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Date: **17 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”)**

**Public**

**Public Redacted Version of “Corrected Version of ‘Prosecution’s request to postpone the confirmation hearing’”, 17 September 2020**

**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 Prosecution respectfully requests, under rule 121(7) of the Rules of Procedure and Evidence, that Pre-Trial Chamber II (“Chamber”)<sup>1</sup> postpone the date of the confirmation of charges hearing from 7 December 2020 to 1 June 2021. It further requests that the Chamber extend the deadline for the submission of any applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence from 11 September 2020 to 1 March 2021.<sup>2</sup>

2. At the outset, the Prosecution wishes to convey to the Chamber its sincere regret regarding the lateness of its request to vacate the 11 September 2020 deadline,<sup>3</sup> and its delay in filing a confidential redacted version of the request for the benefit of the Defence.<sup>4</sup> The Prosecution will do its utmost to prevent such a situation from being repeated.<sup>5</sup> With respect to the current request, which is classified as confidential, *ex parte*, available to the Prosecution only, the Prosecution will file a confidential redacted version simultaneously with the request, and a public redacted version as soon as practicable thereafter.

3. As the Chamber is aware, following a comprehensive assessment of the relevant factors, it became apparent to the Prosecution that it would not be able to adequately discharge its statutory duties vis-à-vis the Defence, or victims and witnesses, in order to be ready to proceed to a confirmation hearing on 7 December 2020.<sup>6</sup> Nonetheless, the Prosecution is doing its best and striving to make progress in preparation for the confirmation hearing as scheduled.

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<sup>1</sup> The Prosecution addresses this request to the full Chamber given that the “Order in relation to the ‘Prosecution’s request for an urgent extension of time’” was issued by the full Chamber.

<sup>2</sup> ICC-02/05-01/20-116 (“Order on disclosure and related matters”).

<sup>3</sup> ICC-02/05-01/20-149-Conf-Exp (“Prosecution’s urgent request for an extension of time”).

<sup>4</sup> The confidential and public redacted versions were filed urgently on 10 September 2020, following the Chamber’s order of the same date. *See* ICC-02/05-01/20-149-Conf-Red; ICC-02/05-01/20-149-Red2.

<sup>5</sup> *See* ICC-02/05-01/20-151, para. 5.

<sup>6</sup> ICC-02/05-01/20-103-Red, para. 60 (“Observations”).

4. A period of more than 13 years elapsed between the issuance of the first arrest warrant against Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”)<sup>7</sup> and his initial appearance before the Court. This length of time is unprecedented at the Court. The Prosecution is now reviving a case which has been largely dormant for well over a decade. Since 2007, limited investigative activities have been carried out in relation to this case within the constraints of the Prosecution’s restricted resources and the total lack of cooperation with the Government of Sudan (“GoS”). The Prosecution is now in the early stages of building a relationship with the GoS to allow for vital investigative activities in the territory of Sudan for the first time since 2007. Furthermore, the Prosecution’s work is significantly impeded by the ongoing COVID-19 pandemic, in particular, in relation to the assessment and implementation of witness protection measures, and the conduct of additional investigations that will assist the Chamber to determine the truth in this case.

5. In the *Ongwen* and *Ntaganda* cases, the period of time between the issuance of the public arrest warrant and the initial appearance of the suspect before the Court was more than nine years, and almost five years, respectively. In *Ntaganda*, the period of time between the initial appearance and the confirmation hearing was 321 days (10 months, 15 days), while in *Ongwen*, this period was 360 days (11 months, 26 days).

6. Similarly, postponement of the confirmation hearing is necessary and justified to enable the Prosecution to comply with its statutory duties in the particular circumstances of this case. Specifically, the Prosecution seeks postponement of the confirmation hearing to be able to:

- a. Carry out additional investigations in order to comply with its duty under article 54(1)(a) of the Rome Statute to establish the truth, and to investigate incriminating and exonerating circumstances equally;

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<sup>7</sup> ICC-02/05-01/20-18-Corr (“First Arrest Warrant”).

- b. Review all of the material in its possession to ensure that it complies with its duty to disclose to the Defence any evidence falling under rule 77 of the Rules or article 67(2) of the Statute;
- c. Re-contact witnesses, conduct individual risk assessments, and implement any necessary protection measures in order to comply with its duty under article 68(1) to protect victims and witnesses;
- d. Translate and, where necessary, transcribe witness statements in order to comply with its duty under rule 76(3) to make statements of Prosecution witnesses available in a language which the accused fully understands and speaks; and
- e. Review material subject to articles 54(3)(e), 72 and 93, and seek consent for the lifting of conditions from the relevant information providers in relation to those items identified as requiring disclosure to the Defence under rule 77 or article 67(2).

