 17; ICC-02/11-01/15-T-128-FRA, p. 52, lines 21 to 27; *Abd-Al-Rahman*: ICC-02/05-01/20-322; ICC-02/05-01/20-371-Red OA7, paras. 22-25; ICC-02/05-01/20 415 OA7, paras. 68-69.

[14] ICCBA, "Legal Analysis: ICC Information Protection Policy Framework", February 2018; CILRAP, "The Wider Policy Framework of Ethical Behaviour", 2 December 2018, at 12.36-14.38; C. Laucci, "The Wider Policy Framework of Ethical Behaviour: Outspoken Observations from a True Friend of the International Criminal Court" in M. Bergsmo and V. E. Dittrich (eds.), *Integrity in International Justice*,

statements, for the protection of the witnesses, victims and other persons at risk on account of the Court's activities and for the fairness of the proceedings against Mr Abd-Al-Rahman – that violation has never been resolved. The Defence further refers to its submissions regarding the fact that the Policy has been obsolete since at least 14 December 2013, when the amendment to regulation 14 of the RoR entered into force.[15]

10. The OTP's failure to apply the Policy to its witnesses' confidential statements is extremely serious and jeopardizes the very integrity of the proceedings as an ingredient of their "fairness" under article 69(4) of the Statute. The proper marking of classified documents constitutes a crucial first line of defence of the confidential information they contain. Without it, all safeguards of the confidentiality of evidence are reduced to naught and serve no further purpose, having been deprived of that on which they essentially rely: information clearly identified as confidential. To proclaim that a document is confidential is pointless if the document is not designated as such by proper markings on all copies of it. In the absence of markings, ill-intentioned recipients may claim ignorance of the document's confidential character and disseminate it on the basis that the compromising of confidentiality is not of their doing but primarily lies in the lack of markings, for which section 8.3(a) of the Policy places sole responsibility on the originator of the unmarked information, *viz.* the OTP. In the absence of markings, unauthorized recipients of the document will also be genuinely unaware that the information is classified and will treat it as public. These unmarked documents have been at risk since their creation, and remain so to this day, of being accidentally or maliciously acquired and/or disseminated to unauthorized recipients who would thereby be apprised of the witnesses' identities and the content of their statements and would be in a position to subject them to all of the interference,

TOAEP, 2020, pp. 870-873; Assembly of States Parties, Doc. ICC-ASP/19/16, Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report, 30 September 2020, p. 18, Recommendation R12 (the recommended review of the Court's internal legal framework entails a review of the Policy).

[15] ICC-02/05-01/20-322, paras. 27-37.

pressure, corrupt influence and retaliation which are offences under article 70(1)(c) of the Statute.

11. That this breach of the OTP's confidentiality obligations arises in none other than a Sudanese case is a major aggravating factor insofar as cooperation with the Court constituted, at least until July 2020[16] – and in the Defence's view[17] still constitutes – a criminal offence under Sudanese national law for which the persons who gave the statements may face capital punishment. It is common knowledge that individuals accused by the Sudanese authorities of cooperating with the Court have been arbitrarily detained, tortured and executed.[18] This is the risk to which the OTP has exposed its witnesses by not appropriately marking their statements.

12. The preservation of the confidentiality of evidence is an essential consideration in the assessment of its admissibility. The Honourable Judges' extensive experience of their national systems will undoubtedly have assured them of this. For instance, article 11 of the French Code of Criminal Procedure provides:

> [TRANSLATION] Except where otherwise provided by law, and without prejudice to the rights of the defence, proceedings during the police investigation and the judicial investigation shall be secret. All persons contributing to such proceedings shall have a duty of professional secrecy under the terms of articles 226(13) and 226(14) of the Criminal Code and may be subject to the penalties set forth therein.

