



Original: English

No. ICC-02/05-01/20

Date: 16 October 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')

Public

Decision on Defence Request for a Stay of Proceedings

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Julian Nicholls

Counsel for Mr Abd-Al-Rahman

Mr Cyril Laucci

Legal Representatives of Victims

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

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Court’),¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, having regard to article 67(1)(c) of the Rome Statute (the ‘Statute’), rule 121(7) of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on Defence Request for a Stay of Proceedings.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute² and decided³ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’) for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004 (‘First Warrant’).⁴
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the First Warrant pursuant to article 58(6) of the Statute,⁵ issuing a second warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, between on or about 5 to 7 March 2004 (‘Second Warrant’).⁶
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, as ordered by the Chamber,⁷

¹ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

² Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, [ICC-02/05-56](#)).

³ Decision on the Prosecution Application under Article 58(7) of the Statute, [ICC-02/05-01/07-1-Corr.](#)

⁴ Warrant of Arrest for Ali Kushayb, [ICC-02/05-01/07-3-Corr.](#)

⁵ 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, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and [ICC-02/05-01/20-6-Red2](#)).

⁶ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, [ICC-02/05-01/07-74-Red](#)).

⁷ Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, 11 June 2020, [ICC-02/05-01/07-82](#).

Mr Abd-Al-Rahman made his first appearance before the Single Judge,⁸ at which time the confirmation of charges hearing was scheduled for Monday, 7 December 2020.⁹

4. On 16 September 2020, the Prosecutor submitted a request to postpone the confirmation hearing to 1 June 2021 (the ‘Postponement Request’).¹⁰ On 5 October 2020, as authorised by the Chamber,¹¹ the Defence submitted its response to the Postponement Request, asking that the Chamber reject it (the ‘Response to Postponement Request’).¹²

5. On 5 October 2020, the Defence also submitted a request for a stay or termination of proceedings (the ‘Request for Stay’),¹³ in which the Defence submits, *inter alia*, that (i) there is no indication that a postponement of the confirmation hearing would resolve the difficulties faced by the Prosecutor, particularly those in relation to a lack of resources and the Government of Sudan’s lack of cooperation; (ii) to postpone the confirmation hearing would infringe upon Mr Abd-Al-Rahman’s right to be tried without undue delay, pursuant to article 67(1)(c) of the Statute; (iii) the Chamber has the power to halt the proceedings if it considers this solution to be the only option, as found in the *Kenyatta* case; (iv) considering that the suspect is currently in detention, this militates all the more in favour of granting a stay of proceedings; (v) the *Banda* case should be considered, in which a temporary, conditional suspension of the proceedings was ordered due to issues surrounding Sudan’s lack of cooperation, with the case still on hold to this day. The Defence has also raised arguments in relation to interim release, the funding of the case, and reparations.

⁸ Transcript of hearing of Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#) (‘Initial Appearance’).

⁹ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 22, line 23 to page 23, line 3.

¹⁰ Corrected Version of “Prosecution’s request to postpone the confirmation hearing”, 16 September 2020, ICC-02/05-01/20-157-Conf-Exp-Corr (a confidential redacted version, ICC-02/05-01/20-157-Conf-Red-Corr, and a public redacted version, [ICC-02/05-01/20-157-Corr-Red](#), were notified on the same date) (‘Postponement Request’).

¹¹ Decision on the Defence’s ‘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’, 23 September 2020, [ICC-02/05-01/20-164](#) (‘Decision on Extension’).

¹² Observations en Réponse à la Requête ICC-02/05-01/20-157-Red, [ICC-02/05-01/20-173](#).

¹³ Requête aux fins d’arrêt ou de suspension temporaire des procédures, [ICC-02/05-01/20-174](#).

6. On 14 October 2020, the Prosecutor filed a response to the Request for Stay (the ‘Response to Request for Stay’),¹⁴ requesting that the Chamber dismiss the Request for Stay *in limine*, as the issues raised therein have already been determined, or are before the Chamber and will be addressed in an upcoming decision. The Prosecutor notes that the Defence has effectively sought to respond to the Postponement Request in two filings, after having been denied an extension to the page limit, thus creating two parallel litigation streams that may delay the proceedings. In the alternative, the Prosecutor submits, *inter alia*, that (i) the Request for Stay does not meet the criteria for a stay of proceedings; (ii) the Postponement Request was made in light of the present circumstances, as well as the statutory duties of the Prosecutor towards victims and witnesses and the Prosecutor has a right to request a postponement under rule 121(7) of the Rules; (iii) the Defence has mischaracterised the Prosecutor’s submissions regarding its cooperation with the Government of Sudan; (iv) whether the Prosecutor can discharge its duties under article 61 of the Statute should be decided following the confirmation hearing, not before; (v) the Request for Stay attempts to re-litigate issues of interim release, reparations, and funding, which have already been addressed in separate litigation; and (vi) the Defence ‘persists in refusing to caption its submissions with the case name decided upon by the Single Judge’, and these repeated refusals should be rejected.

II. ANALYSIS

7. At the outset, the Single Judge recalls that the Court’s statutory framework does not provide for the concept of ‘stay of proceedings’¹⁵ and that, although Chambers

¹⁴ Prosecution’s Response to “Requête aux fins d’arrêt ou de suspension temporaire des procédures” (ICC-02/05-01/20-174), [ICC-02/05-01/20-184](#).