7. The requested postponement will preserve the overall fairness, manageability and expeditiousness of the proceedings, and will not cause any prejudice to the Defence. To the contrary, the fulfilment of the Prosecutor's statutory duties, in particular, as they relate to the comprehensive and timely disclosure of evidence, the protection of victims and witnesses, and the conduct of investigations aimed at establishing the truth, is in the interests of justice.

8. Moreover, the postponement of the confirmation hearing would not cause undue delay under article 67(1)(c), nor would it cause Mr Abd-Al-Rahman to be detained for an unreasonable period prior to trial within the meaning of article 60(4) of the Statute.

## II. CLASSIFICATION

9. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this request is classified as confidential, *ex parte*, because it contains sensitive information pertaining

to the Prosecution's ongoing investigation, the security and protection of witnesses, and cooperation issues. A confidential redacted version will be filed simultaneously with this request and a public redacted version as soon as practicable thereafter.

### III. SUBMISSIONS

10. Under article 61(1) of the Statute, within a reasonable time after the person's surrender to the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The person has the right to be tried without undue delay,<sup>8</sup> and not to be detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.<sup>9</sup>

11. Under rule 121(7) of the Rules, the Prosecutor may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing. Any such request must be assessed by the Chamber "on the basis of the reasons advanced and in light of the circumstances of each case".<sup>10</sup> In assessing such a request, the Chamber "must ensure the overall fairness and expeditiousness of the proceedings bearing in mind the competing interests at stake".<sup>11</sup>

12. The Chambers Practice Manual recommends a typical target date for the confirmation hearing of around four to six months from the first appearance of the suspect,<sup>12</sup> but recognises that "this depends on the circumstances of each particular case".<sup>13</sup> Of particular relevance to the present case, it recommends the following:

[I]t may typically occur again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest, reviving a case that would have been dormant for long. In these

<sup>8</sup> Article 67(1)(c) of the Statute.

<sup>9</sup> Article 60(4) of the Statute.

<sup>10</sup> ICC-02/04-01/15-206, para. 25 ("*Ongwen* Postponement Decision"). *See also* ICC-01/14-01/18-199, para. 30 ("*Yekatom & Ngaiissona* Postponement Decision"); ICC-01/04-02/06-73, para. 18 ("*Ntaganda* Postponement Decision").

<sup>11</sup> *Yekatom & Ngaiissona* Postponement Decision, para. 30; *Ongwen* Postponement Decision, para. 25; *Ntaganda* Postponement Decision, para. 13.

<sup>12</sup> [Chambers Practice Manual](#), para. 12.

<sup>13</sup> *Chambers Practice Manual*, para. 13 ("In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court.").

circumstances, giving more time to the Prosecutor in order to properly prepare the case should be considered.<sup>14</sup>

13. In both *Ntaganda*<sup>15</sup> and *Ongwen*,<sup>16</sup> the length of time that the suspects were fugitives prior to their arrest or surrender to the Court was a key consideration in the Pre-Trial Chambers' decisions to postpone the confirmation hearings in those cases.

14. Furthermore, in both *Ntaganda* and *Ongwen*, the Prosecution benefitted from excellent cooperation from the relevant States Parties and good access to the relevant territories for the purposes of its investigations. By contrast, in the present case, since 2007 until very recently, the former GoS was overtly hostile to the Prosecution.<sup>17</sup> The Prosecution is now working to establish effective cooperation with the GoS and is planning its first mission to Sudan since 2007, as detailed further below.<sup>18</sup>

15. In the present circumstances, especially given that the case was effectively dormant for more than 13 years while Mr Abd-Al-Rahman evaded arrest, a postponement of the date for the confirmation hearing to 1 June 2021 is necessary and justified in order to allow the Prosecution a reasonable amount of time to discharge its statutory duties, as detailed below. In the particular circumstances of this case, the postponement will promote the overall fairness and expeditiousness of the proceedings.

**Further investigation is necessary for the Prosecution to discharge its duty to establish the truth**

16. The Prosecution has a duty, under article 54(1)(a) of the Statute, to carry out a comprehensive investigation in order to establish the truth, and to investigate incriminating and exonerating circumstances equally.

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<sup>14</sup> Chambers Practice Manual, para. 13 (“Indeed, in certain circumstances, allowing more time for the parties’ preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.”).

<sup>15</sup> *Ntaganda* Postponement Decision, paras. 14-18, 20.

<sup>16</sup> *Ongwen* Postponement Decision, paras. 26, 27.