The same rule exists in most national systems, regardless of legal tradition, be it Italy (article 329(1) of the Italian Code of Criminal Procedure), or England and Wales.[19] It is the Defence's submission that no national judge, let alone one qualified for appointment to the highest judicial offices in his or her country, could tolerate such laxity in the protection of confidential information, which is what witness statements are.

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[16] ICC-02/05-01/20-397-Conf-Exp-AnxI-tENG; ICC-02/05-01/20-496, para. 23; ICC-02/05-01/20-496-Conf-AnxII, paras. 4-9.

[17] ICC-02/05-01/20-438-Red, para. 5; ICC-02/05-01/20-485-Conf (public redacted version ICC-02/05-01/20-485-Red), paras. 4(i)-(ii), 6, 8, 10, 17; ICC-02/05-01/20-501-Red, paras. 14-16.

[18] African Commission on Human and Peoples' Rights, Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, 14 March 2014; United Nations, Security Council, doc. S/2009/211, "Report of the Secretary-General on the Sudan", 17 April 2009, para. 58.

[19] In the common law tradition: Contempt of Court Act 1981, Criminal Procedure (Attendance of Witnesses) Act 1965, Criminal Procedure and Investigations Act 1996, Legal Services Act 2007.

13. The rule is no different before the Court, but its importance is even greater, since the Court has no police force at its disposal and depends on the cooperation of national authorities to protect witnesses, victims and other persons at risk on account of its activities, and to preserve evidence in situation countries. Evidence that is not properly protected against the risk of malicious dissemination is exposed to every risk of interference, threats and corruption. The strict rules regarding witness protection and non-disclosure to the Defence – rules which the Defence itself has to a great extent underscored and supported throughout the proceedings[20] – seek precisely to prevent such risk, notwithstanding that the Defence is bound by strict confidentiality obligations under article 8 of the Code of Professional Conduct for counsel and is no doubt one of the safest recipients to which sensitive information could conceivably be disclosed.

14. Precisely with regard to witness statements, the Court has, from day one, consistently held that the need to protect witnesses is an essential criterion in the assessment of the admissibility of evidence under article 69(4) of the Statute.[21] In addition to forming part of a major responsibility shared by all organs of the Court and the Defence to protect witnesses, victims and other persons at risk on account of the Court's activities,[22] the need to protect the confidentiality of witness statements is a fundamental prerequisite to their admissibility under article 69(4) of the Statute. To base a prosecution on OTP witness statements that have not been properly protected in accordance with the Court's applicable instruments, first and foremost its Policy, would directly undermine the fairness of the trial, which would be based on evidence exposed to every possible and conceivable form of tampering.

15. It need not be proved that such tampering has occurred. The Defence's submissions are directed not so much at the existence of a risk that the confidential information contained in the witness statements will be compromised – which, in any

[20] By way of example: ICC-02/05-01/20-100, para. 11; ICC-02/05-01/20-106-Red, para. 23; ICC-02/05-01/20-152, para. 13; ICC-02/05-01/20-182-Red, paras. 3-4; ICC-02/05-01/20-213-Red, paras. 18-37; ICC-02/05-01/20-231-Red, paras. 7, 24-31, 33; ICC-02/05-01/20-245, para. 28; ICC-02/05-01/20-246-Conf; ICC-02/05-01/20-272-Red.

[21] *Lubanga*, 15 September 2006, ICC-01/04/01/06-437, p. 8: "adequate protection of the witnesses on whom the parties intend to rely at the confirmation hearing is one of those additional factors".

