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**No. ICC-02/05-01/20
Date: 11 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

**Decision on the Defence's request for reconsideration or, alternatively, leave to
appeal the oral ruling maintaining the disclosure deadline and start of the
Defence case**

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

The Office of the Prosecutor

Karim A.A. Khan
Nazhat Shameem Khan
Julian Nicholls

Counsel for the Defence

Cyril Laucci
Iain Edwards

Legal Representatives of Victims

Natalie von Wistinghausen
Anand Shah

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 17 April 2023, Trial Chamber I (the ‘Chamber’) issued a decision on the Defence’s request for postponement *sine die* of the presentation of its case, in which it rejected the Defence’s postponement request but nevertheless amended the deadlines concerning the Defence’s case, including the commencement of the Defence case (the ‘First Postponement Decision’).¹
2. On 11 May 2023, the Chamber rejected the Defence’s request seeking reconsideration or, alternatively, leave to appeal the First Postponement Decision (the ‘First Reconsideration Decision’).²
3. On 7 July 2023, the Chamber rendered a decision on a second Defence’s request for postponement of the presentation of its case, postponing the deadlines in respect of the presentation of the Defence case (the ‘Second Postponement Decision’).³ The Chamber nonetheless noted that the postponement was largely the result of the Defence’s strategy during the past years, and that the accused is in custody and victims have been seeking justice for almost 20 years.⁴ The Chamber instructed the Defence to submit bi-monthly updates on the preparation of its case.⁵ In the Second Postponement Decision the Chamber set the deadline of 18 September 2023 for the filing of a trial brief and disclosure of all evidence to be relied upon by the Defence. The Chamber set the date of 16 October 2023, for the opening statements and the start of testimony of the first Defence witnesses.⁶ No leave to appeal was requested in respect of the Second Postponement Decision.
4. On 1 September 2023, in accordance with the Second Postponement Decision, the Defence filed its fourth periodic report on the preparation of its case (the ‘Fourth Report’).⁷ In the Fourth Report, the Defence stated that the deadline of 18 September 2023 appeared

¹ Decision on the Defence’s Request for postponement of the presentation of its case, ICC-02/05-01/20-916-Conf-Exp (a confidential redacted and a public redacted version were notified on the same date, ICC-02/05-01/20-916-Conf-Red, and ICC-02/05-01/20-916-Red, respectively).

² Decision on the Defence’s request for reconsideration or, alternatively, leave to appeal the Decision on the Defence’s Request for postponement of the presentation of its case, ICC-02/05-01/20-938-Conf (a public redacted version was notified on 31 May 2023, ICC-02/05-01/20-938-Red).

³ Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, ICC-02/05-01/20-990-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-990-Red).

⁴ Second Postponement Decision, ICC-02/05-01/20-990-Conf, paras 12, 14.

⁵ Second Postponement Decision, ICC-02/05-01/20-990-Conf, para. 18.

⁶ Second Postponement Decision, ICC-02/05-01/20-990-Conf, para. 15.

⁷ Quatrième Rapport Périodique en vertu du Paragraphe 18 de la Décision #990, ICC-02/05-01/20-1008-Conf-Exp (a confidential redacted version was notified on the same date, ICC-02/05-01/20-1008-Conf-Red).

impossible to achieve in relation to some of its witnesses.⁸ The Defence submitted that the Chamber was in possession of all the relevant information to evaluate whether it is appropriate to postpone the deadline of 18 September to 13 October 2023. The Defence submitted that such a delay would allow the Defence to complete its activities while at the same time preserving the evidentiary block scheduled from 13 November to 15 December 2023.⁹

5. On 5 September 2023, the Chamber scheduled a status conference (the ‘Status Conference’). During that hearing, the Defence clarified that it was seeking a postponement of the 18 September 2023 deadline (to 13 October 2023) and of the start of its case (from 16 October to 13 November 2023).¹⁰ After having heard the submissions of the parties, the Chamber authorised a one-week postponement of the disclosure deadline (from 18 September to 26 September 2023). The Chamber also allowed the Defence to exceptionally disclose evidence after that deadline, on a rolling basis (the ‘Impugned Decision’).¹¹

6. On 6 September 2023, the Defence filed a request for reconsideration or, in the alternative, leave to appeal the Impugned Decision (the ‘Request’).¹²

7. On 8 September 2023, the Prosecution¹³ and the common legal representative for victims (the ‘CLRv’)¹⁴ filed their responses (respectively, the ‘Prosecution Response’ and the ‘CLRv Response’).

