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TRIAL CHAMBER I

**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 'Demande de Report de la
Date de Reprise de la Présentation de la Défense'", 4 January 2024, ICC-02/05-
01/20-1049-Conf**

Source: Office of the Prosecutor

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☒ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

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Victims

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M. Zavala Giler, Osvaldo

☒ Counsel Support Section

☒ Victims and Witnesses Unit

☐ Detention Section

☒ Victims Participation and Reparations
Section

☐ Other

I. INTRODUCTION

1. The Prosecution respectfully requests Trial Chamber I (“Chamber”) to reject the Defence’s open-ended request to postpone the resumption of the presentation of evidence (“Request”).¹ None of the reasons argued by the Defence in the Request justify such a postponement. The Defence has not demonstrated that it is unable to call witnesses from Darfur to testify, only that it is again in conflict with the Registry.² This current conflict with the Registry does not justify any postponement.

2. The Request and the annexes made available to the Prosecution do not demonstrate any material change to the ability of the Defence to continue to secure the testimony of witnesses from Darfur nor any increased or unacceptable risk to witnesses. The Prosecution cannot respond to the assertions and arguments contained in *ex parte* Annex I to the Request.

3. Nevertheless, if, as a result of the Defence’s failure to secure witnesses to testify on 15 January 2024 no witnesses are available on that date, the Prosecution supports the Defence’s proposal to hold a status conference.³

II. CLASSIFICATION

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

III. SUBMISSIONS

The Request does not show cause for the drastic remedy of an open-ended postponement of the trial/stay of proceedings

5. The Defence is again⁴ requesting an open-ended postponement of the trial, at least until it resolves its disputes with Registry or “there is a sudden, radical, and, let

¹ Demande de Report de la Date de Reprise de la Présentation de la Défense, [ICC-02/05-01/20-1048-Conf](#) (“Request”).

² 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](#), para. 10.

³ [Request](#), para. 23.

⁴ See, Requête aux fins de report de la phase de présentation de la Défense, [ICC-02/05-01/20-902-Red](#).

us say, miraculous improvement in the situation in Darfur [...].”⁵ As the Chamber has previously held, an adjournment *sine die* is a drastic remedy which amounts to a stay of proceedings.⁶ While a stay of proceedings may be appropriate in circumstances in which a fair trial is impossible,⁷ that is not the case here. Nothing in the Request supports such a finding. To the contrary, the Defence has already successfully called witnesses from Darfur, [REDACTED].

6. Furthermore, the Legal Representatives of the Victims (“LRV”) has also called witnesses who travelled from Darfur to testify. These witnesses travelled from Darfur to a location outside of Sudan to provide testimony during the current conflict.⁸ The Prosecution understands that the successful testimony of witnesses V-4 and V-5 was accomplished without an LRV team member travelling to Sudan, [REDACTED].

7. [REDACTED]. The Prosecution has never been able to conduct an investigative mission in Darfur. Nevertheless, in the course of its ongoing investigations, the Prosecution continues to interview and meet with potential witnesses from Darfur who travel outside of Sudan to meet the Prosecution. Although the process is not simple, nothing prevents the Defence from doing the same. There is nothing in the Request that supports a finding that it is currently impossible for the Defence to meet with persons outside of Sudan, as it has done with at least six witnesses from Darfur, three of whom who have testified.⁹

8. To the contrary, if as stated by the Defence, [REDACTED]¹⁰ [REDACTED],¹¹ [REDACTED].¹²

9. Furthermore, according to the Request, witnesses D-28 and D-29 will not testify

⁵ [Request](#), para. 19.

⁶ Decision on the Defence's Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf](#), paras. 29, 30.

⁷ Decision on the Defence's Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf](#), para. 30

⁸ [REDACTED].

⁹ Witnesses D-8, D-11 and D-32 have testified. Defence witness, D-6 was ready, willing and available to testify, however, the Defence chose not to call the witness shortly before his scheduled testimony (see [T-139](#), 98:14-23). Witnesses D-28 and D-29 met with the Defence and gave statements. [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

as they “withdrew for security reasons”.¹³ [REDACTED].¹⁴ [REDACTED].¹⁵ Therefore, it may have been possible to obtain the testimony of these two witnesses had the planning for their appearances at trial been approached differently.

