

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: 1 April 2021

PRE-TRIAL CHAMBER II

Before:

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

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 aux fins d’audience”, 22 March 2021,
ICC-02/05-01/20-317-Conf**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Defence request for a status conference (“Defence Request¹”) pursuant to Rules 118(3) and 121(2)(b) of the Rules of Procedure and Evidence should be rejected for the following reasons:

- i. the Defence primarily intends to use a hearing to repeat arguments that have already been made and that are currently under consideration;
- ii. the Defence Request fails to establish that a status conference is required because the preparation of its case has been impacted; and,
- iii. the Defence intends to re-litigate matters that have been determined by the Chamber.

II. CLASSIFICATION

2. The Prosecution files this response confidentially pursuant to regulation 23*bis* of the Regulations of the Court because it responds to a confidential filing of the Defence.

III. SUBMISSIONS

The Defence Request seeks a status conference in order to repeat arguments that have already been made.

3. The Defence Request makes clear that it intends to use a status conference to repeat arguments that it has already made and that are currently under consideration by the Pre-Trial Chamber II (“Chamber”)². Paragraph 27 of the Defence Request states that a primary purpose of a status conference is to “resolve”, “facilitate” and “accelerate” the Chamber’s consideration of three “motions” already submitted by the Defence. This is not a valid reason to convene a status conference.

4. The Chamber has already been presented with all the information it requires to reach a determination on these submissions. Specifically, the Defence has had the

¹ [ICC-02/05-01/20-317-Conf](#).

² [ICC-02/05-01/20-231-Red](#); [ICC-02/05-01/20-261-Red](#); [ICC-02/05-01/20-269](#); [ICC-02/05-01/20-272-Red](#).

opportunity to comprehensively advance arguments and provide written submissions to the Chamber.³

5. In addition and contrary to the Defence's assertion, the Prosecution has responded to two of the filings⁴. With respect to the third filing, the Prosecution deemed a response unnecessary. This is not, as the Defence suggests, because the Prosecution tacitly accepts the merits of its argument, but because the particular filing concerned a Defence request for information from the Registry. The Prosecution is not, therefore, in a position to provide a response which would be of assistance to the Chamber. The Prosecution would not be in any different a position were a status conference to be convened.

6. Under the circumstances a status conference to is not necessary and will not advance proceedings. Furthermore, rather than expedite the Chamber's deliberations, it risks having the opposite effect. This is because the Chamber would have to delay its deliberations until the conclusion of any status conference.

The Defence Request fails to establish that a status conference is required because the preparation of its case has been impacted.

7. The Defence Request fails to establish that a status conference is necessary because the Defence's ability to prepare its case has been impacted by the inability to visit the Republic of Sudan ("Sudan"). This is, first, demonstrated by the Defence's opposition to the Prosecution's request for a second postponement of the confirmation hearing. The Defence acknowledges that its opposition on that occasion was made notwithstanding that there was no prospect of the Defence visiting Sudan at that stage and that further evidence could be presented to the Chamber following confirmation⁵. Furthermore, this Chamber has already stated that "the submission and the granting of a request under article 57(3)(b) cannot *per se* change the timeline

³ [ICC-02/05-01/20-231-Red](#); [ICC-02/05-01/20-261-Red](#); [ICC-02/05-01/20-269](#); [ICC-02/05-01/20-272-Red](#).

⁴ [ICC-02/05-01/20-256](#); [ICC-02/05-01/20-280-Conf](#).

⁵ [ICC-02/05-01/20-229](#), para. 37.

of the confirmation proceedings, which must not be unduly protracted beyond what is strictly necessary".⁶

8. Second, the Defence Request fails to specify in concrete terms how its inability to visit Sudan has in fact impacted its preparations. Rather it makes general and unsubstantiated assertions. This failure renders arguments concerning its preparations of its case purely speculative. In support and by way of analogy, this Court has held when considering matters relating to requests for cooperation a "Defence does not have to lay bare its full strategy for why it seeks information [...]".⁷ However, some level of substantiation is required.

9. Notwithstanding the above, the Prosecution accepts that the Defence may have legitimate reasons to visit Sudan to assist with its investigations. The Prosecution also accepts that the Government of Sudan's cooperation may be important in facilitating these investigations. For this purpose, the Prosecution is prepared to assist the Defence insofar as reasonable and is prepared to use its contacts within the Government of Sudan to facilitate Defence requests for assistance where appropriate.

The Defence Request impermissibly seeks to re-litigate matters already determined by the Chamber.

10. The Defence Request submits that another reason to convene a status conference is to address disclosure of the Memorandum of Understanding ("MoU") between the Prosecution and the Government of Sudan. In so doing, the Defence Request seeks to re-litigate matters.

11. As is acknowledged by the Defence, disclosure of the MoU has already been fully litigated by all parties.⁸ During the course of this litigation, a copy of the MoU was provided to the Chamber which, after considering all representations, concluded that "the nature and content of the MOU ... is not necessary for the Defence ... [and

⁶ [ICC-02/05-01/20-295](#), para. 8.

⁷ [ICC-02/04-01/15-1254](#), para. 9

⁸ [ICC-02/05-01/20-289](#); [ICC-02/05-01/20-294-Conf](#).

that] the Defence has not identified any specific need for disclosure..." ("MoU Decision").⁹

12. A status conference to re-litigate a matter on which the Chamber has already reached a decision is impermissible. Should the Defence wish to challenge the Chamber's MoU Decision the appropriate procedure is to seek leave to appeal or submit a request for reconsideration. The Defence has not sought either in this instance.

IV. CONCLUSION

13. For forgoing reasons, the Defence Request should be rejected. A status conference will not advance proceedings but risks being disruptive and causing further delay.



James Stewart
Deputy Prosecutor

Dated this 1st day of April 2021

At The Hague, The Netherlands

⁹ [ICC-02/05-01/20-323](#).