II. Applicable Law

8. The Chamber incorporates by reference the general framework applicable to the reconsideration of judicial decisions.¹⁵

⁸ Fourth Report, ICC-02/05-01/20-1008-Conf-Red, para. 23.

⁹ Fourth Report, ICC-02/05-01/20-1008-Conf-Red, para. 25.

¹⁰ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 35, lines 1-5.

¹¹ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 35, lines 9-20.

¹² Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision orale relative au maintien du calendrier de l’affaire, ICC-02/05-01/20-1010-Conf (a public redacted version was notified on 7 September 2023, ICC-02/05-01/20-1010-Red).

¹³ Prosecution’s response to “Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision orale relative au maintien du calendrier de l’affaire”, ICC-02/05-01/20-1012-Conf.

¹⁴ CLRv Response to Defence “Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision orale relative au maintien du calendrier de l’affaire”, ICC-02/05-01/20-1011-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-1011-Red).

¹⁵ Decision on Defence request for reconsideration of “Decision on Defence submissions on cooperation with Sudan”, 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10 (the ‘Decision on the reconsideration request of the cooperation decision’). A public redacted version was notified on the same date, ICC-02/05-01/20-650-Red.

9. The Chamber further incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), as set out in previous decisions.¹⁶

III. Submissions and analysis

10. The Defence seeks reconsideration of the Impugned Decision. It requests that the Chamber postpone the deadline for filing its trial brief and disclosure of all evidence, and the commencement of trial to 13 October and 13 November 2023, respectively.¹⁷ Alternatively, the Defence seeks leave to appeal the Impugned Decision.¹⁸

A. Reconsideration

11. The Defence submits that the Impugned Decision contravenes the principle of procedural fairness, particularly the right to adequate time and facilities for the proper preparation of the defence, and the principle of equality of arms.¹⁹ It also argues that the Impugned Decision was based on a manifest misunderstanding and that despite the Defence Counsel’s clarifications, the Chamber’s decision had already been taken and the request was not properly considered during the hearing.²⁰ The Defence submits that there is no valid reason for the refusal of postponement and that the decision affects the accused’s right to prepare and present his evidence as he sees fit.²¹ It also states that the Chamber failed to guarantee the principle of equality of arms, particularly since a five-month postponement had been granted to the Prosecution at the pre-trial stage. The Defence avers that the disclosure of evidence on a rolling basis does not alter the prejudice caused to the accused.²² The Defence argues that the 26 September 2023 deadline will not allow the Defence to file a trial brief containing all the evidence and will therefore prevent it from convincingly articulating its case. For the same reasons, the Defence submits it will not be able to adequately prepare for the opening statements scheduled for 16 October 2023.²³

¹⁶ Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. *See also* oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

¹⁷ Request, ICC-02/05-01/20-1010-Conf, para. 17.

¹⁸ Request, ICC-02/05-01/20-1010-Conf, para. 18.

¹⁹ Request, ICC-02/05-01/20-1010-Conf, para. 9.

²⁰ Request, ICC-02/05-01/20-1010-Conf, para. 10.

²¹ Request, ICC-02/05-01/20-1010-Conf, para. 11.

²² Request, ICC-02/05-01/20-1010-Conf, paras 12-13, 16.

²³ Request, ICC-02/05-01/20-1010-Conf, paras 14-15.

