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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 aux fins de report de la phase de présentation de la Défense’, 14 March 2023, ICC-02/05-01/20-902-Conf-Red”, 20 March 2023, ICC-02/05-01/20-906-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 respectfully requests Trial Chamber I (“Chamber”) to reject the Defence’s request to indefinitely postpone the presentation of the Defence’s evidence in this case (“Request”).¹ Neither of the reasons identified by the Defence in the Request justify such a postponement.²

2. There has been no material change in the situation regarding cooperation with the Government of Sudan (“GoS”) since the relevant dates were set, and the Defence has not shown any specific and concrete negative impact on its investigations. Moreover, the Defence predicates its ability to investigate on cooperation with the GoS, and has not demonstrated that it has made reasonable efforts to otherwise progress its investigation and prepare its case.

3. Furthermore, in asking for an indefinite postponement, the Request is, in effect, an application for a temporary, but completely open-ended, stay of proceedings. Such a drastic remedy, which would only be justified where a fair trial has become impossible, is unwarranted in the circumstances of this case.

II. CLASSIFICATION

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), this filing is classified as confidential since it responds to a document filed with the same classification.

III. SUBMISSIONS

5. In the Request, the Defence asks the Chamber to postpone all of the dates set by the Chamber with respect to the presentation of the Defence’s evidence (“Deadlines”),³

¹ *Requête aux fins de report de la phase de présentation de la Défense*, [ICC-02/05-01/20-902-Red](#) (“Request”).

² This response is filed in compliance with the order of the Chamber. See Email of 14 March 2023 at 15:38.

³ Second Directions on the conduct of proceedings, [ICC-02/05-01/20-836](#), paras. 20-22 (“Second Directions”) (Notification of any defences or alibi, filing of a trial brief and disclosure of evidence to be relied upon by the Defence – 22 May 2023; Opening statements – 20-21 July 2023; Start of testimony of any defence witnesses – 28 August 2023; List of witnesses, list of evidence, and witness statements or sufficiently detailed summaries of the anticipated testimony for Defence witnesses – 23 June 2023; Applications for use of prior recorded testimony pursuant to rule 68 of the Rules of Procedure and Evidence – 14 August 2023).

pursuant to regulation 35 of the Regulations and paragraph 24 of the “Second Directions on the conduct of proceedings”.⁴

6. When setting the Deadlines on 15 December 2022, the Chamber noted its obligation to guarantee a fair and expeditious trial, and balanced multiple factors, including the Accused’s right to have adequate time and facilities for the preparation of his defence, his right to be tried without undue delay, and the interests of justice, in particular, the interests of participating victims to achieve justice.⁵ The Chamber considered that the Deadlines set provided a reasonable and proportional period of time for the preparation of the Defence’s case.⁶

7. The Chamber further noted that the Deadlines were “without prejudice to the Defence’s ability to file a justified request, on a case-by-case basis, seeking an extension of deadline and/or an adjournment to the trial hearings”,⁷ in particular, “when the Defence identifies the need to carry out further investigations and/or new information or evidence becomes available which could be of assistance to the Defence’s case.”⁸

The reasons identified by the Defence in the Request do not justify a postponement of the Deadlines

8. The Defence requests postponement of the Deadlines for two reasons:

- a. *“l’absence continue et aggravée de coopération du Soudan”* (“First Reason”);
and
- b. *“certains manquements graves et continus de la part du Bureau Immédiat du Greffier, par opposition aux autres services compétents du Greffe, à honorer les obligations du Greffier à l’égard de la Défense en vertu de la Règle 20-1-b du [Règles]”* (“Second Reason”).⁹

⁴ [Request](#), para. 1.

⁵ [Second Directions](#), para. 19.

⁶ [Second Directions](#), para. 23. The first Defence witness will only start testifying on 28 August 2023, almost seven months after the last Prosecution witness testified from 13 to 14 February 2023.

⁷ [Second Directions](#), para. 24.

⁸ [Second Directions](#), para. 24.

⁹ [Request](#), para. 5.

9. As detailed below, neither of the two reasons presented by the Defence justify a delay in the presentation of the Defence's case. In addition, they do not satisfy the potential scenarios that could justify postponement envisaged by the Chamber when setting the Deadlines.¹⁰

The difficulties with respect to cooperation with the Government of Sudan do not justify a postponement of the Deadlines

10. In relation to the First Reason, the Defence submits that the GoS's cooperation with the Court has continued or even worsened, negatively impacting its ability to conduct investigations.¹¹

11. Despite some recent developments,¹² there has been no material change regarding cooperation with the GoS since the Deadlines were set. Furthermore, the Defence has not established how the lack of co-operation specifically and concretely impacts its investigations, and has not shown that it has made reasonable and concerted efforts to pursue avenues, other than cooperation with the GoS, to investigate and prepare its case.

