

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 14 July 2026

## **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 ‘CLRV Observations on confidential redacted version of Defence “Réponse aux observations du Bureau du Procureur, des Représentants des Victimes et du Greffe”, 12 January 2024 (ICC-02/05-01/20-1054-Conf)**

**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**  
[REDACTED]

**Counsel for the Defence**  
Mr Cyril Laucci  
Mr Iain Edwards

**Legal Representatives of the Victims**  
Ms Natalie von Wistinghausen  
[REDACTED]

**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**  
[REDACTED]

**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Mr Osvaldo Zavala Giler

**Counsel Support Section**  
[REDACTED]

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

1. Pursuant to Trial Chamber I's instructions,<sup>1</sup> the Common Legal Representative of Victims ("CLRV") provides these observations on the Defence for Mr Abd-Al-Rahman's ("Defence") "Réponse aux observations du Bureau du Procureur, des Représentants des Victimes et du Greffe".<sup>2</sup>

#### **A) Necessity of deployment of Defence team member and alternative options**

2. In the Response, the Defence reiterates the need to deploy a member of the team [REDACTED] to effectuate [REDACTED].<sup>3</sup> Based on the information available to the CLRV in the confidential redacted version of the Response, it remains unclear why such deployment is essential.
3. As the CLRV understands matters, it is [REDACTED] Defence witnesses to securely travel from [REDACTED], and to return thereafter. In light of the indicated [REDACTED], it is not apparent from the confidential redacted Response why the witnesses in question cannot proceed to arrange their own transport [REDACTED], for the Defence to make such arrangements in coordination [REDACTED], and/or engage the OTP for logistical assistance or advice, as has been offered.<sup>4</sup>
4. The CLRV notes that, per the Response, D-01, D-02, D-03 and D-05 [REDACTED],<sup>5</sup> in particular the [REDACTED] (D-01) [REDACTED] (D-02) of [REDACTED]<sup>6</sup> (D-03), and a [REDACTED] (D-05).<sup>7</sup> It would be reasonable to expect that [REDACTED] individuals would be able to make their own transport arrangements. D-28 and D-29 had originally planned to make their own travel arrangements [REDACTED], and presumably had the relevant experience, [REDACTED] to do so.

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<sup>1</sup> Email from Trial Chamber I to the parties, participants, and Registry, 5 January December 2024 at 14h05.

<sup>2</sup> Version confidentielle expurgée de la Réponse aux observations du Bureau du Procureur, des Représentants des Victimes et du Greffe, 10 January 2024, ICC-02/05-01/20-1052-Conf-Red ("Response").

<sup>3</sup> *Id.*, paras 8, 13.

<sup>4</sup> See 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, para. 19.

<sup>5</sup> *Id.* para. 12.

<sup>6</sup> [REDACTED]

<sup>7</sup> See Defence List of Witnesses, ICC-02/05-01/20-1023-Conf-AnxB.

5. While appreciating that it does not have full knowledge, from the available information it also does not appear that the Defence has pursued alternatives prior to or concurrent with the strategy it has implemented [REDACTED]. For example, were [REDACTED] the witnesses discussed with them or otherwise considered, such as the [REDACTED] participating victims DAR-V47-V-0004 and DAR-V47-V-0005 [REDACTED].
6. Further, in respect of the expressed concern that the absence of [REDACTED] would be 'immediately detected', did the Defence consider and discuss with the witnesses possible 'cover' narratives – [REDACTED] (noting again that D-05 is [REDACTED])?
7. The CLRV additionally notes that the Defence's claim of being differently situated than the Office of the Prosecutor (OTP) or CLRV in respect of the possibility of engaging intermediaries on the ground,<sup>8</sup> did not would appear to be undercut by the assistance that has already been provided to the Defence [REDACTED] in locating and/or liaising with potential Defence witnesses.
8. To the extent these matters have not been sufficiently addressed or answered in the Defence's *ex parte* submissions, the CLRV submits that further explanations from the Defence may assist the Chamber, including in an *ex parte* hearing.

## **B) Fairness of the proceedings**

9. The Defence states its agreement with the CLRV's position, in the CLRV's observations of 4 January 2024<sup>9</sup> (in response to the Defence's underlying application<sup>10</sup>), on the need for expeditious proceedings and the interests of the participating victims therein.<sup>11</sup> The Defence submits, however, that expeditiousness and the victims' interests cannot 'override' the principle of fair trial, and that the principle would be compromised if the Defence finds itself

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<sup>8</sup> Response, para. 14.

