

Original: **English**No.: **ICC-02/05-01/20**Date: **25 May 2023****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 response to 'Requête en vertu de la Norme 23bis-3 du Règlement de la Cour'", 22 May 2023, ICC-02/05-01/20-958-Conf

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

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I. INTRODUCTION

1. The Prosecution partially opposes the Defence's "Requête en vertu de la Norme 23 bis-3 du Règlement de la Cour" ("Request"),¹ as some of the information the Defence requests to be disclosed to the public either jeopardises witnesses' safety and future investigative activities in Sudan or cannot be disclosed without the prior approval of the relevant authorities.

II. CLASSIFICATION

2. This filing and its annexes are classified as confidential in accordance with regulation 23bis(2) of the Regulations of the Court since they respond to a request of the same classification.

III. FACTUAL BACKGROUND

3. The Defence requests the reclassification or the issuance of public redacted versions of 10 decisions issued by the Chamber.² The Defence argues, in sum, that the reclassification is necessary to (i) bring to the public's knowledge the information on which the Defence relies to request the postponement of its case in order to make their motives and submissions comprehensible;³ (ii) make it possible for the Defence to refer to these decisions in future submissions without the need to file redacted versions;⁴ and (iii) inform the Sudanese population and the victims of [REDACTED] which has posed difficulties to the conduct of proceedings.⁵

4. Upon receipt of this request, the Chamber instructed the Parties, the Common Legal Representative of the Victims ("CLRv") and the Registry to confer and submit to the Chamber, to the extent possible, a joint proposal of public redacted versions of all the Chamber's 13 decisions still currently classified as confidential.⁶

¹ [ICC-02/05-01/20-932-Conf](#) ("Request").

² [Request](#), para. 5.

³ [Request](#), para. 14.

⁴ [Request](#), para. 15.

⁵ [Request](#), para. 16.

⁶ See e-mail entitled "Filing 932 - Public redacted versions of decisions", 9 May 2023, 14:08h.

5. Following consultations, consensus was reached in relation to the reclassification of one decision to public⁷ and the issuance of public redacted versions of six other decisions.⁸ However, the Parties and Participants were unable to reach a common position in relation to the remaining six decisions.

IV. SUBMISSIONS

A. Decision 770: [REDACTED]

6. Pursuant to articles 64(2), 64(6)(c) and (e), and 68(1) and (2) of the Rome Statute, the Prosecution opposes the reclassification to public of the “Decision on the Defence’s request for leave to appeal the oral ruling authorising [REDACTED]” (“[REDACTED] Decision”).⁹ Instead, the Prosecution proposes a public redacted version of the [REDACTED] Decision (see Annex 1), so as to preserve witnesses’ security and possible future cooperation opportunities with the Government of Sudan (“GoS”). This proposal was supported by both the CLRV and the Registry during *inter partes* consultations.

7. The [REDACTED] Decision should not be made entirely public as witnesses [REDACTED], could be put at undue risk of harm if details regarding their identities are revealed. This risk to personal safety persists regardless of whether their witness codes remain redacted, [REDACTED]. The Prosecution further recalls that the entire testimony of both witnesses [REDACTED].¹⁰

8. Furthermore, there remains the real possibility that [REDACTED], be it in this trial or in other cases in the Darfur situation. Therefore, redaction of this information is necessary both to preserve this possibility and safeguard potential future operations of the Court in Sudan.

⁷ [ICC-02/05-01/20-710-Conf.](#)

⁸ [ICC-02/05-01/20-683-Conf-Red](#), [ICC-02/05-01/20-695-Conf-Red](#), [ICC-02/05-01/20-767](#), [ICC-02/05-01/20-806-Conf](#), [ICC-02/05-01/20-809-Conf](#), [ICC-02/05-01/20-820-Conf](#). See e-mail from the Prosecution entitled :” RE: Filing 932 - Public redacted versions of decisions”, 22/05/2023 10:16h.

⁹ [ICC-02/05-01/20-770-Conf](#) (“[REDACTED] Decision”).

¹⁰ See [ICC-02/05-01/20-T-082-CONF-ENG CT](#), [ICC-02/05-01/20-T-083-CONF-ENG CT](#), [ICC-02/05-01/20-T-084-CONF-ENG CT](#), [ICC-02/05-01/20-T-110-CONF-ENG CT](#) and [ICC-02/05-01/20-T-111-CONF-ENG CT](#).