12. The Prosecution notes that the Defence did not appeal or request reconsideration of the Second Postponement Decision. It further submits that the Fourth Report is not a new motion for postponement and accordingly, the Prosecution was not given a proper opportunity to respond.²⁴ The Prosecution also argues the Defence did not make a new oral motion for postponement at the Status Conference nor was the Chamber properly seized of a Defence motion.²⁵ On the merits, the Prosecution submits that there is no justification for further delay.²⁶ The Prosecution points out that the Defence is in a position to start its case even if, as the Prosecution, the Defence may not be able to call witnesses in its preferred order of appearance.²⁷ The Prosecution further states that the Chamber is aware of the need for the Defence to continue its investigations, and has therefore allowed rolling disclosure, and an extra week for filing of the trial brief, and has acknowledged that only a limited number of witnesses will be called in the first evidentiary block.²⁸

13. The CLRV does not oppose the Request as regards the reconsideration.²⁹ Although the CLRV does not agree that maintaining the deadlines or confirming the Impugned Decision amounts to or would result in a breach of the accused's fundamental rights, she submits that permitting the Defence to focus its attention and resources on the outstanding investigations for one additional month, could potentially benefit the Defence, while only losing ten hearing days during the current calendar year.³⁰ The CLRV states that her position is based on a pragmatic consideration of how best to advance these proceedings and what she considers is the Defence's 'final plea for accommodation to place the Defence house in order prior to the opening of its case'.³¹ The CLRV also clarifies that she would not accept any further delays beyond 13 November 2023.³²

14. The Chamber recalls that a request for reconsideration 'cannot be used as an attempt to re-argue points which have already been made before the Chamber'³³ or 'to correct the record or to make new submissions that could have been made when the request for postponement

²⁴ Prosecution Response, ICC-02/05-01/20-1012-Conf, paras 4-5.

²⁵ Prosecution Response, ICC-02/05-01/20-1012-Conf, paras 6-7.

²⁶ Prosecution Response, ICC-02/05-01/20-1012-Conf, para. 8.

²⁷ Prosecution Response, ICC-02/05-01/20-1012-Conf, para. 9.

²⁸ Prosecution Response, ICC-02/05-01/20-1012-Conf, para. 9.

²⁹ CLRV Response, ICC-02/05-01/20-1011-Conf, para. 2.

³⁰ CLRV Response, ICC-02/05-01/20-1011-Conf, paras 5, 10-11.

³¹ CLRV Response, ICC-02/05-01/20-1011-Conf, para. 13.

³² CLRV Response, ICC-02/05-01/20-1011-Conf, para. 14.

³³ Decision on the reconsideration request of the cooperation decision, ICC-02/05-01/20-650-Conf, para. 10.

was discussed’.³⁴ The Chamber further recalls that reconsideration is not justified, when, as proposed again by the Defence ‘it seems more “appropriate” than a leave to appeal, considering the time the Appeals Chamber would take in resolving the issues arising from the Impugned Decision’.³⁵

15. The Chamber recalls that reconsideration is an exceptional measure. As such, it is incumbent upon the Defence to demonstrate that there was either a clear error of reasoning or that it is necessary to do so to prevent an injustice.³⁶

16. As regards the first limb, the Defence has failed to demonstrate a clear error of reasoning. Although, as noted by the Prosecution,³⁷ the Defence did not file a motion clearly requesting the postponement of its case and related deadlines, the Defence made an unambiguous request which was considered by the Chamber prior to taking the Impugned Decision. Specifically, when asked in Court by the Presiding Judge, the Defence identified that it was requesting a postponement of deadlines ‘for the presentation of the entire case and provision of the Defence case’.³⁸ The Defence also specified that it would be unable to present the statements of the following witnesses by the deadline: D-1, D-2, D-3, D-4, D-5, D-7, D-13, D-16, D-24, D-26 and D-31.³⁹ Moreover, the Defence submitted that without the aforesaid witnesses, it would be ‘deprived of its opportunity to present the Defence case’.⁴⁰

17. Although the Defence may disagree with the outcome of the Impugned Decision, the Chamber’s reasoning was clear in rejecting a further delay in the start of the Defence case. First, the accused is in custody and there has been an adjournment of the trial since February 2023. Second, despite the Defence’s inability to have witness statements for the aforesaid witnesses by the deadline, the Chamber noted that the Defence would still be able to call other witnesses, particularly expert D-23, to testify at the start of trial. Third, bearing in mind the ongoing investigations of the Defence, the Chamber exceptionally, granted leave to the Defence to further disclose evidence on a rolling basis.⁴¹

³⁴ First Reconsideration Decision, ICC-02/05-01/20-938-Conf, para. 12.