<sup>17</sup> ICC-02/05-01/20-64, p. 3-7; ICC-02/05-01/20-6-Red2, para. 91.

<sup>18</sup> *See below*, para. 18.

17. Further investigation is absolutely necessary in this case to replace existing evidence that has been lost or degraded due to the passage of time, and to obtain additional evidence.<sup>19</sup> Significantly, the Prosecution is planning to carry out vital investigative activities in the territory of Sudan. To that end, the Prosecution has been working to develop a cooperation relationship with the GoS, following 13 years of hostility and complete non-cooperation with the previous government.

18. Until recently, although high-level engagement with the GoS had been initiated, COVID-19 travel restrictions, as well as the unstable political environment and security situation, had combined negatively to impact the prospect of travel to Khartoum.<sup>20</sup> The signing of a peace agreement between the GoS and a coalition of armed groups on 31 August 2020, which provides for cooperation with the ICC, has significantly enhanced the prospects for developing a meaningful and productive relationship with the GoS.<sup>21</sup> [REDACTED]<sup>22</sup> [REDACTED].

19. Access to the territory of Sudan is critical for the Prosecution to directly interact, for the first time, with the local communities affected by Mr Abd-Al-Rahman's alleged crimes, and also to [REDACTED]<sup>23</sup> [REDACTED].

20. In addition, a large number of persons have already contacted the Prosecution since Mr Abd-Al-Rahman's surrender stating that they, or persons they know, have information relevant to its investigation. Through these contacts, and other investigative work, the Prosecution has so far identified [REDACTED]. The Prosecution anticipates that it will receive an even greater volume of investigative leads once it has gained access to the territory of Sudan and the affected communities.

21. In parallel, the Prosecution is re-contacting its current witnesses, many of whom were interviewed more than 13 years ago, to establish their continued

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<sup>19</sup> The Prosecution is already aware that [REDACTED], and anticipates that other witnesses may also have become unavailable due to other factors.

<sup>20</sup> Observations, para. 17.

<sup>21</sup> Prosecution's urgent request for an extension of time, paras. 17-18; ICC-02/05-01/20-149-Anx.

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].



willingness and availability to give evidence in this case.<sup>24</sup> It is reasonable and prudent for the Prosecution to require time to undertake this step given that the case has been largely dormant since 2007—the longest period of inactivity of any case before the Court to date.<sup>25</sup>

22. So far, the Prosecution has contacted [REDACTED] of its tentative list of 119 witnesses. Given the passage of time, the contact details of some witnesses are no longer valid, which has hampered this process. To obtain current contact details, the Prosecution must make enquiries through third persons, States and/or external agencies. The response time for some agencies can be extremely slow. In addition, such enquiries must be handled carefully so as not to unnecessarily expose the identity of the individual as an ICC witness. Notwithstanding these challenges, the Prosecution anticipates that it will be able to finish re-contacting the witnesses on its tentative list in approximately six weeks.

23. In the present circumstances, further investigation following Mr Abd-Al-Rahman's surrender is necessary and is a valid ground for postponing the confirmation hearing. As the Appeals Chamber held, "[w]here the Prosecutor requires more time to complete the investigation, rule 121(7) [...] permits [her] to seek a postponement of the confirmation of charges hearing".<sup>26</sup>

24. Since Mr Abd-Al-Rahman's surrender, the Prosecution has been enlarging its investigation team for the purpose of carrying out these additional investigations. In the circumstances, it is reasonable that the Prosecution required time to do so. As the Single Judge held in *Ntaganda*, and quoted with approval in *Ongwen*, "[w]here the suspect is evading justice for many years, it is neither possible nor reasonable to impose on the Prosecutor a permanent stand-by availability of the teams for years".<sup>27</sup>

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<sup>24</sup> Given the passage of time, the Prosecution is also re-establishing its relationships with intermediaries, including individuals and organisations, and establishing new relationships, as necessary.

<sup>25</sup> *Ongwen* Postponement Decision, para. 31 (In which the Single Judge noted, "Witnesses were interviewed about ten years ago; they may no longer wish to cooperate with the Court or may have died. It is reasonable and prudent on the part of the Prosecutor to request additional time to contact and re-interview those witnesses and to assess anew their security situation.").

<sup>26</sup> ICC-01/04-01/10-514, para. 44 ("Mbarushimana Confirmation of Charges Appeals Judgment").

<sup>27</sup> *Ntaganda* Postponement Decision, para. 35; *Ongwen* Postponement Decision, para. 26.

