



**Original: English**

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

**Date: 11 September 2023**

**Date of original: 8 September 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 redacted version of**

**Decision on the Defence's Request for an order prohibiting disclosure of some  
Defence witnesses' identities [REDACTED]**

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

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**REGISTRY**

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**Victims Participation and Reparations  
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**Other**

## I. Procedural background

1. On 18 May 2022, Trial Chamber I (the ‘Chamber’) adopted<sup>1</sup> an updated Protocol on the handling of confidential information and contact with witnesses (the ‘Protocol’).
2. On 28 August 2023, the Defence filed a request seeking that the Chamber issue an order prohibiting disclosure of 17 Defence witnesses’ (the ‘Defence witnesses’) identities to [REDACTED] (the ‘Request’).<sup>2</sup>
3. On 4 September 2023, the Prosecution filed its response, partially opposing the Request (the ‘Response’).<sup>3</sup>
4. On 5 September 2023, the Chamber held a status conference where it heard, *inter alia*, oral submissions by the parties on the Request.<sup>4</sup>

## II. Submissions

5. The Defence submits that the requested measures are necessary, appropriate and proportionate to avoid putting Defence witnesses at risk pending the final resolution by the Appeals Chamber of the Defence’s submissions on cooperation with the Court,<sup>5</sup> and the worsening security situation of witnesses [REDACTED].<sup>6</sup>
6. The Defence further avers that its Request does not prejudice the non-calling party given that the Prosecution accepts the requested measures.<sup>7</sup>
7. In its Response, the Prosecution agrees to the non-disclosure of the identities of the Defence witnesses to [REDACTED], as this has been the practice in this trial as regards Prosecution witnesses. However, the Prosecution opposes the issuance of an order that would prohibit disclosure to [REDACTED].<sup>8</sup> The Prosecution contends that such an order could potentially prejudice its investigative duties under Article 54(1) of the Rome Statute, which

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<sup>1</sup> Decision adopting an updated protocol on the handling of confidential information and contact with witnesses, ICC-02/05-01/20-691 (with public annex, ICC-02/05-01/20-691-Anx).

<sup>2</sup> Defence Request for an Order Prohibiting Disclosure of some Defence Witnesses’ Identities to the Sudanese authorities, ICC-02/05-01/20-1007-Conf.

<sup>3</sup> Prosecution’s response to “Defence Request for an Order Prohibiting Disclosure of some Defence Witnesses’ Identities to the Sudanese authorities”, ICC-02/05-01/20-1009-Conf.

<sup>4</sup> Transcript of hearing, ICC-02/05-01/20-T-125-ENG.

<sup>5</sup> Request, ICC-02/05-01/20-1007-Conf, paras 9-13; Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.19, lines 1-8.

<sup>6</sup> Request, ICC-02/05-01/20-1007-Conf, paras 14-15; Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.17, line 4 to p. 18, line 24.

<sup>7</sup> Request, ICC-02/05-01/20-1007-Conf, paras 16-17.

<sup>8</sup> Response, ICC-02/05-01/20-1009-Conf, paras 1-2; Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.15, lines 8-22.

may require to communicate the identities of Defence witnesses (but not their witness status) to third parties such as [REDACTED].<sup>9</sup> The Prosecution pledges to take measures to ensure that these communications do not endanger any witness.<sup>10</sup>

8. The Prosecution further submits that there is no reason to issue an order that could unnecessarily restrict the Prosecution's investigative activities given the effectiveness of the measures of the Protocol in place.<sup>11</sup>

### III. Analysis

9. At the outset, the Chamber notes that part of the Defence's submissions,<sup>12</sup> relate to cooperation issues ruled upon in previous decisions.<sup>13</sup> Accordingly, the Chamber will disregard these arguments.

10. The Chamber notes that in accordance with Article 68(1) of the Rome Statute (the 'Statute') it shall take appropriate measures to protect the safety and wellbeing of witnesses, whilst preserving the rights of the accused and a fair and impartial trial.

11. The Chamber recalls that one of the protective measures envisaged by Rule 87(3)(b) of the Rules of Procedure and Evidence (the 'Rules') is the issuance of an order to the Prosecutor, the defence or any other participant in the proceedings prohibiting disclosure of the identity or the location of a witness to a third party. The Chamber further observes that pursuant to paragraph 11 of the Protocol a party or participant may disclose the identity of a witness to a third party if 'such disclosure is directly and specifically necessary for the preparation or presentation of its case.' In its Request, the Defence seeks an order from the Chamber prohibiting the disclosure envisaged by this provision.