12. When setting the Deadlines, the Chamber recognised "the difficulties encountered by the Defence *vis-à-vis* pending cooperation requests and mission plans".¹³ The Chamber was also aware of [REDACTED].¹⁴ While acknowledging these challenges, the Chamber reiterated that "the accused is in custody and will be prejudiced if there is a significant delay in the proceedings."¹⁵

13. Nevertheless, the Defence now requests that the Deadlines be postponed *indefinitely* on the basis that it cannot predict if and when the GoS will cooperate with the Court.¹⁶ In effect, the Defence asks the Chamber for a potentially endless stay of

¹⁰ See above, para. 7. The Prosecution acknowledges that these scenarios are non-exhaustive.

¹¹ [Request](#), paras. 6-11.

¹² [REDACTED].

¹³ [Second Directions](#), para. 18.

¹⁴ [REDACTED].

¹⁵ [Second Directions](#), para. 18.

¹⁶ [Request](#), paras. 11, 20, 23-24.

the proceedings,¹⁷ and to accept that the only way that the Defence can adequately progress its investigations and prepare its case — and thus receive a fair trial — is for the GoS to cooperate with the Court.¹⁸

14. Such a finding would lay the foundation for the Defence to make an application for a termination of the proceedings should such cooperation not be forthcoming. The possibility that the GoS may not cooperate with the Court in the future is already foreseen by the Defence, even were the Chamber to make a finding of non-cooperation pursuant to article 87 of the Statute.¹⁹

15. The Prosecution notes that cooperation from the GoS is not a pre-requisite for an effective investigation. Between 2007 and 2019, the Prosecution carried out its investigation in the Darfur situation in the face of open hostility from the former GoS, which refused all forms of cooperation. The Prosecution's first investigative mission on the territory of Sudan in 14 years only took place on 24 March 2021.²⁰ Despite this total lack of cooperation, the Prosecution was able to gather sufficient evidence to obtain an additional warrant of arrest against the Accused, issued in 2017, in relation to crimes committed in Deleig and surrounding areas.²¹ This example demonstrates that an effective investigation can be carried out without access to the territory of the situation country, [REDACTED].

16. Indeed, given that the Accused was born and resided in Darfur,²² and formerly held positions in the Sudanese Armed Forces and Central Reserve Forces,²³ it is highly likely that the Defence has superior access to local networks of information in order to

¹⁷ See below, paras. 27-32.

¹⁸ See [Request](#), para. 11 (“Ne pas constater la non-coopération prolongée et chaque jour aggravée du Soudan prive la Défense de l’unique recours prévu par les textes afin de débloquent la situation et de lui permettre de mener ses enquêtes et compromet l’équité du procès. À ce stade, la Défense limite les conséquences de cette situation à la formulation de la présente Requête aux fins de report des dates”); [REDACTED].

¹⁹ [Request](#), para. 11.

²⁰ This was possible following the signing of a Memorandum of Understanding with the new GoS authorities on 14 February 2021. See Annex A to Prosecution Response to the Direction of the Single Judge in relation to Defence Request ICC-02/05-01/20-289-Conf, ICC-02/05-01/20-298-Conf-Exp-AnxA.

²¹ Prosecution's application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”) by adding new crimes, [ICC-02/05-01/20-6-Red2](#); Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), [ICC-02/05-01/20-80-Red](#).

²² See Annex A to Third Joint Prosecution and Defence Submission on Agreed facts, [ICC-02/05-01/20-504-AnxA](#), Agreed Facts 7, 15.

²³ [Annex A to Third Joint Prosecution and Defence Submission on Agreed facts](#), Agreed Facts 10, 13.

find and contact witnesses who are willing to testify and/or provide documentary evidence. [REDACTED].

17. Despite this possibility, the Defence has not demonstrated that it has made reasonable efforts to advance its investigation in lieu of cooperation from the GoS. The Defence, which anticipated in 2020 that the GoS may not cooperate with the Court,²⁴ should have planned for this contingency. [REDACTED].²⁵

18. The Defence has been on notice of the factual contours of the Prosecution's case, at the latest, since the Document Containing the Charges was filed on 29 March 2021.²⁶ Given that the identity of the Accused is the principal line of defence in this case, the Defence has had *at least* from this date and, in fact, since the initial appearance on 15 June 2020,²⁷ to conduct investigations and otherwise prepare itself.