25. Finally, the situation with respect to the COVID-19 pandemic, and the resulting remote working arrangements and travel restrictions, continues to severely impact the Prosecution's ability to conduct investigative interviews and to collect additional evidence.<sup>28</sup> A significant number of the potential witnesses identified by the Prosecution reside in, or would be required to, travel to countries where the Prosecution has access difficulties due to COVID-19 travel restrictions and quarantine measures.<sup>29</sup> For practical and security reasons, as well as issues relating to witness vulnerability, remote interviews are assessed as not feasible for most of these individuals.<sup>30</sup> COVID-19 restrictions also impact the work of external agencies [REDACTED].<sup>31</sup>

26. Should the COVID-19 pandemic continue to restrict the travel necessary for investigations, the Prosecution will continue to explore alternative methods for conducting the most important parts of its investigation, including through expanding and developing the use of tools and techniques to obtain evidence in high risk environments.

27. The Prosecution submits that postponement of the confirmation hearing to the proposed date of 1 June 2021 will allow it to carry out the additional investigations required in the case against Mr Abd-Al-Rahman largely prior to the confirmation hearing.<sup>32</sup>

**The Prosecution must conduct a comprehensive disclosure review of the evidence in its collection relating to Mr Abd-Al-Rahman for the first time in 13 years**

28. There are currently 33,889 items (171,555 pages) in the Prosecution's Ringtail database relating to the Darfur situation.<sup>33</sup> In addition, approximately 4,000 items

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<sup>28</sup> Observations, para. 15.

<sup>29</sup> To facilitate its investigative missions, the Prosecution has been working to agree quarantine exemptions for Prosecution representatives with relevant States in relation to specific missions. [REDACTED]. These exemptions would not, however, apply to witnesses travelling from third countries to meet with the Prosecution.

<sup>30</sup> Observations, para. 15.

<sup>31</sup> Observations, para. 16.

<sup>32</sup> The Appeals Chamber has stated that "the investigation should largely be completed at the stage of the confirmation of charges hearing". *See Mbarushimana Confirmation of Charges Appeals Judgment*, para. 44.

<sup>33</sup> Additional items have been registered in Ringtail since the Observations were filed on 23 July 2020, at which time there were 33,215 items (169,886 pages) in the database. *See Observations*, para. 4.

will soon be registered in Ringtail following a recent review of a second database for relevant material.<sup>34</sup> Approximately 401 items in the current evidence collection are audio/video material.<sup>35</sup> Within the 33,889 items, there are approximately 10,160 items (31,837 pages) that are categorised as “not electronically searchable” and a number of these items are handwritten.

29. No litigation that would have triggered disclosure took place during the 13 years that Mr Abd-Al-Rahman chose to remain a fugitive. In these circumstances, and unable to anticipate which of the five suspects in the Darfur situation might be transferred to the Court, the Prosecution was not able to dedicate its limited resources to a highly time-consuming and labour-intensive disclosure review process for Mr Abd-Al-Rahman.<sup>36</sup> As the Single Judge held in *Ongwen*:

[I]t could not have been reasonably expected that the Prosecutor process the evidence and prepare requests for protective measures in the abstract as long as [the suspect] remained a fugitive.<sup>37</sup>

30. In addition, the recent severance of Mr Abd-Al-Rahman’s case requires that the Prosecution assess the evidence in light of its new contours,<sup>38</sup> in a more individualised manner.

31. Therefore, to comply with its statutory duties, the Prosecution is now reviewing its entire evidence collection in order to finalise its list of witnesses under rule 76(2), and to identify all material falling under rule 77 or article 67(2).

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<sup>34</sup> Observations, para. 4. The Prosecution is working hard to finalise, as soon as practicable, the list of items to be registered in Ringtail as a result of this review. This comprehensive and methodical process is complicated by the very large volume of material collected over the lifespan of the Darfur situation in relation to all suspects.

<sup>35</sup> Observations, para. 4, fn. 2.

<sup>36</sup> Observations, para. 6. *See Ntaganda* Postponement Decision, para. 41 (“[T]he Single Judge cannot disregard the continuous increase in the number of situations and cases before the Court. Some of these situations and cases are more active than others depending on, *inter alia*, whether or not suspects have been apprehended or appeared voluntarily. In these circumstances, there is a need to prioritise these active cases which require prompt action and to manage them with the staff available.”); *Ongwen* Postponement Decision, para. 26 (“Given this situation, and mindful of the ever-growing workload at the Court, the Single Judge recognizes the compelling need for the Prosecutor to prioritize and to direct her efforts and resources to other activities of her Office, more specifically preliminary examinations, investigations and prosecutions.”).

<sup>37</sup> *Ongwen* Postponement Decision, para. 27.

<sup>38</sup> *See Ongwen* Postponement Decision, para. 27.