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<sup>9</sup> Response, ICC-02/05-01/20-1009-Conf, para. 5; Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.15, lines 23-25 to p. 16, lines 22-23.

<sup>10</sup> Response, ICC-02/05-01/20-1009-Conf, para. 6.

<sup>11</sup> Response, ICC-02/05-01/20-1009-Conf, para. 7; Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 23, lines 7-11.

<sup>12</sup> Request, ICC-02/05-01/20-1007-Conf, paras 9-12.

<sup>13</sup> See Decision on the Defence's Motion pursuant to Article 67(1)(e) of the Rome Statute, 18 July 2023, ICC-02/05-01/20-995-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-995-Red); Decision on the Defence's Request for postponement of the presentation of its case, 17 April 2023, ICC-02/05-01/20-916-Conf-Exp (confidential redacted and public redacted versions were notified on the same date, ICC-02/05-01/20-916-Conf, and ICC-02/05-01/20-916-Red, respectively); Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-561-Red).

12. As observed by the Prosecution,<sup>14</sup> the requested measures, if granted, would amount to a blanket prohibition for the Prosecution to conduct any investigation on Defence witnesses. The Prosecution would be unable to test the Defence's evidence during cross-examination and meet its obligation under Article 54(1)(a) of the Statute to arrive at the truth.<sup>15</sup> Potential inquiries into the Defence's witnesses would occasionally require, as observed by the Prosecution,<sup>16</sup> the revealing of their identity (but not of their status) to [REDACTED]. Not allowing the Prosecution to do so in all instances would unduly restrict its investigative activities,<sup>17</sup> particularly considering that the Defence Request, if granted, would result in at least 17 out of the 21 witnesses in the Defence's provisional list benefiting from the non-disclosure order.<sup>18</sup>

13. The Chamber further notes the Defence's contention that any investigative activity by the Prosecution in which a witness's identity is disclosed to [REDACTED] could reveal the witness's relationship to the Court.<sup>19</sup> Parties and participants in this case are duty-bound to consult with the Victims and Witnesses Unit (the 'VWU') prior to disclosure to a third party of a witness's identity,<sup>20</sup> and to seek the VWU's advice in case of doubt as to whether a proposed investigative activity may lead to the disclosure of a witness's identity.<sup>21</sup> Parties and participants are therefore obliged to exercise particular caution with regard to investigative activities involving witnesses falling under the scope of the Protocol, which provides for sufficient guarantees thereon. As conceded by the Defence,<sup>22</sup> some of its prospective witnesses are [REDACTED]. Given the scope of application of the Protocol to witnesses [REDACTED]<sup>23</sup> many of the Defence's prospective witnesses identified in the Request may benefit already from the safeguards therein.

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<sup>14</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.16, line 22 to p. 17, line 1; p.21, lines 10-13; p. 22, lines 9-11.

<sup>15</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.21, lines 10-13.

<sup>16</sup> Response, ICC-02/05-01/20-1009-Conf, para. 5; Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.15, lines 23-25 to p. 16, line 23.

<sup>17</sup> Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Arido Defence Request for Protective Measures for D24-1, 17 March 2016, ICC-01/05-01/13-1725-Red (a public redacted version was notified on 6 January 2017), paras 5-6.

<sup>18</sup> Request, ICC-02/05-01/20-1007-Conf, paras 1, 18. Regarding the Defence's provisional list of witnesses, *see* Submission of Provisional List of Witnesses, 28 August 2023, ICC-02/05-01/20-1006-Conf (with one confidential annex).

<sup>19</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.18, lines 3-24.

<sup>20</sup> Protocol, para. 11.

<sup>21</sup> Protocol, para. 14.

<sup>22</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 24, lines 1-4.

<sup>23</sup> Protocol, para. 11.

