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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 'Version Confidentielle Expurgée de la Requête en vertu des Article 43-6, 64-2 et 67-1 du Statut de la Cour (Protection des témoins de la Défense)'" , 19 May 2023, ICC-02/05-01/20-944-Conf**

**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. The Prosecution respectfully requests that the Chamber reject the Defence's "Requête en vertu des Article 43-6, 64-2 et 67-1 du Statut de la Cour (Protection des témoins de la Défense)" ("Request").<sup>1</sup> There is no inequality of arms in this case. The Defence has not demonstrated that the Chamber's intervention is necessary at this stage, and there is no imbalance between the Parties that obliges the Defence to put its potential witnesses at risk or affects Mr Abd-Al-Rahman's fair trial rights.

## II. CLASSIFICATION

2. Pursuant to regulation 23bis(2) of the Regulations of the Court, this filing is classified as confidential as it responds to a filing with the same classification.

## III. SUBMISSIONS

3. The Defence requests the Chamber's urgent intervention to "re-establish the equality of arms" in the current proceedings by means of ordering the Victims and Witnesses Unit ("VWU") to adapt its procedures to the "complexity of the situation in Sudan and the particular situation of the Defence's witnesses".<sup>2</sup>

*A. The Defence has not demonstrated that the Chamber's intervention is necessary*

*VWU are acting in accordance with their established procedure*

4. In accordance with VWU's established procedure, which applied to the Prosecution and the Common Legal Representative of the Victims ("CLR"),<sup>3</sup> VWU meets with and assesses witnesses after the calling party (whether the Prosecution, Defence or CLR) has met and interviewed the witness, and if appropriate, referred them to VWU. As such, it is typically not necessary for every witnesses to be subject to an independent VWU assessment.

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<sup>1</sup> [ICC-02/05-01/20-942-Red](#) ("Request").

<sup>2</sup> [Request](#), para. 21.

<sup>3</sup> [Request](#), para. 10.

5. As previously stated,<sup>4</sup> [REDACTED] Prosecution witnesses who testified in court [REDACTED]. [REDACTED]. Moreover, VWU did not provide any assistance to witnesses travelling to meet Prosecution investigators. Rather, all travel and security planning was organised by the Prosecution itself without any “logistical support” from the Court.<sup>5</sup>

6. At this stage, based on the information available to the Prosecution, the Defence’s request for VWU to meet potential witnesses at the same time as the Defence, before the Defence has determined whether they will even be called as actual witnesses in its case and if so, whether the services of VWU may be required, is not justified.

7. Alternative options should be explored. For example, if necessary, the Defence may be able to request VWU, [REDACTED],<sup>6</sup> to put in place emergency or interim protective measures for witnesses while they wait to be assessed by VWU [REDACTED]. Other options may include [REDACTED].

*The Defence has not demonstrated good cause to depart from the standard procedure*

8. The simple fact that it is inconvenient or difficult for Defence witnesses to [REDACTED] to meet with VWU following their interviews is not a reason to authorise the Defence’s departure from the standard procedure set by VWU. The Defence has not demonstrated – in the documents currently available to the Prosecution – why it alleges that [REDACTED].<sup>7</sup> Nor does the Defence explain why its witnesses would be unavailable to make the journey again later to meet with VWU.<sup>8</sup>

9. The Defence does not identify any objectively justifiable risk that its potential witnesses would face as a consequence of their interaction with the Court in order to justify VWU’s immediate intervention in this instance. As established in article 43(6) of the Rome Statute and [REDACTED], only individuals who are at risk on account of

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<sup>4</sup> [ICC-02/05-01/20-T-115-CONF-ENG ET 04-04-2023 1-39 T](#), 34:8-11. [REDACTED].

<sup>5</sup> [Request](#), para. 7.

<sup>6</sup> Annex 66 to the Transmission de documents en vue de la Conférence de mise en état du 23 mai 2023, 16 May 2023, [ICC-02/05-01/20-941-Conf-Anx66](#).

<sup>7</sup> [Request](#), para. 7.

<sup>8</sup> [Request](#), para. 10.

their interaction with the Court are entitled to protection. The generic allegation [REDACTED] does not meet this threshold.

10. The Prosecution also notes that due to the ongoing armed conflict in Sudan ([REDACTED]),<sup>9</sup> [REDACTED].<sup>10</sup> [REDACTED].

11. The Defence also does not demonstrate how following VWU's established practice would impact its ability to meet and interview witnesses. First, the Defence seems to conflate two unrelated issues: its ability to interview witnesses and these witnesses potentially being granted protective measures. As mentioned above, assessments are only conducted once VWU is satisfied that certain criteria are met, they are not undertaken for every witness and are not a prerequisite for a witness' interview. The Defence cannot expect that assessments will be conducted for all of its potential witnesses, nor can it make its investigative efforts dependent on such an assessment. More generally, the Defence cannot excuse itself from its duty and responsibility to investigate by simply transferring to VWU all operational responsibility for the security of its potential witnesses.

12. Furthermore, contrary to the Defence's assertion,<sup>11</sup> it was not "impossible" for its witnesses [REDACTED] to access the services of VWU. Correspondence between the Defence and VWU demonstrates that (i) [REDACTED];<sup>12</sup> (ii) [REDACTED];<sup>13</sup> and (ii) [REDACTED].<sup>14</sup>

13. There is, therefore, no prejudice to the Defence or to the equality of arms that needs to be remedied by the Chamber at this stage.

