



**Original: English**

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

**Date: 18 December 2020**

**PRE-TRIAL CHAMBER II**

**Before:** **Judge 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**

Decision on the Prosecutor's Second Request to Postpone the Confirmation Hearing  
and Requests for Variation of Disclosure Related Time Limits

**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

**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**

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**Registrar**  
Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER II** of the International Criminal Court (the ‘Court’),<sup>1</sup> in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, having regard to articles 67 and 68(1) of the Rome Statute (the ‘Statute’), rule 121(7) of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 35 of the Regulations of the Court (the ‘Regulations’), issues this Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits.

## **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 Statute<sup>2</sup> and decided<sup>3</sup> 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’).<sup>4</sup>

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,<sup>5</sup> issuing a second warrant of arrest against Mr Abd-Al-Rahman<sup>6</sup> 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’).

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,<sup>7</sup> Mr Abd-Al-Rahman made his first appearance before the Single Judge.<sup>8</sup> On this

<sup>1</sup> Decision on the designation of a Single Judge, 9 June 2020, [ICC-02/05-01/07-80](#).

<sup>2</sup> 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](#)).

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

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

<sup>5</sup> 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](#)).

<sup>6</sup> 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](#)).

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

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

occasion, *inter alia*, (i) the suspect indicated that the language he fully understands and speaks is Arabic;<sup>9</sup> and (ii) the confirmation of charges hearing was scheduled to take place on Monday, 7 December 2020.<sup>10</sup>

4. On 17 August 2020, Judge Rosario Aitala, acting as the Single Judge on behalf of the Chamber,<sup>11</sup> issued the ‘Order on disclosure and related matters’ (‘First Order on Disclosure’) in which the Single Judge, *inter alia*, ordered that any applications for non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence shall be submitted to the Chamber no later than 11 September 2020’ (the ‘11 September 2020 deadline’).<sup>12</sup>

5. On 9 September 2020, the Prosecutor submitted the ‘Prosecution’s urgent request for an extension of time’,<sup>13</sup> requesting that the Chamber vacate the 11 September 2020 deadline.

6. On 16 September 2020, the Prosecutor submitted a request to postpone the confirmation hearing to 1 June 2021 and to adjust 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 to 1 March 2021 (the ‘First Postponement Request’).<sup>14</sup>

7. On 2 October 2020, the Chamber issued the ‘Second Order on disclosure and related matters’ (the ‘Second Order on Disclosure’)<sup>15</sup> in which it indicated that it ‘would only entertain the possibility of postponing the hearing once the OTP has demonstrated that it is seriously committed to discharging its disclosure obligations *as early as possible*, in a transparent, efficient and expeditious manner’.<sup>16</sup>

<sup>9</sup> Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 20, lines 14 to 18.

<sup>10</sup> Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 22, line 23 to page 23, line 3.

<sup>11</sup> Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

<sup>12</sup> Order on disclosure and related matters, 17 August 2020, [ICC-02/05-01/20-116](#) (‘First Order on Disclosure’), para. 12(iii).

<sup>13</sup> ICC-02/05-01/20-149-Conf-Exp (as instructed by the Chamber, a confidential redacted version, ICC-02/05-01/20-149-Conf-Red, and a public redacted version, [ICC-02/05-01/20-149-Red2](#), were notified on 10 September 2020).

<sup>14</sup> 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’).

<sup>15</sup> [ICC-02/05-01/20-169](#).

<sup>16</sup> Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 35.

8. On 2 November 2020, the Chamber issued the ‘Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines’, in which it, *inter alia*, set the confirmation hearing to commence on 22 February 2021, and ordered the Prosecutor to disclose by 7 December 2020 the totality of the witness statements intended to be relied upon at the confirmation hearing (the ‘First Decision on Postponement’).<sup>17</sup>

9. On 3 December 2020, the Prosecutor submitted a request to postpone the confirmation to 31 May 2021, and to postpone related deadlines, including, *inter alia*, the 7 December 2020 deadline to disclose the totality of witness statements intended to be relied upon at the confirmation hearing (the ‘Second Postponement Request’).<sup>18</sup>

10. On 4 December 2020, the Chamber sent an email to the parties indicating that the Second Postponement Request would only be considered in relation to the date of the confirmation hearing, and that all other deadlines would remain applicable, including the 7 December 2020 deadline to submit the totality of witness statements to be relied upon at the confirmation hearing, with redactions where necessary. The Chamber further instructed that the Prosecutor may apply in writing to extend time limits under the conditions set forth in regulation 35 of the Regulations.<sup>19</sup>

11. Also on 4 December 2020, the Prosecutor submitted an urgent request for the Chamber to extend the time limit for the disclosure of the totality of the witnesses’ statements to be relied upon at the confirmation hearing from 7 December 2020 to 30 April 2021 (the ‘4 December 2020 Request’).<sup>20</sup>

12. On 7 December 2020, the Defence submitted its response to the 4 December 2020 Request, seeking that it be dismissed *in limine* (the ‘7 December 2020 Response’).<sup>21</sup>

13. On 10 December 2020, the Prosecutor submitted a request for the variation of disclosure related time limits, as follows: (i) the deadline for the submission of

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<sup>17</sup> [ICC-02/05-01/20-196](#).

<sup>18</sup> Prosecution’s second request to postpone the confirmation hearing and related deadlines, ICC-02/05-01/20-218-Conf. A public redacted version of the Second Postponement Request was filed on 4 December 2020 ([ICC-02/05-01/20-218-Red](#)).

<sup>19</sup> Email sent by the Chamber to the parties on 4 December 2020 at 13:29.

