



Original: **English**

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

Date: **20 July 2022**

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
“Defence response to Prosecution’s application under regulation 35 to extend the
disclosure and associated deadlines concerning newly obtained material of
P-1034, ICC-02/05-01/20-713-Conf”, 18 July 2022, ICC-02/05-01/20-714-Conf**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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**Victims Participation and Reparations
Section**

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) opposes the Prosecution’s latest application under Regulation 35 of the Rules of Procedure and Evidence (“Rules”) to extend the disclosure and associated deadlines concerning newly obtained material of P-1034 (“Application” and “New Witness” respectively) and submits that the Trial Chamber (“the Chamber”) should deny it in totality.¹ The Prosecution seeks: (i) an extension of the lapsed disclosure deadline to 22 July 2022 to disclose the Arabic translation of the statement and newly obtained material pertaining to the New Witness; (ii) leave for the addition of the New Witness to the Prosecution’s List of Witnesses; and (iii) leave to add the statement and associated material of the New Witness to the Prosecution’s List of Evidence.²

2. The Defence submits that the Application should be rejected. The Application is insufficiently justified. The request for the addition of the evidence of the New Witness comes 6 months after the expiry of the disclosure deadline set by the Chamber of 5 January 2022. Considering the fast pace at which the trial is progressing and that as a result the Prosecution is well-advanced in the presentation of its case, the Defence submits that the Application will occasion great prejudice to the Defence should it be granted.

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this Response is classified “Confidential”, mirroring the classification of the Application. A public redacted version will be filed shortly.

Submissions

A. Granting the Application would further undermine the effect of the deadline set by the Chamber and would impact on the fairness of the proceedings

4. The Defence incorporates by reference its submissions on the damaging impact on the preparation of its case of a continuous extension of the disclosure deadline set by the Trial Chamber at the beginning of the proceedings.³ The Defence

¹ ICC-02/05-01/20-713-Conf. Public redacted version not yet available.

² *Ibid*, paras 2, 23.

³ ICC-02/05-01/20-674-Conf and its public redacted version [ICC-02/05-01/20-674-Red](#), paras 4-7.

submits in particular that the previous authorization of extensions of the deadline by the Chamber in its decisions dated 24 December 2021, 11 April 2022, and 2 May 2022⁴, should not be interpreted by the Prosecution as a “free pass” to collect new evidence nor as an encouragement to submit requests⁵ seeking authorization to introduce material from new witnesses.

5. The Defence recalls that at the start of the proceedings the Chamber unambiguously insisted on the importance of strict compliance with the deadline and “discourage[d] strongly” the Prosecution to request authorization to add new material after expiration of the deadline.⁶ In its latest decision on a Prosecution request pursuant to Regulation 35 of the RoC dated 2 May 2022, the Chamber rejected “the Defence contention that ‘the Deadline is meaningless and exists in name only’”, thereby underscoring the very importance of the deadline.⁷ The Defence further points out that the Chamber also took note of the Defence’s submissions that now that the trial has started, it must know with certainty the parameters of the Prosecution’s case and the evidence it intends to rely on to prove its case so it can prepare for trial and the cross-examination of upcoming witnesses⁸. This particular acknowledgement of the Defence’s aforementioned argument illustrates the Chamber’s recognition of the utmost importance for the Defence to know with certainty the evidence with which it is confronted.

6. The submission of the Application exacerbates the uncertainty about the contours of the Prosecution case and creates an undue burden on the Defence’s ability to prepare its case in full knowledge of the evidence to be adduced by the Prosecution in support of its case.

⁴ ICC-02/05-01/20-545-Conf and its public redacted version [ICC-02/05-01/20-545-Red](#); ICC-02/05-01/20-668-Conf and its public redacted version [ICC-02/05-01/20-668-Red](#) filed on 5 May 2022; ICC-02/05-01/20-681-Conf and its public redacted version [ICC-02/05-01/20-681-Red](#), dated 10 May 2022.

⁵ ICC-02/05-01/20-541-Conf-Red-Corr and its public redacted version [ICC-02/05-01/20-541-Red2-Corr](#); ICC-02/05-01/20-624-Conf and its public redacted version [ICC-02/05-01/20-624-Red](#); ICC-02/05-01/20-652-Conf and its public redacted version [ICC-02/05-01/20-652-Red](#); ICC-02/05-01/20-662-Conf and its public redacted version [ICC-02/05-01/20-662-Red](#); ICC-02/05-01/20-667-Conf and its public redacted [ICC-02/05-01/20-667-Red](#).

⁶ [ICC-02/05-01/20-T-013-ENG](#), p. 78, 8 September 2021.