<sup>9</sup> CLRV Observations on Defence "Demande de Report de la Date de Reprise de la Présentation de la Défense", 4 January 2024, ICC-02/05-01/20-1050-Conf ("First CLRV Observations"), para. 12.

<sup>10</sup> Demande de Report de la Date de Reprise de la Présentation de la Défense, 29 December 2003, ICC-02/05-01/20-1048-Conf ("Defence Application").

<sup>11</sup> Response, para. 18.

‘prevented’ from obtaining the appearance of its witnesses [REDACTED].<sup>12</sup> The Defence further notes that the CLRV’s reference to the two decades period since the events underlying the case took place are attributable to the OTP and non-cooperation of Sudan with the Court.<sup>13</sup>

10. The CLRV disagrees with the implication that the issues presented in the Defence Application and the Response, and the circumstances of the proceedings as a whole, can be characterised as a (potential) ‘prevention’ of the Defence obtaining witnesses [REDACTED]. The CLRV refers to its submission in the First CLRV Observations<sup>14</sup> referencing the Trial Chamber’s relevant findings on the time and facilities afforded the Defence to prepare its case and conduct its investigations, including in respect of seeking to identify and interview witnesses, and where the Defence had set out its core position on mistaken identity of the accused at a very early stage.

11. The CLRV finds incongruous the Defence’s assertion that it is the OTP’s actions and long-standing past Sudanese government non-cooperation that are wholly responsible for the delay in the commencement of these proceedings in circumstances where the accused chose to voluntarily surrender to the Court more than thirteen years after the first ICC arrest warrant was publicly issued against him. The CLRV observes that this context is different than that of the Darfur ‘rebel’ cases concerning Mr Abu Garda,<sup>15</sup> Mr Banda, and the late Mr Jerbo,<sup>16</sup> or the six suspects in the now closed Kenya Situation,<sup>17</sup> all of whom promptly appeared before the Court after the issuances of summonses to appear.

### **C) Suspension of cooperation agreement and Status of Defence team members**

12. Expanding on submissions in the Defence Application, and further to the Chamber’s instructions, the Defence submits that under the customary

<sup>12</sup> *Ibid.*, para. 18 (“Ces considérations ne peuvent toutefois l’emporter sur l’équité du procès, qui serait compromise dans l’hypothèse où la Défense se trouverait empêchée d’obtenir la comparution de ses témoins de Raad-El-Berdi.”).

<sup>13</sup> *Ibid.*

<sup>14</sup> First CLRV Observations, para. 12.

<sup>15</sup> Case ICC-02/05-02/09.

<sup>16</sup> Case ICC-02/05-03/09.

<sup>17</sup> Cases ICC-01/09-02/11 and ICC-01/09-01/11.

international law principle of reciprocity, which applies both to agreements between states and those involving international organizations, “[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”<sup>18</sup>

13. The Defence notes<sup>19</sup> that pursuant to Article 1(3) of the Agreement on Cooperation between the International Criminal Court and the Republic of Sudan: “Sudan shall cooperate fully with the ICC in accordance with the provisions of the Rome Statute [...]”<sup>20</sup> The Defence asserts that the Trial Chamber’s finding of non-cooperation against Sudan<sup>21</sup> arising from a Defence request for provision of documents said to be in the possession of the Government of Sudan (“GoS”), constitutes a material breach of the GoS’ obligations under the Cooperation Agreement. Such breach would justify the Court suspending in full or in part its obligations to the GoS under the Agreement.<sup>22</sup> The Defence argues more specifically that to the extent that finding of non-cooperation concerns the investigative activities of the Defence, a partial suspension of the Court’s obligations under the Cooperation Agreement must extend at least to the investigative activities of the Defence, including the requirement of notification of any Defence missions on the territory of Sudan.<sup>23</sup>
14. Assuming, *arguendo*, that the law and factual assertions set out by the Defence are correct, the CLRV notes that any justified action by one party to an international agreement in response to the material breach of the agreement by the other party is an entitlement, and based on the discretion of the party that has been harmed.