19. To the Prosecution's knowledge, the Defence [REDACTED] ([REDACTED])²⁸ since the proceedings began almost three years ago. [REDACTED], the Prosecution and Registry have each conducted multiple missions to Sudan, including to Darfur, over the same period. A planned Defence mission to Sudan during the pre-trial phase did not occur, and the Defence itself decided not to conduct a second mission to Sudan in November 2021.²⁹ [REDACTED].³⁰ [REDACTED].³¹

20. [REDACTED].³² [REDACTED].³³ [REDACTED].³⁴ [REDACTED].³⁵

²⁴ See e.g. *Requête aux fins d'arrêt ou de suspension temporaire des procédures*, [ICC-02/05-01/20-174](#), para. 17 ("la non-coopération du Soudan est connue, ancienne, patente, totale").

²⁵ [REDACTED].

²⁶ Document Containing the Charges, [ICC-02/05-01/20-325-Anx1-Corr2-Red](#).

²⁷ T-1-CONF-ENG ET.

²⁸ [REDACTED].

²⁹ T-18-CONF CT, 25:22-26:1-22 (Mr Laucci: "the Defence, taking into account the submission on the lack of a legal basis to carry out activities in the field, estimated that the conditions had not been met to carry out field operation for investigations in Darfur").

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

21. In relation to documents, despite receiving no response to cooperation requests transmitted through the Registry to the GoS, [REDACTED]³⁶ the Defence only requested the intervention of the Chamber on 18 January 2022.³⁷

22. [REDACTED],³⁸ [REDACTED].

23. Finally, the Prosecution remains willing to assist the Defence's preparations to the extent possible, including the facilitation of missions. [REDACTED].³⁹

The purported deficiencies of the Immediate Office of the Registrar in providing assistance to the Defence do not justify a postponement of the Deadlines

24. In relation to the Second Reason, the Defence submits that there have been deficiencies in the assistance provided by the Immediate Office of the Registrar ("IoR") to the Defence, in alleged violation of rule 20(1)(b) of the Rules.⁴⁰

25. The Defence submits that: (i) [REDACTED];⁴¹ (ii) [REDACTED];⁴² (iii) the IoR did not provide the Defence with the standardised protocols and/or practices of the Registry Crisis Management Team applicable in the event of a major security incident in Sudan, which resulted in the Defence having to take additional precautions;⁴³ and (iv) [REDACTED].⁴⁴ The Defence submits that these purported deficiencies delayed and hindered the conduct of the Defence investigations and preparations.⁴⁵

26. The Defence has not shown how any of these purported deficiencies concretely impacted its investigations or the preparation of its case, or that they are of such significance that a postponement of the Deadlines is justified.

³⁶ T-18-CONF-ENG CT, 24:20-25.

³⁷ *Requête relative à la non-coopération du Soudan*, [ICC-02/05-01/20-557-Red](#).

³⁸ [Request](#), para. 10.

³⁹ [REDACTED].

⁴⁰ [Request](#), paras. 12-19.

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [Request](#), paras. 17-18.

⁴⁴ [REDACTED].

⁴⁵ [Request](#), paras. 14, 16, 18-19.

A stay of proceedings is an exceptional remedy which is not justified in this case

27. The Request, in asking the Chamber to postpone the Deadlines indefinitely, is equivalent to another request for an open-ended stay of proceedings.⁴⁶ A stay of proceedings is an exceptional remedy that is justified only when breaches of the fundamental rights of the accused are such that a fair trial is impossible in the concrete circumstances of the case.⁴⁷

28. In *Banda & Jerbo*, the defence requested a temporary stay of proceedings on the basis that “severe restrictions on investigations have made an effective defence impossible and that these restrictions by the [GoS] have been absolute.”⁴⁸ This request was made during the rule of former Sudanese President Omar al-Bashir, when cooperation was non-existent and hostility to the Court was at its height. The defence in that case claimed to have made multiple unsuccessful attempts to gain access to Sudan, and stated that “even if access to the Sudan were to be granted, witnesses’ fears of monitoring by the GoS would have adverse implications with regard to any defence investigation.”⁴⁹ The defence submitted that “the GoS has denied access to the defence – and indeed, to all ICC-related personnel – and has even criminalized cooperation with the Court.”⁵⁰

29. In rejecting the request, the Trial Chamber held that:

“[A] stay of proceedings is a drastic remedy. It brings proceedings to a halt, potentially frustrating the trial's objective of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Statute. The Appeals Chamber has set a high threshold for a Trial Chamber to

⁴⁶ The Defence has already requested a termination or temporary stay of proceedings in this case, which was rejected by Pre-Trial Chamber II. See Decision on Defence Request for a Stay of Proceedings, [ICC-02/05-01/20-186](#).