³⁵ First Reconsideration Decision, ICC-02/05-01/20-938-Conf, para. 12.

³⁶ Decision on the reconsideration request of the cooperation decision, ICC-02/05-01/20-650-Conf, para. 10.

³⁷ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 31, lines 16-21.

³⁸ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 30, lines 13-14.

³⁹ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 33, lines 7-10.

⁴⁰ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 34, lines 6-10.

⁴¹ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 35, lines 9-20. *See also*, p. 26, lines 15-19, p. 31, line 5-11, p. 32, line 22 to p. 33, line 6.

18. As regards the second limb, the Chamber equally considers that the threshold for reconsideration has not been met. First, as noted in the preceding paragraph, it is clear from the Defence's Fourth Report and its submissions in court, that the Defence can disclose some witness statements and call some witnesses to testify after its opening statements (during the first evidentiary block scheduled between 16-27 October 2023). Second, as noted above, the Impugned Decision foresees the possibility for the Defence to disclose after the deadline, and thus naturally add to its list of evidence and list of witnesses, the evidence related to the witnesses identified above.⁴²

19. The Chamber notes the Defence's submissions related to its Trial Brief and its opening statements.⁴³ Although these submissions should have been made in the context of the Impugned Decision, the Chamber will still take them into consideration for the purpose of the present Request and particularly to clarify some misconceptions arising from the Request. As regards the Trial Brief, the Chamber notes that its objective is to duly inform the Prosecution, the CLRV and the Chamber, of the matters that the Defence takes issue with and the defence.⁴⁴ The Impugned Decision does not preclude the Defence from amending its Trial Brief, if and when the evidence identified above would have an impact on the Defence's presentation of its case.⁴⁵ Therefore, the Defence's ability to articulate in a clear and convincing manner its case remains unaffected. Similarly, the Impugned Decision does not prevent the Defence from requesting, beyond the 26 September 2023 deadline, the addition of the accused to its list of witnesses or request leave for the accused to make an unsworn statement,⁴⁶ if and when it would consider this necessary for the presentation of its case. Moreover, the Defence will have the opportunity to further explain its case during the closing statements.

⁴² The Chamber notes that this was the common practice during the Prosecution case, whenever late disclosure of incriminatory evidence was authorised. See Prosecution's submission of the updated List of Witnesses and List of Evidence, 9 May 2022, ICC-02/05-01/20-685 (with three Confidential Annexes).

⁴³ Request, ICC-02/05-01/20-1010-Conf, paras 14-15.

⁴⁴ See remarks by the Chamber during the first status conference to set the start date of the trial. Although the Chamber was referring here to the pre-trial brief, it is clear that the purpose of such a document is equally applicable at this stage of the proceedings. Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 56, lines 10-17.

⁴⁵ See similarly Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 56, lines 19-23.

⁴⁶ Request, ICC-02/05-01/20-1010-Conf, para. 15. The Defence states 'Des questions essentielles qui restent à déterminer, telles que le choix de Mr Abd-Al-Rahman de délivrer une déclaration liminaire et/ou de comparaître en qualité de témoin dans sa propre affaire devront être tranchées sans que la totalité de la preuve soit connue, c'est-à-dire pour l'essentiel en aveugle'.

20. The Chamber further notes that the Defence's submissions, which again should have been made in the context of the Impugned Decision, that the disclosure of evidence on a rolling basis and the current deadline, deprive the Defence of the possibility to call its most relevant witnesses, and the Defence will have no other choice but to call as first witnesses, those that are available.⁴⁷ The Chamber considers this submission without merit. First, as conceded by the Defence in court,⁴⁸ the Defence could start with expert D-23 immediately after the opening statements. Thereafter, considering that the Chamber will only sit for two weeks, only a limited number of Defence witnesses will be heard.⁴⁹ Accordingly, the Defence's submissions are speculative and overstate the impact that the current deadline will have on the Defence strategy or the entirety of its case.

21. For the above reasons the Chamber concludes that the Defence fails to identify a clear error of reasoning or new facts that justify reconsideration of the Impugned Decision.