Purported lack of cooperation by the Government of Sudan/[REDACTED] is not a justification for a stay of proceedings

10. Since the Defence has not established any material change in circumstances regarding the ability of witnesses to travel from Darfur [REDACTED] to testify, the only “justification” for the relief sought in the Request is the purported impossibility of such “critical” travel due to lack of cooperation and/or the current dispute between the Defence and the Registry over notification to the Government of Sudan (“GoS”).

11. This Chamber has held that “continuation of trial proceedings at this Court cannot be contingent upon a State’s cooperation being forthcoming”.¹⁶ In sum, the Defence’s argument for an open-ended postponement amounts to the assertion that [REDACTED].¹⁷

12. No explanation is given as to why, at this advanced stage of the trial, the continued testimony of Defence witnesses can only be secured by [REDACTED]. Furthermore, the Request does not explain why its existing arrangement and coordination with [REDACTED] is no longer sufficient to facilitate the travel of witnesses [REDACTED] to meet with the Defence and/or testify before the Court.

13. Thus, the Request should be denied as it is solely based on a purported lack of cooperation and the unsubstantiated assertion that [REDACTED].

The Defence fails to establish that cooperation with GoS/[REDACTED] is either necessary or

¹³ [Request](#), para. 3.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ Decision on the Defence’s Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf.](#), para. 32.

¹⁷ [REDACTED].

unobtainable

14. The Defence has not established that cooperation from [REDACTED] or GoS is “necessary” nor that it is unobtainable. As outlined above, the Defence, LRV, and Prosecution have all successfully met with witnesses from Darfur outside of Sudan since the outbreak of fighting in April 2023, with the Defence and LRV calling witnesses from Darfur to testify during this time. The Defence has not established that their witnesses could not travel, as the LRV witnesses did, [REDACTED] to meet the Defence and/or testify. It is demonstrably possible to call witnesses from Darfur without cooperation from [REDACTED] the GoS [REDACTED]. Nothing in the Request convincingly establishes that this possibility has ceased.

15. From the materials available to the Prosecution, the Defence also fails to demonstrate that cooperation from the GoS [REDACTED] is in fact impossible to achieve. The Defence note [REDACTED].¹⁸ However, the Defence does not state whether they have even requested visas for the Defence team to visit Sudan and, if they did so, whether or not they were granted.¹⁹ [REDACTED],²⁰ it is not clear that such a visa request would not have been granted to him or indeed to any other member of the Defence. The Defence has also not established that they could not meet with witnesses in [REDACTED].

16. The Prosecution notes that it recently applied for and received visas for Prosecution staff to travel to Sudan. A mission to Sudan is currently being planned for the near future. [REDACTED].

17. In sum, it appears that the Defence [REDACTED],²¹ [REDACTED].

¹⁸ [Request](#), para. 4.

¹⁹ The Prosecution notes that the Defence again misleadingly claim that only one mission to Sudan was possible for the Defence team, [Request](#) para. 4, without reference to the fact that the Defence cancelled several missions to Sudan. See, Prosecution’s response to “Note for the Record in relation to Paragraph 10 of the Decision on the Second Application for Postponement of the Defence Case (ICC-02/05-01/20-990-Conf)”, [ICC-02/05-01/20-997-Conf](#), para. 8.

²⁰ [REDACTED].

²¹ [REDACTED].

The Defence could have and should have been ready to call witnesses on schedule this month
[REDACTED]

18. Given the fact that the Defence has called three witnesses from Darfur, [REDACTED], to testify thus far and chose at the last moment to drop their fourth witness from Darfur (D-6), there is no apparent justification for the failure to comply with the scheduled calling of witnesses this month. No changed circumstances have been established which would excuse the Defence from complying with the deadlines set by the Chamber.

19. The Prosecution would not object to a reasonable and measured request for an adjustment of the trial schedule if good cause is demonstrated, but the Request fails to do so. As noted by this Chamber, the victims in this case have been waiting for justice for approximately 20 years.²² In addition, the Prosecution re-iterates its long-standing willingness to assist the Defence in securing witnesses²³ and notes that prior to the filing of the Request no such assistance was requested in regard to Defence witnesses to be called this month.

IV. CONCLUSION

20. For the foregoing reasons, the Prosecution respectfully requests that the Chamber reject the request for an open-ended postponement and holds a status conference on 15 January 2024 if no witnesses are available to testify.



Nazhat Shameem Khan

Deputy Prosecutor

Dated this 1st day of July 2026

At The Hague, The Netherlands

²² 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](#), para. 14.

²³ [REDACTED].