⁴⁷ *Lubanga* Jurisdiction Appeal Judgment, [ICC-01/04-01/06-772](#), paras. 30-31, 37, 39; *Lubanga* Stay of Proceedings Judgment, [ICC-01/04-01/06-2582](#), para. 60; *Lubanga* Request for Stay Decision, [ICC-01/04-01/06-844](#), para. 10; *Al Hassan* Termination of Proceedings Decision, [ICC-01/12-01/18-1009-Red](#), paras. 50-51; *Ongwen* Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 44; *Ongwen* Fair Trial Violations Decision, [ICC-02/04-01/15-1147](#), para. 14; *Banda & Jerbo* Stay of Proceedings Decision, [ICC-02/05-03/09-410](#), paras. 78-83; *Bemba* Suspension of Proceedings Decision, [ICC-01/05-01/08-530](#), paras. 15-16.

⁴⁸ [Banda & Jerbo Stay of Proceedings Decision](#), para. 3.

⁴⁹ [Banda & Jerbo Stay of Proceedings Decision](#), para. 3.

⁵⁰ [Banda & Jerbo Stay of Proceedings Decision](#), para. 3.

impose a stay of proceedings, requiring that it be impossible to piece together the constituent elements of a fair trial.”⁵¹

30. The Trial Chamber further held that:

“[A]s a general principle, the Chamber should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable. Furthermore, the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a States’ choice to cooperate or not cooperate with the Court.”⁵²

31. Moreover, the Trial Chamber held that the facts supporting a request for a stay of proceedings should be “properly substantiated”.⁵³ Where the Defence claims that it cannot secure evidence necessary for the presentation of its case, it should identify this evidence with “sufficient specificity”⁵⁴ and cannot rely on “speculative or vague claims of impeded defence investigations”.⁵⁵ The Defence must also show that the unavailable evidence possesses “an apparent exculpatory value and be of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means”.⁵⁶

32. In the present case, it cannot be concluded that [REDACTED]. Further, at least based on information available to the Prosecution in the Request, the Defence has not identified with sufficient specificity the evidence it claims it cannot obtain, nor established how this evidence is essential to its case or why it is unable to obtain similar evidence through other reasonable means. The Defence merely makes speculative and vague assertions in the abstract regarding the supposed impact on its investigations

⁵¹ [Banda & Jerbo Stay of Proceedings Decision](#), para. 80.

⁵² [Banda & Jerbo Stay of Proceedings Decision](#), para. 100. At para. 99, the Chamber further held that “Part 9 of the Statute does not include an absolute and an all-encompassing right by the prosecution and the defence to on-site investigations.”

⁵³ [Banda & Jerbo Stay of Proceedings Decision](#), para. 90.

⁵⁴ [Banda & Jerbo Stay of Proceedings Decision](#), paras. 93, 102.

⁵⁵ [Banda & Jerbo Stay of Proceedings Decision](#), para. 95.

⁵⁶ [Banda & Jerbo Stay of Proceedings Decision](#), para. 95.

and preparations. This lack of precision means that the Chamber is not in a position to take any specific measures to prevent or remedy any purported prejudice to the Defence⁵⁷ before resorting to the drastic measure of a stay of proceedings.⁵⁸

IV. RELIEF REQUESTED

33. The victims of the alleged crimes have waited almost 20 years to achieve justice, and the Request does not justify a further delay in these proceedings. Furthermore, achieving justice for the most serious crimes of international concern cannot be made contingent on the cooperation of a State.

34. The Prosecution respectfully requests the Chamber to reject the Request.



Karim A. A. Khan KC
Prosecutor

Dated this 21st day of March 2023

At The Hague, The Netherlands

⁵⁷ Pursuant to articles 64(3)(a) and (6)(f), the Chamber shall confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings and, in performing its functions during the course of a trial, the Trial Chamber may, as necessary, rule on any other relevant matter. *See e.g. Lubanga Stay of Proceedings Judgment*, para. 60; *Banda & Jerbo Stay of Proceedings Decision*, para. 79; *Al Hassan Termination of Proceedings Decision*, para. 119.

⁵⁸ *See above*, para. 27.