32. Disclosure review guidelines and templates tailored to the case against Mr Abd-Al-Rahman have been prepared and this review is underway.<sup>39</sup> The first three packages, containing a total of 852 items (6,288 pages) of evidence, were disclosed to the Defence on 31 August 2020.<sup>40</sup> The Prosecution will continue to disclose relevant items on a monthly basis.<sup>41</sup>

33. Based on previous experience, the Prosecution estimates that one reviewer is able to review approximately 50 pages per day, on average. Based on the current number of pages in the Ringtail database,<sup>42</sup> it would take ten full-time reviewers approximately 340 days to review all items. Additional time is required in relation to the 401 audio/video items and the handwritten documents in the collection, which are particularly time-consuming to review.<sup>43</sup> Furthermore, identifying and applying standard and non-standard redactions, and implementing pseudonyms, is a time-consuming task requiring at least two layers of review, which also slows the disclosure process.

34. The Prosecution team assigned to this case currently has a small number of disclosure reviewers, who are also required to work on other essential tasks. In recent weeks, several staff members have been reassigned to the team, but additional reassignment and/or recruitment of personnel is necessary to reach a sufficient staffing level to manage the high workload. Reassignment of staff to this case presents challenges given that the Prosecution's already severely limited resources are currently stretched across several active preliminary examinations, investigations and trials. In addition, recruitment of new staff, including interns and visiting

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<sup>39</sup> These guidelines and templates are based on standard documents previously developed by the Prosecution, but they must be tailored carefully to the individual circumstances of each case. In the current circumstances, it is reasonable that the Prosecution completed this work shortly after Mr Abd-Al-Rahman's surrender to the Court – contrary to the Defence's submission that this demonstrates a "*niveau stupéfiant d'impréparation*". See Defence Observations, para. 15.

<sup>40</sup> ICC-02/05-01/20-146, para. 5 ("Second Progress Report"). These first three disclosure packages comprised items from publically available sources that could, following initial review, be immediately disclosed to the Defence without redactions to their content. See Observations, paras. 23-24.

<sup>41</sup> The Prosecution made this commitment in its first and second progress reports on the evidence review, translation and disclosure process. See ICC-02/05-01/20-131, para. 5 ("First Progress Report"); Second Progress Report, para. 5.

<sup>42</sup> See above, para. 28 (171,555 pages).

<sup>43</sup> See above, para. 28.

professionals, has faced unavoidable delays in the midst of the ongoing COVID-19 pandemic.<sup>44</sup>

35. The Prosecution respectfully submits that postponement of the confirmation hearing to the proposed date of 1 June 2021 will allow the necessary time for the Prosecution to discharge its disclosure duties under rule 77 and article 67(2) largely prior to confirmation.

36. Given the size of its evidence collection and the resources currently available to the Prosecution, discharging its disclosure obligations within the proposed timeframe will be very challenging. Nonetheless, the Prosecution is committed to obtaining the resources necessary and to make every possible effort to be prepared for a confirmation hearing on 1 June 2021.

**The Prosecution must carry out individual risk assessments of its witnesses and implement the necessary protection measures**

37. Article 68(1) obliges both the Court and the Prosecution to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

38. Prior to disclosing a witness' identity, the Prosecution must re-contact the witness and obtain up-to-date information in order to prepare an individual risk assessment ("IRA"). This process must take place reasonably close in time to the planned disclosure of the witness' identity so that changes in the personal circumstances of the witness and their family members can be taken into account, including changed circumstances in the location(s) where they reside. It must also occur after the arrest or surrender of the suspect, since this may negatively impact the security situation of witnesses and their family members.<sup>45</sup>

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<sup>44</sup> The Prosecution notes that the Defence has faced similar challenges. *See* Defence Observations, para. 11.

<sup>45</sup> *Ntaganda* Postponement Decision, para. 39 (The Single Judge agreed with the Prosecution that the process of contacting witnesses and securing their protection "can only realistically be undertaken at the moment the suspect is detained and faces the prospect of trial and conviction.").

