



Original: English

No.: ICC-02/05-01/20
Date: 10 December 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”)**

Public

Prosecution’s request for variation of disclosure related time limits

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**

States Representatives

Amicus Curiae

REGISTRY

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Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Prosecution respectfully requests that Pre-Trial Chamber II (“Chamber”), pursuant to regulation 35 of the Regulations of the Court (“Regulations”), extend the time limits for the disclosure and reporting deadlines set out by the Chamber in its decision on the Prosecution’s first request to postpone the confirmation of charges hearing on 2 November 2020 (“Postponement Decision”).¹

2. On 3 December 2020, the Prosecution submitted its second request to postpone the confirmation of charges hearing (“Second Postponement Request”), which included requests to extend the related disclosure and reporting deadlines.² The Prosecution submits this further request for extension on the basis that it has demonstrated sufficient good cause within the meaning of regulation 35(2) of the Regulations for the reasons provided in the Second Postponement Request, as described in greater detail below.³

II. SUBMISSIONS

3. Under regulation 35 of the Regulations, the Prosecution respectfully requests that the Chamber extend the time limits for the disclosure and reporting deadlines set out in the Postponement Decision. Under regulation 35(1), applications to extend or reduce a time limit as ordered by the Chamber shall be made in writing or orally to the Chamber setting out the grounds on which the variation is sought. The Prosecution hereby submits an application under regulation 35(1) setting out the grounds for which it seeks an extension.

4. Under regulation 35(2), the Chamber may extend or reduce a time limit if good cause is shown. As the Prosecution observed in the Second Postponement Request, unresolved witness security concerns, recent material developments with respect to its investigative activities, disclosure challenges and the ongoing COVID-

¹ ICC-02/05-01/20-196, p. 20.

² ICC-02/05-01/20-218-Conf (“Second Postponement Request”). *See also* ICC-02/05-01/20-218-Red.

³ The Prosecution files this request under regulation 35 of the Regulations pursuant to an email sent by the Chamber at 13:29 on 4 December 2020.

19 pandemic have inevitably delayed the Prosecution's progress with respect to the deadlines set out by the Chamber in the Postponement Decision.⁴

5. In the Second Postponement Request, the Prosecution detailed the unavoidable difficulties in meeting its disclosure and reporting deadlines that justify an extension. As the Prosecution noted previously,⁵ due to factors outside of its control, it has not yet been able to conduct necessary witness risk assessments and implement the appropriate protective measures for witnesses despite its tireless efforts.⁶ Ongoing witness security concerns and the addition of new witnesses have also delayed the process of clearing many of the Prosecution's most critical witnesses for disclosure.⁷ Therefore, the Prosecution requests that the Chamber extend the deadline for the submission of applications for the authorisation of the non-disclosure of witnesses' identities and/or non-disclosure of entire items of evidence from 18 December 2020 to 1 March 2021.⁸

6. In the Second Postponement Request, the Prosecution also described the challenges it has faced with respect to the disclosure process, including resource constraints.⁹ In addition, the Prosecution's investigations have been significantly impacted by the ongoing COVID-19 pandemic¹⁰ and the material developments in opportunities posed by its recent direct engagement with the Government of Sudan, in particular the imminent prospect of conducting risk assessments and investigations *in situ* in Darfur, Sudan for the first time.¹¹ The Prosecution's implementation of potential mitigation measures has proven to be insufficient to overcome these challenges, as explained in the Second Postponement Request.¹²

⁴ Second Postponement Request, para. 6.

⁵ ICC-02/05-01/20-221.

⁶ Second Postponement Request, para. 16-20.

⁷ Second Postponement Request, para. 18.

⁸ The Prosecution intends to submit applications for the authorisation of the non-disclosure of witnesses' identities and/or disclosure of entire items of evidence as soon as possible. In particular, the Prosecution intends to file, by 18 December 2020, as many applications as possible in relation to the witnesses cited in its submissions on the evidence demonstrating that Ali Abd-Al-Rahman is Ali Kushayb. ICC-02/05-01/20-224.

⁹ Second Postponement Request, paras. 27-39.

¹⁰ Second Postponement Request, paras. 40-47.

¹¹ Second Postponement Request, paras. 21-26.

¹² Second Postponement Request, paras. 45-47.

7. As a result, the Prosecution's preparation of the Document Containing the Charges ("DCC"), pre-confirmation brief and list of evidence to be presented at confirmation has been considerably delayed, as well as its review and disclosure of other evidence in its collection. The Prosecution respectfully requests that the Chamber extend the deadline for the submission of the DCC from 4 January 2021 to 16 April 2021, and the submission of the pre-confirmation brief and list of evidence intended to be presented at the confirmation hearing from 15 January 2021 to 23 April 2021. The Prosecution further requests that the deadline for disclosure of the non-witness related material¹³ on which it intends to rely at the confirmation hearing, all evidence within the meaning of article 67(2) of the Rome Statute and all material referred to in rule 77 of the Rules of Procedure and Evidence ("Rules") be extended to 30 April 2021.

III. CONCLUSION

8. The Prosecution submits that it has demonstrated sufficient good cause within the meaning of regulation 35(2) of the Regulations justifying the variation of the remaining disclosure and reporting deadlines in the Postponement Decision due to witness security concerns, investigative opportunities, disclosure challenges and obstacles related to the ongoing COVID-19 pandemic, in particular, as set out in the Second Postponement Request.

9. For the aforementioned reasons demonstrating good cause, the Prosecution respectfully requests that the Chamber, within its discretion under regulation 35 of the Regulations, extend the time limit for:

- Submission of applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence to 1 March 2021;
- Submission of the DCC to 16 April 2021;

¹³ ICC-02/05-01/20-200, para. 9; ICC-02/05-01/20-207, para. 9. *See also* ICC-02/05-01/20-221.

- Submission of the pre-confirmation brief and the list of evidence intended to be presented at the confirmation hearing to 23 April 2021; and
- Disclosure of the non-witness related material on which it intends to rely at the confirmation hearing, all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules to 30 April 2021.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart
Deputy Prosecutor

Dated this 10th day of December 2020

At The Hague, The Netherlands