B. Leave to Appeal

22. The Defence identifies the following issue for leave to appeal.

Issue: Par son refus de reporter les dates de soumission du mémoire de la Défense et de formulation de ses déclarations liminaires au 13 octobre et 13 novembre 2023 respectivement, la Décision Orale a-t-elle porté atteinte au droit de Mr Abd-Al-Rahman de préparer et présenter sa preuve à décharge, en particulier la possibilité de choisir quelle preuve présenter, dans quel ordre la présenter et comment la présenter de la façon qu'elle considère la plus persuasive pour la Chambre en connaissance de la totalité de sa preuve? ⁵⁰

23. The Defence submits that the Chamber made an error of fact, as the postponement was indeed requested. It argues that the Impugned Decision also contains two errors of law as it lacks reasoning whilst the Defence itself did provide valid reasons for the postponement requested. The Defence further identifies what in its view is a second error of law, namely an

⁴⁷ Request, ICC-02/05-01/20-1010-Conf, para. 16.

⁴⁸ Transcript of hearing, 5 September 2023, ICC-02/05-01/20-T-125-ENG, p. 26, lines 15-19.

⁴⁹ A limited number of witnesses that could be heard in addition to the opening statements and expert testimony of D-23, in the 2-week period between 16-27 October 2023.

⁵⁰ Request, ICC-02/05-01/20-1010-Conf, para. 18. The Chamber has unofficially translated the issue as follows: 'By its refusal to postpone the deadline for submission of the Defence's trial brief and the date of its opening statement to 13 October and 13 November respectively, has the Chamber's oral decision infringed on AAR's right to prepare and present exculpatory evidence, in particular the possibility of choosing what evidence to present, in what order, and how to present it in the most persuasive manner to the Chamber and with knowledge of his entire body of evidence?'.

abuse of discretion which prevents the Defence from completing its activities to prepare its case within a feasible and reasonable time.⁵¹

24. As regards the criteria under Article 82(1)(d), the Defence submits that the Issue directly and significantly affects the fair conduct and outcome of the trial. In support, it claims that the Impugned Decision is based on erroneous dates, the detention period of the accused, and courtroom availability.⁵² It also argues that the Impugned Decision breaks the balance between the right to be tried within a reasonable time and the right to a fair trial.⁵³

25. The Defence further submits that an immediate resolution by the Appeals Chamber will advance the proceedings.⁵⁴ In support, it claims that a judgment of conviction pronounced by the Chamber without giving the Defence time to complete its investigations before (i) submitting its trial brief and, (ii) choosing what evidence to present and the order in which to present them; and (iii) formulating its opening statements, would be invalidated by the Appeals Chamber for violation of Article 67(1)(b) of the Statute, the principle of equality arms, and fairness of the trial.⁵⁵

26. The Prosecution and the CLRV did not make any submissions as regards this part of the Request or the requirements under Article 82(1)(d) of the Statute.

27. After considering the Defence's submissions in relation to its leave to appeal the Impugned Decision, the Chamber, for the same reasons set out in paragraphs 18 to 20 above, finds that the Defence has failed to identify how the Issue so identified would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

28. Therefore, the Chamber finds that the Defence's leave to appeal has failed to meet the requirements necessary for the granting of leave to appeal pursuant to Article 82(1)(d) of the Statute.

⁵¹ Request, ICC-02/05-01/20-1010-Conf, para. 19.

⁵² Request, ICC-02/05-01/20-1010-Conf, para. 20.

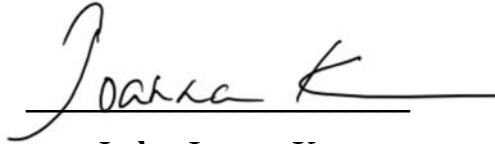
⁵³ Request, ICC-02/05-01/20-1010-Conf, para. 20.

⁵⁴ Request, ICC-02/05-01/20-1010-Conf, para. 21.

⁵⁵ Request, ICC-02/05-01/20-1010-Conf, para. 21.

IV. Conclusion

29. Accordingly, the Chamber rejects the Request in its entirety.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 11 September 2023

At The Hague, The Netherlands