39. The Protection Strategies Unit (“PSU”) is working closely with Prosecution investigators in re-contacting witnesses. [REDACTED] witnesses have been contacted to date, as detailed above.<sup>46</sup>

40. The PSU is in the process of preparing IRAs for the Prosecution’s tentative list of 119 witnesses. [REDACTED].<sup>47</sup> To date, the PSU has prepared [REDACTED] witnesses can be disclosed.<sup>48</sup>

41. IRAs will also be required for witnesses that the Prosecution will inevitably add to its current witness list prior to the confirmation hearing, including as a result of its ongoing investigation. Furthermore, IRAs will also be required for any of the [REDACTED] witnesses in the Darfur situation who are not included on the Prosecution’s tentative witness list, but whose material is subject to disclosure pursuant to article 67(2) or rule 77.<sup>49</sup>

42. The Prosecution has recently informed the Chamber of the specific challenges the PSU faces in assessing risks to witnesses [REDACTED],<sup>50</sup> and witnesses [REDACTED] but whose family members [REDACTED].<sup>51</sup> It also reported on recent positive developments on the ground, which have impacted the overall risk environment and the Prosecution’s ability to gather information and implement risk mitigation measures.<sup>52</sup> The Prosecution has recently secured a specific exemption from travel restrictions that has enabled it to [REDACTED], which will better inform its initial determinations on witness security.<sup>53</sup>

43. Although these positive developments could change its assessment in the near future, the PSU has initially determined that applications for authorisation of the non-disclosure of witnesses’ identities will be necessary for at least [REDACTED]

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<sup>46</sup> See above, para. 22.

<sup>47</sup> Observations, para. 35.

<sup>48</sup> [REDACTED].

<sup>49</sup> Observations, para. 26.

<sup>50</sup> Prosecution’s urgent request for an extension of time, para. 14.

<sup>51</sup> Prosecution’s urgent request for an extension of time, paras. 15-16.

<sup>52</sup> Prosecution’s urgent request for an extension of time, paras. 17-21.

<sup>53</sup> Prosecution’s urgent request for an extension of time, paras. 20-21.

witnesses.<sup>54</sup> [REDACTED].<sup>55</sup> On the basis of the information currently available, the Prosecution expects to be in a position to submit applications to the Chamber in relation to these [REDACTED] witnesses in November 2020, following the PSU's [REDACTED], and thereafter on a rolling basis.

44. The Prosecution cannot determine conclusively how many additional witnesses will require applications for the authorisation of the non-disclosure of their identities until all IRAs are completed. Its proposed deadline of 1 March 2021 will require a substantial effort by the Prosecution to meet, given its current estimate [REDACTED] for the completion of all IRAs. However, the Prosecution assesses that this date, which is approximately three months prior to its proposed date for the confirmation hearing of 1 June 2021, will provide sufficient time for the Chamber to decide all such applications, and for the Prosecution to subsequently disclose the relevant items, sufficiently in advance of the confirmation hearing to allow the Defence time to adequately prepare.

45. Any protection measures assessed as necessary once an IRA has been prepared must be implemented before the witness' identity can be disclosed. This includes any referral to the VWS for protection advice. [REDACTED].<sup>56</sup> [REDACTED]. As noted in the Observations, the exact number of witnesses to be referred, and timelines for implementation of protection measures, will depend on a variety of factors.<sup>57</sup>

46. Finally, as detailed in the Observations, COVID-19 related travel and contact restrictions continue to reduce and slow the Prosecution's [REDACTED].<sup>58</sup> Since the Observations were submitted, a number of States imposed, often at very short notice, further travel and quarantine restrictions in relation to States experiencing significant numbers of COVID-19 infections, including The Netherlands. Nevertheless,

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<sup>54</sup> [REDACTED].

<sup>55</sup> [REDACTED].

<sup>56</sup> [REDACTED].

<sup>57</sup> Observations, para. 46 (listing the relevant factors).

<sup>58</sup> Observations, paras. 11-14.

[REDACTED] is a positive development in this respect, and the Prosecution will continue to monitor and assess the situation.

47. In this regard, the privileges and immunities pursuant to the Headquarters Agreement between the ICC and the Host State (“Headquarters Agreement”),<sup>59</sup> and the Agreement on the Privileges and Immunities of the ICC (“Agreement on Privileges and Immunities”),<sup>60</sup> do not mitigate the impact of the COVID-19 related challenges that the Prosecution faces, as set out in the Observations.<sup>61</sup>

48. In particular, the “exemption from immigration restrictions or alien registration” provided by the Headquarters Agreement and the Agreement on Privileges and Immunities for OTP staff, or witnesses travelling to The Hague for “purposes of their testimony” before the Court,<sup>62</sup> has no bearing on the COVID-19 health and safety restrictions that States party to these agreements may place on travel and movement. Furthermore, neither of these agreements relates to the ability of witnesses to travel to third States for the purpose of an interview or a security assessment.

### **The Prosecution must translate large numbers of witness statements for disclosure**

49. Rule 76(3) of the Rules requires that statements of Prosecution witnesses be made available in a language which the accused fully understands and speaks. According to Mr Abd-Al-Rahman, the language he fully understands and speaks is Arabic.<sup>63</sup>

50. The Prosecution has identified approximately 119 witnesses on which it intends to rely at the confirmation hearing, who have provided 130 statements and

<sup>59</sup> See [Headquarters Agreement between the International Criminal Court and the Host State](#), ICC-BD/04-01-08, 1 March 2008 (“Headquarters Agreement”).