9. In addition, and contrary to the Defence's submissions,¹¹ this issue is unrelated to the litigation brought by the Defence on the issue of the [REDACTED]. The public interest in knowing this information is also low and does not outweigh the risks entailed by its public release.

B. Decisions 853, 857, 864, 875 and 913: Communication received from the GoS

10. The Prosecution also opposes the reclassification of the "Decision on the Defence's requests for [REDACTED]",¹² and submits that the redactions proposed by the Defence to the other four decisions are insufficient.¹³ The Prosecution proposes additional redactions be applied to these decisions in order to allow for their public disclosure (see Annexes 2-6). This proposal was supported by both the CLRV and the Registry during *inter partes* consultations.

11. The redactions sought by the Prosecution aim to avoid publicly disclosing [REDACTED], as this information stems from confidential communications between the Court and the GoS. The obligation to keep such confidentiality applies to both the GoS and the Court pursuant to article 87(3) of the Rome Statute. Public disclosure would require the GoS's prior consent or an order from the Trial Chamber, which the Prosecution submits is not warranted in this case. [REDACTED].

12. Contrary to the Defence's assertions,¹⁴ disclosure of such information would in no way progress the Defence's requests for assistance nor foster future cooperation considering the "[REDACTED]".¹⁵ To the contrary, if anything, such disclosure could further delay the preparation of the Defence's case.

¹¹ [Request](#), para. 11.

¹² [ICC-02/05-01/20-913-Conf](#).

¹³ Decision in relation to [REDACTED] on 11 February 2022, 20 January 2023, [ICC-02/05-01/20-853-Conf](#); Decision relating to the [REDACTED] on 8 November 2022, 27 January 2023, [ICC-02/05-01/20-857-Conf](#); Decision on the Defence's modified request for [REDACTED] dated 30 January 2023, 06 February 2023, [ICC-02/05-01/20-864-Conf](#); Decision on the Defence's request for leave to appeal two decisions requesting [REDACTED], 16 February 2023, [ICC-02/05-01/20-875-Conf](#).

¹⁴ [Request](#), para. 17.

¹⁵ [REDACTED].

13. As such, disclosure of such information, much like [REDACTED], is not “[REDACTED]”¹⁶ nor does it benefit either the advancement of proceedings or the public.

C. The Prosecution has not conceded that difficulties related [REDACTED] could lead to a stay of proceedings

14. In the Request, the Defence incorrectly claims that the Prosecution, at paragraphs 27 to 32 of its response to the Defence’s request for a postponement of the presentation of its case,¹⁷ considered that the difficulties posed by [REDACTED], if not resolved, “*puissent conduire à un arrêt temporaire ou définitif des poursuites.*”¹⁸

15. This misstates the Prosecution’s submission. The Prosecution submitted that the Defence’s request, in asking the Chamber to postpone the relevant deadlines indefinitely, was equivalent to a request for an open-ended stay of proceedings.¹⁹ The Prosecution did not state that the difficulties posed by the [REDACTED] could lead to a temporary or permanent stay of the proceedings. To the contrary, the Prosecution stated that the [REDACTED] is not a pre-requisite for an effective investigation, that the Defence has not established how [REDACTED] is essential to its case, and that the Defence has not made reasonable efforts to otherwise progress its own investigation.²⁰ As held by the Chamber, “continuation of trial proceedings at this Court cannot be contingent upon a State’s cooperation being forthcoming.”²¹

V. CONCLUSION

16. For the foregoing reasons, the Prosecution requests the Chamber to partially reject the Request in relation to the reclassification of two decisions and the redactions

¹⁶ [REDACTED].

¹⁷ Prosecution’s response to “Requête aux fins de report de la phase de présentation de la Défense”, [ICC-02/05-01/20-906-Red](#), paras. 27-32.

¹⁸ [Request](#), para. 16.

¹⁹ [Response](#), para. 27.

²⁰ [Response](#), paras. 2, 11, 15-21, 32.

²¹ Decision on the Defence’s Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Red](#), para. 32.

to be applied to four other decisions, and authorise, instead, the redactions proposed by the Prosecution in Annexes 1-6.



Karim A. A. Khan KC
Prosecutor

Dated this 25th day of May 2023

At The Hague, The Netherlands