¹⁵ As noted by other Chambers, *see, for example*, Appeals Chamber, *The Prosecutor v. Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status Conference on 10 June 2008”, [ICC-01/04-01/06-1486](#) (‘Lubanga Judgment on Decision on non-disclosure’) 20 October 2008, para. 77; Trial Chamber V(b), *The Prosecutor v. Kenyatta*, Decision on Prosecution’s application for a further adjournment, 03 December 2012, [ICC-01/09-02/11-981](#), para. 58.

have at times resorted to this as an exceptional remedy,¹⁶ it is disputable whether this could be validly applied in the Court's system.

8. The Single Judge notes that the content of the Request for Stay relates substantially to issues raised in the Postponement Request. By submitting this filing as well as the Response to the Postponement Request, the Single Judge considers that the Defence has attempted to bypass the Chamber's decision rejecting an extension of the page limit.¹⁷ The Single Judge disapproves of such tactics, and cautions the Defence against submitting duplicative filings in the future.

9. While the Defence submits that certain issues raised in the Postponement Request risk violating the suspect's right to an expeditious trial, the Single Judge notes that a decision has not yet been issued on this request, and as such, this argument is speculative and without basis. Noting that rule 121(7) of the Rules allows for the Prosecutor to request a postponement of the confirmation hearing, it cannot be said that such a request is in itself prejudicial to the Defence. The Postponement Request shall be decided upon in due course, and in doing so, the Chamber shall 'ensure the overall fairness and expeditiousness of proceedings bearing in mind the competing interests at stake'.¹⁸

¹⁶ See *Lubanga* Judgment on Decision on non-disclosure, [ICC-01/04-01/06-1486](#), 21 October 2008, para. 77; Appeals Chamber, *The Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(2) of the Statute of 3 October 2006", 14 December 2006, [ICC-01/04-01/06-772](#), para. 37; Trial Chamber III, *The Prosecutor v. Bemba Gombo*, Decision on "Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'", 24 July 2015, [ICC-01/05-01/08-3273](#), para. 12; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)", 15 August 2012, [ICC-02/11-01/11-212](#), para. 91; Appeals Chamber, *The Prosecutor v. Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 14 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 08 October 2010, [ICC-01/04-01/06-2582](#), para. 55.

¹⁷ Decision on Extension, [ICC-02/05-01/20-164](#), para. 8

¹⁸ Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, Decision on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 17 June 2013, [ICC-01/04-02/06-73](#) ('*Ntaganda* Postponement'), para. 13; Pre-Trial Chamber II, *Prosecutor v. Dominic Ongwen*, Decision Postponing the Date of the Confirmation of Charges Hearing, 6 March 2015, [ICC-02/04-01/15-206](#) ('*Ongwen* Postponement'), para. 25, Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*,

10. Furthermore, while the Defence expresses concern about potential delays, it fails to consider that, if granted, the requested relief of a stay of proceedings would itself result in a delay to the proceedings, thus harming the interests of the suspect. As such, this filing and the Response to the Postponement Request are in fact contradictory in nature. The Single Judge recalls that the fundamental purpose of the confirmation procedure is to ‘filter out cases that should not go to trial’.¹⁹ As established by the statutory framework, in compliance with international human rights law, the suspect has a fundamental right to be tried without undue delay. Before trial, the suspect enjoys a right to appear promptly before the Pre-Trial Chamber to defend himself in the context of the confirmation hearing,²⁰ irrespective of whether the suspect is in detention.

11. The Single Judge notes that in the Request for Stay, the Defence has raised issues relating to interim release, reparations, and funding. As these matters have been addressed in separate decisions by this Chamber, and have gone before the Presidency or Appeals Chamber,²¹ they will not be further addressed in the present decision. Lastly, noting that the Defence has omitted the alias portion of the case name in the title page to a series of filings,²² the Single Judge directs the Defence to use the full name of the case in its submissions, as previously determined by the Chamber.²³

Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’, 15 May 2019, [ICC-01/14-01/18-199](#) (*‘Yekatom and Ngaïssona Postponement’*) para. 30.

¹⁹ Appeals Chamber, *The Prosecutor vs. Germain Katanga*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 15 July 2010, [ICC-01/04-01/07-2259](#), para. 40.

²⁰ *Yekatom and Ngaïssona Postponement*, [ICC-01/14-01/18-199](#), para. 31.

²¹ Decision on the Defence Request for Leave to Appeal the Decision pursuant to Article 75(1) of the Rome Statute, 31 August 2020, [ICC-02/05-01/20-141](#); Appeals Chamber, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled ‘Decision on the Defence Request for Interim Release’, 8 October 2020, [ICC-02/05-01/20-177](#); Decision on the ‘Requete en vertu des Articles 38-3-a, 43-2 et 115-b’ dated 25 September 2020 (ICC-02/05-01/20-165), 12 October 2020, [ICC-02/05-01/20-180](#).

²² See, for example, Requête aux fins d’exécution du paragraphe 25 de la Décision ICC-02/05-01/20-123-Conf, 13 October 2020, ICC-02/05-01/20-183-Conf; Observations en Réponse à la Requête ICC-02/05-01/20-157-Red, 5 October 2020, [ICC-02/05-01/20-173](#); Réponse à la Requête ICC-02/05-01/20-178, 12 October 2020, ICC-02/05-01/20-182-Conf.

²³ Decision on the Defence request to amend the name of the case, 26 June 2020, [ICC-02/05-01/20-8](#), para. 16 and page 8.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for a Stay of Proceedings; and

DIRECTS the Defence to use the full case name in all submissions and filings.

Done in both English and French, the English version being authoritative.


Judge Rosario Salvatore Aitala
Single Judge

Dated this Friday, 16 October 2020

At The Hague, The Netherlands