<sup>60</sup> See [Agreement on the Privileges and Immunities of the International Criminal Court](#), ICC-ASP/1/3, Adopted by the Assembly of States Parties, First Session, New York, 3-10 September 2002 (“Agreement on Privileges and Immunities”).

<sup>61</sup> Observations, paras. 11-17. The Defence has not demonstrated how the Headquarters Agreement or the Agreement on Privileges and Immunities would mitigate the COVID-19 related challenges set out in the Observations. See Defence Observations, para. 16.

<sup>62</sup> Headquarters Agreement, articles 18(1)(f) and 26(1)(f); Agreement on Privileges and Immunities, articles 16(1)(f), 19(1)(f) and 19(2).

<sup>63</sup> ICC-02/05-01/20-T-001-ENG, p. 20, l. 16-18; Defence Observations, para. 20. The Prosecution does not contest that the language Mr Abd-Al-Rahman fully understand and speaks is Arabic.



transcripts.<sup>64</sup> The original language of the written statements is English, while the transcripts of recorded interviews are in Arabic and English.<sup>65</sup> Written statements, totalling 3,205 pages, still require translation from English to Arabic. Of these, 1,275 pages have now been translated in draft form and a further 1,930 pages still require translation. All draft translations, once prepared, will require secondary review prior to finalisation.<sup>66</sup>

51. When the Observations were filed on 23 July 2020, the Prosecution's Language Services Unit ("LSU") estimated that a team of five translators and one reviser, working full time, would take approximately 10 months to complete the translation of the written statements referred to above.<sup>67</sup> The LSU does not currently have these resources and has been working to procure them on an expedited basis.<sup>68</sup>

52. The LSU's estimate also does not include the translation and transcription of any new rule 76(3) witness statements that will be obtained as a result of the Prosecution's ongoing investigations. This estimate also does not factor in the additional translation burden on the Prosecution in relation to material falling outside of rule 76(3), including, in particular, approximately 293 items (2,307 pages) of Arabic language material that the Prosecution has already identified as requiring translation into one of the working languages of the Court for the purposes of the confirmation hearing.

53. The Prosecution recognises that the LSU's estimate of 10 months from 23 July 2020 to translate the existing written statements into Arabic is not sufficient to meet

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<sup>64</sup> Observations, para. 29.

<sup>65</sup> Observations, para. 31. In addition, the Prosecution has identified 45 hours, 28 minutes of recorded interviews in English and Arabic, for which transcription into English has been completed but transcription into Arabic is still required. Based on the LSU's current transcription resources, the Prosecution does not assess that this will affect the 10 month estimate previously provided.

<sup>66</sup> As at 23 July 2020, 1,198 pages of witness statements had been translated from English to Arabic in draft form. A further 77 pages have been translated since that time. *See* Observations, paras. 31-32; Second Progress Report, para. 4. The LSU's current staffing level and its prioritisation of work to meet current deadlines has not yet allowed it to carry out secondary review of translations as part of this process.

<sup>67</sup> Observations, para. 33.

<sup>68</sup> The LSU currently has three staff translators (one working from Arabic into English, one from English into Arabic, and one in both directions). One of these translators also provides Fur translation and interpretation when required. The LSU has contracted six external freelance translators and is seeking to obtain additional external translation resources. In addition, the LSU's Arabic language team is also required to carry out translation work for the Mali, Libya and Central African Republic II situations.

the disclosure deadlines in relation to a confirmation hearing scheduled on 1 June 2021. Furthermore, as set out above, the LSU will also be required to translate additional material. Clearly, additional resources will be required to enable the LSU to complete its work within the proposed timeframe.

54. A confirmation hearing on the proposed date of 1 June 2021 will present a significant challenge in relation to the timely completion of the requisite translations, but the Prosecution is confident it will be able to secure the necessary translation resources to ensure it can meet the requisite disclosure deadline.<sup>69</sup>

**The Prosecution must submit requests to relevant information providers for consent to lift restrictions on disclosure of evidence subject to articles 54(3)(e), 72 and 93 of the Statute**

55. In its Observations, the Prosecution advised that it possesses approximately 3,754 items (14,901 pages) of material affected by agreements in accordance with articles 54(3)(e), 72 and 93 of the Statute.<sup>70</sup> It also advised that it had begun reviewing this material before Mr Abd-Al-Rahman's surrender, and it had sent a lifting request pertaining to a first batch of documents to the relevant information provider,<sup>71</sup> whose consent is still pending.

