

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19 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 “Observations on behalf of Victims on the
‘Prosecution’s application under regulation 35 to extend the disclosure and
associated deadlines concerning newly obtained material of P-1034’”, 18 July 2022**

Source: The Common Legal Representative of Victims

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Mr James Stewart
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representative of the Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. Introduction

1. The Common Legal Representative of Victims (“CLRV”) files these observations on the “Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1034”.¹
2. The CLRV agrees with the Prosecution, for the reasons set out in the Application, that good cause exists to authorise the requested extension of disclosure deadlines in respect of material obtained from P-1034, the addition of this newly obtained material to the Prosecution’s list of evidence, and the inclusion of P-1034 in the Prosecution’s list of witnesses.²
3. The expected evidence of P-1034 concerns core matters in this case, including the identity and background of the accused and his direct involvement and role in the attack on Bindisi and surrounding areas on or around 15 and 16 August 2003. The CLRV respectfully submits that the Chamber hearing and considering the evidence of this witness will measurably assist its determination of the truth,³ is in the interests of justice, and commensurate with the rights and interests of the participating victims in this case. Grant of the Application will not be prejudicial to the Accused’s fair trial rights under Article 67(1) of the Statute, nor impact the expeditiousness of the proceedings, which is of significant importance to the participating victims.
4. This filing is classified as confidential pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), as it responds to a filing with this classification. The CLRV will submit a public redacted version of these observations.

¹ 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 (“Application”).

² *Id.*, para. 2.

³ Rome Statute, Article 69(3).

II. Submissions

a. The Prosecution has demonstrated good cause for extension of time limits

5. The Prosecution submits, in line with its first application under Regulation 35 of the Regulations,⁴ that its capacity to identify or conclude interviews of witnesses in Sudan was significantly impacted by events arising from the 25 October 2021 *coup d'état* in Sudan, the continuing political and security instability in the country, and COVID-19 travel-related restrictions.⁵
6. The Prosecution acted expeditiously in conducting a screening interview of P-1034 on [REDACTED], just a few days after obtaining the individual's contact details during the interview of another witness.⁶ The Prosecution explains that [REDACTED] later the *coup d'état* occurred, and it was thereafter unable to reach P-1034 "despite a number of efforts".⁷ In these circumstances the Prosecution decided to "de-prioritise[]" this investigative lead "given the finite number of interview opportunities the Prosecution was able to pursue during this period, due to the" factors noted in paragraph 5 above.⁸
7. The Prosecution further advises that the [REDACTED] testimony of [REDACTED] "placed renewed focus on P-1034, including in particular the evidence given during cross-examination [REDACTED]."⁹ The Prosecution then renewed its efforts to contact P-1034 [REDACTED].¹⁰
8. The Trial Chamber has previously determined that difficulties arising from the *coup d'état*, the continuing political and security instability in Sudan, and the travel-related impact of COVID-19, in principle, constitute good cause under Regulation 35(2) of the Regulations to vary the applicable disclosure deadlines

⁴ Application, fn. 7, citing Corrected version of "Prosecution's request for an extension of time to disclose materials of seven witnesses and a report pursuant to regulation 35 of the Regulations of the Court", 16 December 2021, ICC-02/05-01/20-541-Conf-Exp, paras 13-16.

⁵ Application, para. 8.

⁶ *Id.*, para. 9.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Id.*, para. 10.

¹⁰ *Ibid.*

and permit the addition of evidence and witnesses to the Prosecution's respective lists.¹¹ The Chamber has emphasised "that these factors could not have been foreseen when the [disclosure and witness list] deadline was set".¹²

9. The CLRV submits that the Trial Chamber's sound logic, and previous findings, equally apply to the situation of P-1034, and that the Prosecution has accordingly demonstrated good cause in respect of the relief requested in the Application. The Prosecution's inability to contact and arrange an interview with the individual in the days following P-1034's screening arose directly from the aftermath of the 25 October 2021 *coup d'état*. While the Prosecution thereafter took the decision to deprioritise pursuing an interview with P-1034, this determination was likewise driven by the unforeseen factors of the continuing political and security instability in Sudan and travel-related impact of COVID-19; it was a reasonable, pragmatic, and understandable course of action in these unique circumstances.¹³ When the Prosecution renewed its efforts to contact and interview P-1034, [REDACTED], it did so in a diligent fashion, and within the context of the continuing above-noted factors.

b. It is in the interests of justice to grant the Application

10. As noted in the Application, P-1034's statement and associated materials "relate[] 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".¹⁴ As examined below, the expected evidence of P-1034 is important, relevant, and will undoubtedly assist the Chamber in its search for the truth in these proceedings.
11. The identity of Mr Abd-Al-Rahman, and whether or not the accused is one and the same as the individual known as "Ali Kushayb" during the period relevant to

¹¹ See, e.g., Decision on the Prosecution's applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, 11 April 2022, ICC-02/05-01/20-668-Conf, para. 26 (public redacted version issued on 5 May 2022, [ICC-02/05-01/20-668-Red](#)).