[22] *Lubanga*, 29 January 2008, ICC-01/04-01/06-1140, para. 36; *Katanga and another*, 25 April 2008, ICC-01/04-01/07-428-Corr, para. 27.

event, is real – as at the objective, recorded and acknowledged fact that that information has been compromised, which constitutes a violation of the confidentiality of the witness statements. The existence of the compromise suffices to render the evidence whose confidentiality has been compromised inadmissible, irrespective of whether the evidence has been interfered with. The burden of proof, in a challenge to the admissibility of evidence, rests with the challenging party, but it is sufficiently met and discharged by a showing that the witness statements were not appropriately marked in accordance with section 7.2 of the Policy. Failure to abide by section 7.2 of the Policy constitutes by itself, under sections 1.7 and 40.3 of the Policy, a compromise of classified information and disciplinary misconduct. The mere fact that the witness statements were exposed to possible interference by a violation of the Policy, a fact proved by the lack of markings, suffices to discharge the burden of proving that they are inadmissible under article 69(4) of the Statute; it is not necessary to show that the risk has materialized in the form of concrete instances of threats, pressure or corrupt influencing of witnesses.

16. To rule otherwise and require proof, not only of the failure to mark in violation of section 7.2 of the Policy, but also of concrete instances of witness interference, would be to render the rules in force at the Court for the protection of classified information nugatory. Those strict rules, violation of could result in disciplinary measures, would be relegated to the ranks of non-binding good practice which the OTP would be free to ignore, as it casually admitted doing in 2017 before the Honourable Trial Chamber I: "While the documents are not marked, we never marked the documents on the paper".[23]

17. If the obligation to mark were merely a non-binding good practice, its violation would not constitute a compromise constituting disciplinary misconduct under sections 1.7 and 40.3 of the Policy and sections 35(a) and 74 of the OTP Code of Conduct.[24] Nor would it constitute a violation of the solemn undertaking given by the

[23] *Gbagbo and Blé Goudé*: ICC-02/11-01/15-T-122-ENG, p. 10, lines 11 to 14.

[24] Reference to the various applicable disciplinary regimes is made solely to underscore the peremptory character of the obligation to mark. The Defence has no intention of seeking disciplinary action, which, in any event, would not fall within the jurisdiction of the Honourable Trial Chamber I.

Honourable Judges, Prosecutor, Deputy Prosecutors, Registrar, Deputy Registrar and Court staff to respect the "confidentiality of investigations and prosecutions".[25] The view that marking is merely a non-binding good practice must therefore be discarded and the obligation to mark reaffirmed.

18. The OTP's violation – a violation that is systemic, structural, institutionalized, openly acknowledged[26] and on record[27] – of its obligations regarding the marking of witness statements represents a major threat to the security of its witnesses. It puts all the Prosecutor's witnesses at constant risk of being identified and exposed to pressure, threats and attempts to corruptly influence them. The fact of being exposed to such risk, irrespective of whether the risk materializes, renders the documents in question inadmissible for their incompatibility with the integrity and fairness of the proceedings, prescribed by article 67(1) of the Statute. It would be unfair for evidence to be given at trial by witnesses who for years have been exposed to risks of interference simply because the OTP refuses to comply with the Court's straightforward rules for protecting the confidentiality of their written statements. All of these unmarked witness statements are compromised by their lack of proper markings. Having been compromised, they are inadmissible. They must, therefore, be rejected, as must any appearance in court by the witnesses who gave them.

[25] Rules of Procedure and Evidence ("RPE"), rules 5(1)(a), 5(1)(b), 6(1).
[26] *Gbagbo and Blé Goudé*: ICC-02/11-01/15-T-122-ENG, p. 10, lines 11 to 14.
[27] *Gbagbo and Blé Goudé*: ICC-02/11-01/15-T-128-FRA, p. 52, lines 21 to 27; ICC-02/05-01/20-402, para. 42.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE TRIAL CHAMBER I TO FIND that all of the OTP's witness statements not marked "confidential" are **INADMISSIBLE** under article 69(4) of the Statute because their confidentiality has been compromised by non-compliance with the rules governing the protection of confidential information and documents of the Court, and by their lack of proper markings; **TO EXCLUDE THEM** from the record of the case; **AND TO REFUSE** the appearance, at trial, of the witnesses who gave those statements.

[signed]

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

Dated this 2 November 2021,

At The Hague, Netherlands