56. As also advised, the Prosecution is prioritising its review of the remaining documents to identify those relating to the allegations against Mr Abd-Al-Rahman and, in particular, any material falling under rule 77 or article 67(2).<sup>72</sup> Since 23 July 2020, the Prosecution has reviewed a total of 465 of these documents (1,949 pages).<sup>73</sup> The Prosecution is mindful of its statutory duty to disclose any such material to Mr Abd-Al-Rahman as soon as possible. As previously advised, it will send lifting

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<sup>69</sup> This assumes that translations would be required no sooner than 30 days prior to a confirmation hearing on 1 June 2021, the minimum time necessary under rule 121(3) of the Rules.

<sup>70</sup> Observations, para. 39.

<sup>71</sup> Observations, para. 39.

<sup>72</sup> Observations, para. 40.

<sup>73</sup> See First Progress Report, para. 3 (reporting 421 items (1,819 pages)); ICC-02/05/01/20-146, para. 3 (reporting 44 items (130 pages)).

requests to the relevant information providers, on a rolling basis, as such documents are identified.<sup>74</sup>

57. Nonetheless, the speed at which restrictions can be lifted will depend on how quickly the external information providers are able to respond. To lift restrictions pursuant to these agreements, some information providers may also require notification and consultation prior to disclosure, for example, in relation to any protective measures that need to be implemented. Such requirements could further delay the disclosure process.

58. Given the volume of material still subject to confidentiality restrictions, postponement of the confirmation hearing to the proposed date of 1 June 2021 is necessary to give the Prosecution additional time to have such restrictions lifted, so that it may take all possible steps to comply with its disclosure duties under rule 77 and article 67(2) prior to the confirmation hearing.

#### IV. CONCLUSION

59. The Prosecution respectfully requests postponement of the confirmation hearing to 1 June 2021 in order to have sufficient time to discharge its statutory duties in the case against Mr Abd-Al-Rahman. The fulfilment of those duties is in the interests of justice, since it safeguards the comprehensive and timely disclosure of evidence, the protection of victims and witnesses, and the conduct of investigations aimed at establishing the truth. The requested postponement of confirmation would preserve the overall fairness and expeditiousness of the proceedings, and would not occasion prejudice to Mr Abd-Al-Rahman. Further, the request is fully in line with the Chambers Practice Manual and the established jurisprudence of the Court.

60. An unprecedented period of more than 13 years elapsed between the issuance of the first warrant of arrest and Mr Abd-Al-Rahman's decision to finally surrender himself to the Court. During this period, the Prosecution has been faced with the complete non-cooperation of the previous government in Sudan. It is only now that

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<sup>74</sup> Observations, para. 41; First Progress Report, para. 3; Second Progress Report, para. 3.

the Prosecution is in the early stages of building cooperation with the GoS and preparing its first mission to the territory of Sudan since 2007.

61. In addition, the Prosecution must now contend with the unprecedented impact that the COVID-19 pandemic is having, and will continue to have, on its work in relation to witness protection, and its ability to continue its investigations and carry out other activities which require travel by Prosecution staff or witnesses.

62. Together, the unique challenges faced by the Prosecution in the case against Mr Abd-Al-Rahman manifestly warrant an extension of time of the date for the confirmation hearing. The period of time proposed by the Prosecution for postponement of the confirmation hearing is reasonable, proportionate and consistent with the prior jurisprudence of the Court. Indeed, a confirmation hearing on 1 June 2021, which would not constitute an undue delay within the meaning of article 67(1)(c), would require an unprecedented effort by the Prosecution.

63. Furthermore, to facilitate the Defence's preparation for the confirmation hearing, in particular, the smooth and timely disclosure of evidence, the Prosecution will (i) disclose evidence to the Defence on a monthly basis; (ii) prioritise the review of material subject to articles 54(3)(e), 72 or 93 and transmit lifting requests to the relevant information providers for their consent on a rolling basis; and (iii) request non-standard redactions and protective measures from the Chamber on a rolling basis, beginning with applications for authorisation of the non-disclosure of the identities of [REDACTED] witnesses in November 2020.

64. The Prosecution therefore respectfully requests that the Single Judge (i) postpone the date of the confirmation hearing from 7 December 2020 to 1 June 2021, and (ii) set the deadline for the submission of any applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence from 11 September 2020 to 1 March 2021.



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**James Stewart**  
**Deputy Prosecutor**

Dated this 17<sup>th</sup> day of September 2020

At The Hague, The Netherlands