¹² Decision on the Prosecution's fifth application seeking the authorisation to add two witnesses pursuant to Regulation 35, 2 May 2022, ICC-02/05-01/20-681-Conf, para. 10 (public redacted version issued on 10 May 2022, [ICC-02/05-01/20-681-Red](#)).

¹³ Application, para. 9.

¹⁴ *Id.*, para. 3.

this case, is an issue that is strongly contested between the parties and of central importance to the Trial Chamber's search for the truth, as well as the participating victims right to the same.¹⁵ P-1034's statement indicates that he had regular and direct interactions with "Ali Kushayb" [REDACTED], and is able to speak about Kushayb's personal and professional background and attributes.¹⁶

12. Further, and of particular interest and importance to the participating victims, P-1034's expected evidence includes a direct account of Ali Kushayb's presence in Bindisi during the attack on the village, and Kushayb's command or exercise of authority over the attacking forces.¹⁷

13. Additionally, [REDACTED],¹⁸ he provides useful and relevant background information on the physical and human geography of Bindisi and its administrative structures and functioning,¹⁹ as well as on the activities of JEM and SLA/M forces and representatives in the Bindisi area during the period relevant to the case.²⁰ The CLRV submits that the scope and detail of this information will assist the Trial Chamber in better understanding the context in which the crimes alleged took place, and therefore further the Chamber's search for the truth.

c. Grant of the Application will not prejudice the Accused's fair trial rights or impact the expeditiousness of the proceedings

14. The CLRV agrees with the Prosecution that any potential prejudice to the Accused arising from grant of the Application would be mitigated by calling P-1034 at a later stage of the proceedings.²¹ P-1034's expected evidence falls squarely within the charges and facts and circumstances confirmed by the Pre-Trial Chamber. Calling the witness later in the proceedings will provide adequate time

¹⁵ See, e.g., *Prosecutor v. Katanga and Ngujolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, [ICC-01/04-01/07-474](#), para. 32 ("[T]he Single Judge underlines that the victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights.") (internal citations omitted).

¹⁶ P-1034, DAR-OTP-0224-0832 at paras 72-73, 155-165.

¹⁷ *Id.*, paras 67-75, 85.

¹⁸ *Id.*, paras 15, 16, 21.

¹⁹ *Id.*, paras 32-44, 55.

²⁰ *Id.*, paras 47-55.

²¹ Application, para. 22.

for the Defence's preparations in respect of this individual, including, if relevant, through cross-examination of other witnesses, the bulk of whom remain to be called.

15. Importantly, as with previous decisions permitting the inclusion of evidence and witnesses in the Prosecution's lists after the expiration of the relevant deadlines, the CLRV submits that should the Chamber grant the Application, it should be with the expectation that P-1034 will be called within the time that has been allocated to the Prosecution to present its case.²² The expeditiousness of the proceedings is of vital importance to all parties and participants, as well as to the judicial process itself. As the CLRV has previously advised the Trial Chamber,²³ participating victims have underlined to the CLRV the need for an efficient and expeditious judicial process in the *Abd-Al-Rahman* case. The participating victims have explained that an efficient judicial process is of importance not only for the sake of the victims themselves in view of the time that has passed since the events of 2003 and 2004, but also to demonstrate the international community's commitment to justice and accountability in a situation that has been marked by their absence, and to set an example in light of the continuing mass violence and potential atrocity crimes that continue to plague Darfur to the present day.
16. The CLRV respectfully submits that the interests of justice, including the interests of the participating victims, as addressed above, weigh in favour of granting the Application.

III. Conclusion

17. For the reasons above, the CLRV respectfully requests the Trial Chamber to grant the Prosecution's Application for extension of the relevant time limits and

²² See, e.g., Decision on the Prosecution's fifth application seeking the authorisation to add two witnesses pursuant to Regulation 35, 2 May 2022, ICC-02/05-01/20-681-Conf, para. 15 (public redacted version issued on 10 May 2022, [ICC-02/05-01/20-681-Red](#)).

²³ CLRV's email submission to the Trial Chamber of 27 June 2022 at 8:23am (concerning the Prosecution's application to introduce the written statements and associated materials of four witnesses (P-0877, P-0919, P-0984 and P-0986) pursuant to Rule 68(3) of the Rules of Procedure and Evidence).

authorise P-1034 to appear as witnesses before the Chamber.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a stylized, flowing script.

Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 19th of July 2022

At The Hague, the Netherlands