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<sup>18</sup> Response, paras 23-24, quoting the Vienna Convention on the Law of Treaties, 23 May 1969, Article 60(1), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, 21 March 1986, Article 60(1) (the Defence submits that the text of the two Vienna Conventions codify a principle of customary international law).

<sup>19</sup> Response, para. 24.

<sup>20</sup> Agreement on Cooperation between the International Criminal Court and the Republic of Sudan, 10 May 2021 (“Cooperation Agreement”) (a copy is provided in ICC-02/05-01/20-561-Conf).

<sup>21</sup> Decision on the Defence’s requests for a finding of non-compliance by Sudan, 31 March 2023, ICC-02/05-01/20-913-Conf.

<sup>22</sup> Response, para. 24.

<sup>23</sup> *Ibid.*

15. The CLRV observes that the Trial Chamber's finding of non-cooperation concerned the provision of documents that the Chamber, while acknowledging the assistance which would be provided by the documents, was not convinced how they "may be considered to be so essential as to prevent the defence from putting forward any kind of a case", including in respect of notification of an *alibi* defence.<sup>24</sup> The CLRV notes again its above submission on the Chamber's relevant finding on the time and facilities granted the Defence to prepare its case and conduct investigations.<sup>25</sup>
16. The CLRV further observes that the Defence's request for the Court – whether by unilateral action of the Registry or by the Chamber's order<sup>26</sup> – to waive the notification obligation under the Cooperation Agreement arises not from any action of the GoS, but rather [REDACTED]. The CLRV submits that as a matter of law and policy, it is relevant for the Court to take into account the propriety [REDACTED] imposing conditions on the Court in respect of the Court's obligations under an international agreement or wider legal obligations.<sup>27</sup>
17. In the CLRV's view, and in light of the particular circumstances presented by the Defence Application and Response, the more appropriate legal and factual matters that the Registry and Trial Chamber may wish to consider are those set out at paragraph 13 of the First CLRV Observations, concerning the parameters of an 'official ICC mission' and the past and current practices of the Court. The Defence expresses its agreement on the relevance of these issues, as well as the assistance that may be provided by precise answers and information from the Registry on these matters.<sup>28</sup>

#### **D) Proposed timeline for continuation of case**

18. Lastly, and pursuant to the Trial Chamber's instructions, the Defence proposes a timeline for the continuation of the presentation of its case, running from "D-

<sup>24</sup> Decision on the Defence's Request for postponement of the presentation of its case, ICC-02/05-01/20-916-Conf-Red, para. 33 (public redacted version [ICC-02/05-01/20-916-Red](#));

<sup>25</sup> See para. 10 *infra*.

<sup>26</sup> Response, para. 17.

<sup>27</sup> See First CLRV Observations, paras 5, 8.

<sup>28</sup> Response, para. 19.

Day” – namely, the date the Court issues a decision waiving the notification requirement to the GoS of the intended deployment of a Defence mission to [REDACTED].<sup>29</sup>

19. At this stage, the CLRV does not object to the schedule outlined by the Defence premised on “D-Day”, but emphasises once again the need for these judicial proceedings to continue in an expeditious fashion, and the interests of the 1,004 participating victims therein.
20. Noting the issue of visa renewal [REDACTED],<sup>30</sup> the CLRV suggests that the Defence and Registry move forward now in seeking such renewals for Defence team members should this be deemed appropriate and feasible, in order to lessen any delays arising from seeking such visas only after the proposed “D-Day”.
21. While it is a matter for the Defence, the CLRV suggests that the Chamber may wish to recommend that the Defence continue to explore alternative means of facilitating the travel of the concerned witnesses<sup>31</sup> while the Defence Application is under consideration by the Chamber.
22. Finally, the CLRV advises that, while she does not take an ultimate position at this stage, she is unlikely, in light of all the relevant facts and circumstances, to support any further postponement of the continued presentation of the Defence case in the event the Defence determines, after the issuance of the Chamber’s decision on the Defence Application, not to deploy the proposed mission to [REDACTED] vigorously and promptly pursue alternative means to facilitate the travel of its proposed witnesses.

Respectfully submitted,



Natalie v. Wistinghausen

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<sup>29</sup> *Id.*, para. 26.

<sup>30</sup> *Ibid.*

<sup>31</sup> See paras 5-6 *supra*.

## Common Legal Representative of Victims

Dated this 14 July 2026  
At Berlin, Germany