14. Moreover, as noted by the Presiding Judge during the status conference,<sup>24</sup> no such order was issued in respect of the Prosecution's witnesses. The fact that the Prosecution would have to carry out its investigations on the opposing party's witnesses with such a blanket prohibition, while the Defence had no such restriction, unduly impinges on the fairness of the proceedings. The Defence's submission that its situation *vis-à-vis* the Prosecution is different given [REDACTED],<sup>25</sup> the outbreak of the conflict of 15 April,<sup>26</sup> and the depiction of the Defence's investigations [REDACTED],<sup>27</sup> is not one which the Chamber finds persuasive. The Chamber has already rejected, as noted above,<sup>28</sup> several motions of the Defence in this regard. Furthermore, as noted by the Prosecution,<sup>29</sup> there is no evidence, indicating that all Defence witnesses are at a greater risk than those of the Prosecution. Several Prosecution witnesses expressed concerns for their safety should their testimony become known to the Sudanese authorities. The Chamber granted in-court protective measures to such Prosecution witnesses to mitigate these risks.<sup>30</sup> The Defence may already make requests for in-court protective measures in advance of these witnesses' testimonies.

15. The Chamber further observes that the Defence has failed to articulate why alternative protective measures — less restrictive to the Prosecution's investigative activities — would not be feasible, particularly those already foreseen in the Protocol adopted by this Chamber and implemented throughout the trial. While the Defence contends that the intended protective measures would be justified given the worsening security situation of witnesses [REDACTED],<sup>31</sup> no information suggests, as noted by the Prosecution,<sup>32</sup> that the Protocol and foreseeable in-court protective measures have been ineffective or would be ineffective for Defence witnesses.

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<sup>24</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 19 line 16 to p. 20, line 8.

<sup>25</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 19, line 20 to p. 20, line 1.

<sup>26</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 20, lines 9-21.

<sup>27</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p.17, line 8 to p. 18, line 24.

<sup>28</sup> See Decision on the Defence's Request for postponement of the presentation of its case, 17 April 2023, ICC-02/05-01/20-916-Conf-Exp (confidential redacted and public redacted versions were notified on the same date, ICC-02/05-01/20-916-Conf, and ICC-02/05-01/20-916-Red, respectively). See also paragraph 9 above.

<sup>29</sup> Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 21, lines 14-15.

<sup>30</sup> Transcript of hearing, 26 September 2022, ICC-02/05-01/20-T-080-CONF-ENG, p. 11; Second Decision on in-court protective measures, 16 June 2022, ICC-02/05-01/20-705-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-705-Red); Confidential redacted version of the Decision on in-court protective measures, 25 March 2022, ICC-02/05-01/20-645-Conf-Red.

<sup>31</sup> Request, ICC-02/05-01/20-1007-Conf, paras 13, 15.

<sup>32</sup> Response, ICC-02/05-01/20-1009-Conf, para. 7; Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 23, lines 7-11.

16. Accordingly, the Chamber is not satisfied that the requested measures are either necessary or appropriate. Whilst the Presiding Judge raised the possibility of an *ex parte* application by the Prosecution to the Chamber to make disclosure, the Chamber is satisfied that the onus should lie with the Defence to demonstrate reasons why the protocol should not be applied. Therefore, the Defence may request the Chamber for such measures, for individual witnesses, on a case-by-case basis and after consultation with the VWU. Specifically, the Defence must provide good reasons for deviation from the Protocol, particularly why the guarantees provided by paragraphs 11 and 14 of the Protocol are insufficient to protect a witness's safety and which would justify a deviation from the procedure therein. Bearing in mind the extensive practice informing the Protocol, any such deviation will be exceptional and will be granted only if strictly justified upon carefully considering the VWU's assessment of individual witnesses.

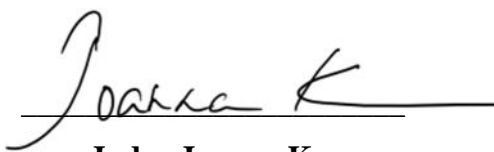
17. The Chamber further observes that the Request and the Response were filed confidentially. In accordance with the principle of publicity of the proceedings,<sup>33</sup> the Chamber directs the parties to file public redacted versions of their filings.

#### **IV. Conclusion**

18. For the above reasons the Chamber:

**REJECTS** the Defence's Request as indicated in paragraph 16 above; and

**DIRECTS** the parties to file public redacted versions of their filings.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 8 September 2023

At The Hague, The Netherlands

<sup>33</sup> Appeals Chamber, *The Prosecutor v Mathieu Ngudjolo Chui*, Order on the filing of public redacted versions of submissions by the parties and participants, 4 October 2013, ICC-01/04-02/12-143, para.8.