⁷ ICC-02/05-01/20-681-Conf and its public redacted version [ICC-02/05-01/20-681-Red](#), dated 10 May 2022, par. 10.

⁸ ICC-02/05-01/20-681-Conf and its public redacted version [ICC-02/05-01/20-681-Red](#), dated 10 May 2022, par. 10.

B. The Prosecution has not provided a “full explanation of the reasons for the delay”

7. The Defence submits that in the Application, the Prosecution has failed to comply with the Chamber’s instruction to provide a “full explanation of the reason for the delay” when submitting requests pursuant to Regulation 35 of the Rules.⁹

8. The Prosecution claims that the evidence of P-1034 is relevant insofar as it pertains to core issues in the case, namely the identity of Mr. Ali Muhammad Ali Abd-Al-Rahman and his alleged leadership role in the course of the attack on Bindisi and surroundings areas on or about 15 and 16 August 2003.¹⁰ The Prosecution claims in particular that it obtained the contact details of P-1034 during the interview of [REDACTED] which took place from [REDACTED] 2021 and explains that the screening of P-1034 took place on [REDACTED] 2021.¹¹ The Prosecution notes that, in the aftermath of the *coup d’état* in Sudan, it made numerous unsuccessful attempts to contact P-1034. Most notably, the Prosecution indicates that it took the decision at this stage to “de-prioritize” P-1034.¹²

9. The Defence submits that the Prosecution cannot use the Regulation 35 of the RoC procedure to reactivate, as it pleases, leads that it wilfully de-prioritized. The Defence points out in particular that the Prosecution’s decision was taken prior to the start of the trial and the expiration of the disclosure deadline and that the lead was left dormant since [REDACTED] 2021 until [REDACTED] 2022, namely for [REDACTED].

10. With regard to the reasons provided to justify the reactivation of the link, the Defence submits that they are misleading. The Prosecution contends that the renewed focus on P-1034 stems from the evidence related to [REDACTED] elicited from [REDACTED] during the cross-examination.¹³ The Defence submits that during this specific part of its cross-examination, [REDACTED] did not provide details

⁹ [ICC-02/05-01/20-T-013-ENG](#), p. 78, 8 September 2021.

¹⁰ ICC-02/05-01/20-713-Conf. Public redacted version not yet available, par.3.

¹¹ ICC-02/05-01/20-713-Conf. Public redacted version not yet available, par. 9.

¹² ICC-02/05-01/20-713-Conf. Public redacted version not yet available, paras 9, 13.

¹³ ICC-02/05-01/20-713-Conf. Public redacted version not yet available, paras 10, 13.

which were not already mentioned in his statement and which could be of relevance to the issue of identification of “Ali Kushayb”:

[REDACTED]¹⁴

By way of comparison, the relevant excerpt of paragraph 27 of his statement reads:

[REDACTED]¹⁵

It is submitted that the Prosecution misleads the Chamber when it claims that the testimony of [REDACTED], which took place on [REDACTED], “placed renewed focus on P-1034” as the information on [REDACTED] was already in its possession since [REDACTED], when the evidence of [REDACTED] was collected. Had the Prosecution deemed it relevant to explore further material related to this incident, it had been at liberty to do so since [REDACTED]. It cannot now and under the misleading pretext of allegedly new information revealed during the cross-examination of another witness do what it decided not to do when it was time to do it.

11. The Defence further notes that the Prosecution invokes the effects of the COVID pandemic and regime change in Sudan as factors impeding its ability to conduct investigative activities in Sudan, as well as its ability to contact actual and potential witnesses, as justifying an extension of the time limit for disclosure pursuant to Regulation 35 of the RoC. This claim is without merit as the Prosecution plainly indicates in its Application that the “lead was [...] de-prioritised” in November 2021.¹⁶ Further the Defence recalls that the Prosecution was able to provide [REDACTED].¹⁷

12. Mindful of the Chamber’s ruling on the absence of a “cut-off” date for the Prosecution’s investigations¹⁸, the Defence underscores its position that the right of the Prosecution to continue its investigations after the confirmation of charges is not without limit¹⁹. In particular, the Defence submits that the permissibility of

¹⁴ ICC-02/05-01/20-T-039-CONF-ENG ET, 10 May 2022, p. 46, lines 4-20.

¹⁵ DAR-OTP-0222-0312 at 0319, par. 27.

¹⁶ ICC-02/05-01/20-713-Conf. Public redacted version not yet available, paras 9, 13.

¹⁷ ICC-02/05-01/20-T-025-CONF-ENG ET, p. 37, lines 21-25, p. 38, lines 1-10.

¹⁸ ICC-02/05-01/20-668-Conf and its public redacted version [ICC-02/05-01/20-668-Red](#) filed on 5 May 2022, par. 19.

