

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/05-01/20
Date: **21 September 2020**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB")**

Confidential

**Prosecution's response to "Requête en vertu des normes 23bis-2, 35-1 et 37-2 du
Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr James Stewart
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of the Victims

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**

Mr. Xavier-Jean Keïta
Ms. Marie O 'Leary

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

Mr. Paddy Craig

**Victims Participation and Reparations
Section**

Other

Mr. Marc Dubuisson

I. INTRODUCTION

1. On 16 September 2020, the Prosecution filed the "Prosecution's request to postpone the confirmation hearing" ("Postponement Request").¹

2. On 17 September, the Defence filed a "Requête en vertu des normes 23bis-2, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red" ("Defence Request"),² asking the Pre-Trial Chamber II ("Chamber") to: (i) reclassify the *ex parte* confidential version of the Postponement Request to a confidential version, or, in the alternative, direct the Prosecution to file a lesser redacted version of same;³ (ii) extend the page limit for its response;⁴ and (iii) extend the deadline to submit its response.⁵

3. At the outset, the Prosecution observes that the Defence did not use the correct title of the case in the Defence Request notwithstanding the Chamber's decision on 26 June 2020 not to amend the name of the case until the Chamber is in a position to make an informed decision on the matter.⁶

4. The Prosecution opposes the Defence's request that the Chamber reclassify the *ex parte* confidential version of the Postponement Request to a confidential version, or, in the alternative, that the Prosecution provide a lesser redacted version.⁷ All of the redactions applied to the Postponement Request were necessary and justified to safeguard the Prosecution's ongoing investigation, the security and safety of witnesses and their family members or the cooperation efforts of the Prosecution. Contrary to the Defence claims, these limited redactions cause no prejudice to Mr Abd-Al-Rahman and do not materially affect the Defence's ability to comprehend

¹ICC-02/05-01/20-157-Conf-Exp; ICC-02/05-01/20-157-Conf-Red ("Postponement Request"). On 17 September 2020, the Prosecution filed corrected versions of the Postponement Request and the confidential redacted version of the Postponement Request. See ICC-02/05-01/20-157-Conf-Exp-Corr; ICC-02/05-01/20-157-Conf-Red-Corr. On 17 September 2020, the Prosecution also filed a public redacted version of the corrected version of the Postponement Request. See ICC-02/05-01/20-157-Corr-Red.

²ICC-02/05-01/20-159-Conf ("Defence Request").

³Defence Request, para. 5.

⁴Defence Request paras. 6-7.

⁵Defence Request, paras. 8-10.

⁶ICC-02/05-01/20-8, 26 June 2020, para. 16.

⁷Defence Request, para. 5.

and meaningfully respond to the Postponement Request. Since the redactions were kept to the minimum necessary, the Defence's request for a lesser redacted version should be rejected.

5. The Prosecution takes no position in relation to the Defence's request for an extension of the page limit for their response to the Postponement Request.⁸

6. The Prosecution opposes the Defence's request for an extension of the time limit to respond to the Postponement Request from 28 September 2020 to 9 October 2020.⁹ The issues in dispute are legally and factually straightforward, and an extension of time to respond to the Postponement Request is not warranted.

II. CLASSIFICATION

7. Pursuant to regulation 23*bis*(2) of the Regulations, this request is classified as confidential, since it is responding to the Defence Request that bears the same classification.

III. SUBMISSIONS

The Chamber should reject the Defence's request to reclassify the *ex parte* version of the Postponement Request to a confidential version

8. The Defence request to reclassify the Postponement Request should be rejected as all redactions applied in the confidential redacted version were necessary and justified under the Rome Statute. The Prosecution acknowledges that *ex parte* procedures are only to be used exceptionally when they appear "truly necessary," with no lesser procedure being available, and should be proportionate given the potential prejudice to the accused.¹⁰ When *ex parte* procedures are used, the other party should be notified of the procedure and the legal basis explained.¹¹

⁸ Defence Request, paras. 6-7.

⁹ Defence Request, paras. 9-10.

¹⁰ ICC-01/04-01/06-1058, 6 December 2007, para. 12. *See also* ICC-01/04-02/06-2230, 15 February 2018, para. 8 (*citing* ICC-01/04-02/06-1883, 28 April 2017, para. 49).