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<sup>9</sup> In fact, public data shows that [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> [Request](#), para. 12.

<sup>12</sup> Annex 52 to the Transmission de documents en vue de la Conférence de mise en état du 23 mai 2023, 16 May 2023, [ICC-02/05-01/20-941-Conf-Anx52](#). [REDACTED].

<sup>13</sup> [Request](#), para. 11.

<sup>14</sup> Annex 66 to the Transmission de documents en vue de la Conférence de mise en état du 23 mai 2023, 16 May 2023, [ICC-02/05-01/20-941-Conf-Anx66](#).

*B. The Prosecution does not enjoy an advantage over the Defence in relation to witnesses' protection*

14. It is important to properly define the Prosecution's abilities pursuant to the Protocol. Contrary to the Defence's assertions,<sup>15</sup> the Prosecution is not able to [REDACTED]. This is the same procedure that VWU is now asking Defence to follow.

15. The allocation of responsibility for protection tools between the Prosecution and VWU is further governed by [REDACTED]. It is, therefore, only exceptionally and on a temporary basis that [REDACTED]. Even in the exceptional cases [REDACTED], it will only do so following consultation with VWU.

16. Consequently, most of the security measures listed by the Defence in its Request<sup>16</sup> cannot be implemented by the Prosecution unilaterally and, in any event, are not options exclusively available to the Prosecution. As set out in the Protocol<sup>17</sup> and in the Request,<sup>18</sup> the Protocol is also applicable *mutatis mutandi* to the Defence, who are equally [REDACTED],<sup>19</sup> [REDACTED],<sup>20</sup> [REDACTED]<sup>21</sup>, [REDACTED]<sup>22</sup> and [REDACTED].<sup>23</sup>

17. The Protocol thus only confers the Prosecution very limited capability [REDACTED],<sup>24</sup> [REDACTED].

18. Most importantly, the Prosecution does not possess its own "protection system"<sup>25</sup> nor does the Protocol excuse the Prosecution from following the procedure set by VWU, whereby witnesses first should be met by representatives of the calling party and then be referred to VWU, if necessary. Thus, the Prosecution does not enjoy

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<sup>15</sup> [Request](#), para. 14.

<sup>16</sup> [Request](#), para. 15.

<sup>17</sup> [REDACTED].

<sup>18</sup> [Request](#), para. 17.

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [Request](#), para. 16.

any advantage over the Defence in its handling of witness, as purported by the Defence.

*C. The request inaccurately characterises the reasons for the Defence's lack of progress in its investigations*

19. The Request again seeks to portray a delay in preparations occasioned by the Defence as an obstacle attributable to external actors. The Chamber has already determined that “many of the delays in the preparation of, and investigations relating to, the Defence’s case are attributable to the Defence”,<sup>26</sup> and the Request is another such example. The Prosecution therefore will address some of the factual mischaracterisations presented in the Request in relation to the lack of progress in the Defence’s investigations.

20. The Defence’s [REDACTED] to Sudan since Mr Abd-Al-Rahman’s surrender is not solely attributable to co-operation issues or fighting in Sudan.<sup>27</sup> For example, the Chamber previously found the Defence, “without proper justification, postponed missions to Sudan on the basis of non-transmission of security-related documents by the Registry”.<sup>28</sup>

21. In relation to the Defence’s submission that it has not been able to meet and interview witnesses in person,<sup>29</sup> the Prosecution notes that the Chamber has found the Defence “requested assistance for missions to third countries only in 2023” and “has provided no information in respect of its exploration of other avenues to obtain evidence”.<sup>30</sup>

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<sup>26</sup> Decision on the Defence’s Request for postponement of the presentation of its case (“Decision on postponement request”), [ICC-02/05-01/20-916-Conf](#), para. 40.

<sup>27</sup> [Request](#), para. 4.

<sup>28</sup> [Decision on postponement request](#), para. 41.

<sup>29</sup> [Request](#), para. 6.

<sup>30</sup> [Decision on postponement request](#), para. 41.

22. Furthermore, while the Defence submits that it had to delay [REDACTED],<sup>31</sup> [REDACTED].<sup>32</sup> In addition, the Defence fails to identify any alternative solutions it considered, such as [REDACTED].

23. Similarly, the Defence does not indicate whether it considered any solutions to [REDACTED].<sup>33</sup>

24. The Prosecution acknowledges, as the Presiding Judge has previously recognised, that investigations of this nature entail certain risks to all sides<sup>34</sup> and these challenges have been further exacerbated by the conflict in Sudan.<sup>35</sup> Nevertheless, the Prosecution continues its investigative work regarding the overall situation in Darfur. [REDACTED]. The Prosecution is willing to assist the Defence however possible in doing the same.

### III. CONCLUSION

25. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Request.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 25<sup>th</sup> day of May 2023

At The Hague, The Netherlands

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<sup>31</sup> [Request](#), para. 8.

<sup>32</sup> Annex 52 to the Transmission de documents en vue de la Conférence de mise en état du 23 mai 2023, 16 May 2023, [ICC-02/05-01/20-941-Conf-Anx52](#). [REDACTED].

<sup>33</sup> [Request](#), para. 11.

<sup>34</sup> [ICC-02/05-01/20-T-115-CONF-ENG ET 04-04-2023 1-39 T](#), 25:22-26:2.

<sup>35</sup> [ICC-02/05-01/20-T-116-CONF-ENG ET 19-04-2023 1-26 T](#), 13:6-8, 14:1-3.