¹⁹ ICC-02/05-01/20-544-Conf and its public redacted version [ICC-02/05-01/20-544-Red](#), par. 8.

investigations at this stage do not amount to an absolute right to reactivate dormant leads to seek to refine and strengthen its case through the collection of new evidence, only after realising that some material already in its possession is explored during the Defence's cross-examination of witnesses.

C. The addition of new witnesses negatively impacts on the fair trial rights of Mr. Abd-Al-Rahman

13. The Defence takes issue with the Prosecution's submission that, should the Chamber grant the Application, the appearance of the witness later in the trial would mitigate any potential prejudice to the Accused.²⁰

14. The Defence takes note of the Chamber's finding on a similar argument raised by the Prosecution in its previous application submitted pursuant to Regulation 35 of the RoC.²¹ However, the Defence respectfully submits that the factual foundations of this conclusion is swiftly eroding. The Prosecution's case is over three months old and the trial is progressing apace. To date, the Chamber has heard the evidence of 22 witnesses out of the [REDACTED] *viva voce* and 68(3) witnesses on [REDACTED]. What might reasonably have been presented as a late appearance a few months ago can no longer be so presented in light of the brisk pace of the trial. And the pace is likely only to accelerate as the mode of testimony of more and more witnesses is converted from *viva voce* to Rule 68(3). As the tail end of the trial looms, the mitigating effect of calling new evidence later reduces.

15. It is therefore the Defence's position that addition of new witnesses at this stage of the proceedings would strongly impact the fair trial rights of Mr. Muhammad Ali Abd-Al-Rahman enshrined in Art. 64(2) and 67 of the Rome Statute, and more particularly its right to have adequate time for the preparation of its Defence.

²⁰ ICC-02/05-01/20-713-Conf. Public redacted version not yet available, par. 22. [ICC-02/05-01/20-T-013-ENG](#), p. 78, 8 September 2021.

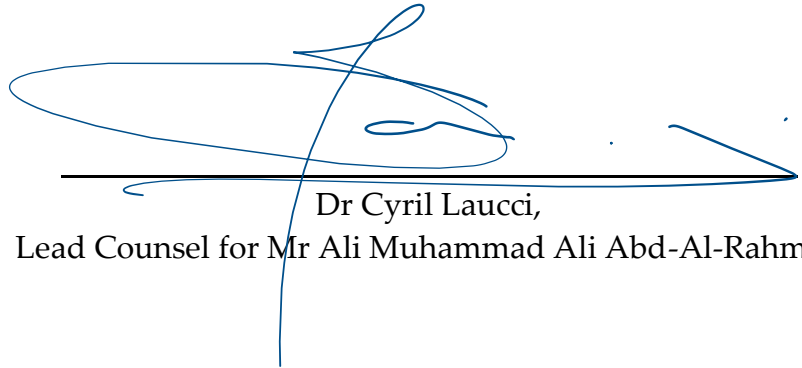
²¹ ICC-02/05-01/20-681-Conf and its public redacted version [ICC-02/05-01/20-681-Red](#), dated 10 May 2022, par. 16.

D. The addition of new witnesses in reaction to information allegedly revealed during the cross-examination of another witness would be in breach of the Defence's right to cross-examine witnesses pursuant to Article 67(1)(e) of the Statute

16. More specifically, the fact that the Application is essentially based on the need to provide new evidence in order to address a new aspect which allegedly came to light during the cross-examination of another witness makes that granting the Application would be in breach of the Defence's right to cross-examine witnesses pursuant to Article 67(1)(e) of the Rome Statute. When cross-examining the Prosecution's witnesses, the Defence needs to be confident that it is informed and aware of the full parameters of the Prosecution case. Should the OTP be allowed to vary those parameters to adapt to the outcome of the Defence's cross-examination of its witnesses, the cross-examination of witnesses would become an impossible exercise and would be deprived of the essential of its purposes. Being informed of the exact and final parameters of the case is a precondition to the exercise of the Defence's right to cross-examine witnesses pursuant to Article 67(1)(e) of the Statute, which the Application tries to prevent.

17. The OTP needs to understand that, at some point, its case shall be complete and accept the impact of the Defence cross-examination of its witnesses without trying to compensate by the addition of new witnesses. Should the Chamber grant the Application, this would open the door to an avalanche of new applications, each time the OTP is not happy with the way the cross-examination of its witnesses turned. In addition to compromising the Defence's right to cross-examine witnesses efficiently, this would also be irreconcilable with any notion of judicial economy and expeditiousness of the proceedings.

FOR THE FOREGOING REASONS, THE DEFENCE REQUESTS THAT THE CHAMBER DISMISS the Application in its entirety.



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 20th day of July 2022 at The Hague, The Netherlands