¹¹ *Id.*

9. Appropriate reasons relating the legitimate risks justifying that the Prosecution file an *ex parte* version were made available to the Defence in the confidential redacted version of the Postponement Request¹² filed almost immediately following the *ex parte* confidential version. The Defence's assertion that the Prosecution provided a "generic" justification¹³ is therefore wrong and should be dismissed by the Chamber.

10. Similarly, the Defence's contention that the redactions applied to the confidential redacted version of the Postponement Request "do not seem necessary"¹⁴ is speculative and incorrect.

11. The redactions applied to paragraphs 18, 19 and footnote 23 of the Postponement Request are warranted by the need to preserve the integrity of the Prosecution's ongoing investigation and its ability to secure evidence in accordance with Rule 81(4) of the Rules of Procedure and Evidence.

12. Likewise, redactions to paragraphs 42, 43 and 46 and to footnotes 22, 29 are necessary to preserve both the integrity of the Prosecution's ongoing investigation and the security and safety of potential vulnerable witnesses located in high risk and operationally challenging environments.

13. In addition, the minimal redactions applied in the confidential redacted version are neither prejudicial to nor inconsistent with the rights of the suspect. Contrary to the Defence's claim, it is not compelled to "take a blind position"¹⁵, as the limited redactions do not materially affect the Defence's ability to comprehend and meaningfully respond to the Postponement Request.

14. Lastly, in line with usual practice and in accordance with regulation 23bis(3), the Prosecution will review its *ex parte* confidential filings and request that the

¹² ICC-02/05-01/20-157-Conf-Red, 16 September 2020; ICC-02/05-01/20-157-Conf-Red-Corr, 17 September 2020, para. 9.

¹³ Defence Request, para. 3.

¹⁴ Defence Request, para. 4.

¹⁵ *Id.*

Chamber reclassify them should the basis for the *ex parte* classification no longer exist.

The Prosecution takes no position on the Defence request to extent the page limit for its response

15. The Prosecution takes no position on the Defence's request for extension of the page limit to respond to the Postponement Request.¹⁶

The Chamber should deny the Defence's request for an extension of time to respond the Postponement Request

16. The Prosecution opposes the Defence's request to extend the deadline to submit its response by two weeks until 9 October 2020.¹⁷ The issues raised in the Postponement Request are legally and factually straightforward, and an extension of time to respond to the Postponement Request is not warranted.

17. The arguments that the Prosecution set out in the Postponement Request are largely similar to those in its observations on disclosure dated 23 July 2020¹⁸ and in its more recent request to extend the deadline for the application for non-disclosure of witness identities.¹⁹ The Defence has therefore been on notice of the main issues raised by the Prosecution in the Postponement Request since the Prosecution filed its observations on disclosure and related matters on 23 July 2020.

18. The Prosecution notes that the Defence has sought information from the Registry on various issues in preparation for its response to the Postponement Request.²⁰ However, it is not apparent from the Defence Request when it expects to receive this information and why this information is necessary for its response to the Postponement Request. Further, the Chamber's determination of the Defence

¹⁶ Defence Request, paras. 6-7.

¹⁷ Defence Request, paras. 9-10.

¹⁸ ICC-02/05-01/20-103-Conf.

¹⁹ ICC-02/05-01/20-149-Conf.

²⁰ Defence Request, para. 9.

“Demande de reconsidération de la Décision ICC-02/05-01/20-110”²¹ is not relevant to the Postponement Request. Accordingly, these issues do not justify an extension of the deadline to respond to the Postponement Request.

IV. CONCLUSION

19. For the aforementioned reasons, the Prosecution respectfully requests that the Chamber reject the Defence’s requests to reclassify the confidential *ex parte* version to a confidential version, or, in the alternative, to direct the Prosecution to provide a lesser redacted confidential version. The Prosecution takes no position on the appropriateness of providing the Defence with double the permitted page limit for its response. The Prosecution further submits that the Chamber should reject the Defence request for an extension of the deadline to file its response to the Postponement Request.



James Stewart
Deputy Prosecutor

Dated this 21st day of September 2020

At The Hague, The Netherlands

²¹ ICC-02/05-01/20-113, 13 August 2020.