<sup>20</sup> Prosecution’s urgent request for variation of disclosure related time limit, [ICC-02/05-01/20-221](#).

<sup>21</sup> Réponse à la Requête ICC-02/05-01/20-221, [ICC-02/05-01/20-222](#). A courtesy copy was sent by the Defence to the Chamber on 4 December 2020 at 18:27.

applications for the authorisation of the non-disclosure of witness identities and/or the non-disclosure of entire items of evidence to be moved to 1 March 2021; (ii) the deadline for the submission of the DCC to be moved to 16 April 2021; (iii) the deadline for the submission of the pre-confirmation brief and the list of evidence to be moved to 23 April 2021; and (iv) the deadline for the 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) and rule 77, to be moved to 30 April 2021 (the '10 December 2020 Request').<sup>22</sup>

14. On 11 December 2020, the Defence submitted its consolidated response to the Second Postponement Request and the 10 December 2020 Request (the '11 December 2020 Response').<sup>23</sup> The Defence argues that both requests should be rejected, and requests that the existing date for the confirmation hearing and related deadlines be upheld.

## II. APPLICABLE LAW

15. Rule 121(7) of the Rules provides for the postponement of the confirmation hearing on the request of either party or *proprio motu* by the Chamber. The Chamber recalls the applicable law as set out in its First Decision on Postponement,<sup>24</sup> and highlights that a postponement of the confirmation hearing is an exceptional measure, given the important implications on the competing interests of the parties and the rights of the suspect.<sup>25</sup>

16. In this context, the Chamber is mindful that the pre-trial detention of a suspect must be limited to what is strictly necessary, and of the suspect's right to appear promptly before the Pre-Trial Chamber.<sup>26</sup> These rights must be balanced alongside the

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<sup>22</sup> Prosecution's request for variation of disclosure related time limits, [ICC-02/05-01/20-228](#).

<sup>23</sup> Réponse aux Requêtes ICC-02/05-01/20-218-Red et ICC-02/05-01/20-228, [ICC-02/05-01/20-229](#).

<sup>24</sup> First Decision on Postponement, paras 11-13.

<sup>25</sup> First Decision on Postponement, para. 11; Pre-Trial Chamber II, *The Prosecutor v. Yekatom and Ngaiissona*, 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](#), para. 31.

<sup>26</sup> First Decision on Postponement, para. 12, referencing *The Prosecutor v. Yekatom and Ngaiissona*, 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](#), para. 31.

Court's obligation towards the protection of witnesses and victims, pursuant to article 68(1) of the Statute.

### **III. ANALYSIS**

17. The Prosecutor puts forward four different grounds in support of the request to postpone the confirmation hearing. The same grounds are invoked in support of the 4 December 2020 Request and the 10 December 2020 Request, pursuant to regulation 35 of the Regulations of the Court for a variation of several time limits. The Chamber will address each of the four grounds in turn.

#### **A. Unresolved witness security concerns**

##### *1. Submissions*

18. The first ground relied upon by the Prosecutor relates to multiple and continued difficulties with regard to contacting and offering sufficient protection to a significant number of witnesses. In particular, the Prosecutor explains that out of 98 witnesses intended to be relied upon for the confirmation hearing, only 75 have so far been cleared for disclosure. Among the 23 witnesses that have not yet been cleared are many of the Prosecutor's most critical witnesses for the confirmation hearing, including insiders and survivors of a number of the attacks alleged in the warrants of arrest. The Prosecutor also notes that new witnesses requiring clearance are continuously added.

19. The Prosecutor claims that the delay in contacting witnesses and putting in place the necessary protective measures is due to circumstances that are beyond its control. The Prosecutor further explains that, given the significant redactions required to protect the identities of several of its core witnesses and their family members, the relevant statements would need to be redacted so thoroughly as to make them of limited value to the preparation of the Defence case.

20. The Defence acknowledges the importance of providing adequate protection for victims and witnesses. However, the Defence asks the Chamber to reject this ground on the basis that the Prosecutor failed to provide sufficient details of the efforts that were made in this regard, and that the current situation is due to the Prosecutor's decision to start investigating without first concluding a special agreement with Sudan pursuant to article 4(2) of the Statute. In relation to the last point, the Defence argues

that the Prosecutor's projected conclusion of a memorandum of understanding with Sudan is insufficient ground to postpone the confirmation hearing, because the legal nature of such an understanding is unclear and because there is no indication when such an understanding will be concluded. The Defence further argues that the Prosecutor cannot invoke its own failure to conclude a special agreement with Sudan, which it claims to be the root cause of the present difficulties, to ask for a postponement at this stage of the proceedings.

21. The Defence also argues that the 4 December 2020 Request should be rejected *in limine*, because at the time of filing the Chamber had not yet granted the Second Postponement Request and because the 4 December 2020 Request was filed too close to the deadline.

## 2. *Analysis*

22. The Chamber starts by reiterating the Court's duty to take appropriate measures to protect victims and witnesses pursuant to article 68(1) of the Statute.

23. The Chamber has taken note of the explanations provided by the Prosecutor. It accepts that the Prosecutor has made genuine efforts under difficult circumstances and that it has proved impossible to resolve all issues. At the same time, the information provided by the Prosecutor suggests that there is hope of making some significant further progress in the relatively near future in relation to the 23 witnesses whose security situation has not yet been resolved. Under these circumstances, the Chamber is prepared to grant the Prosecutor some additional time.

24. The Chamber has considered the Defence's arguments in relation to article 4(2) of the Statute but deems them misplaced because it is not the case that the security-related concerns mentioned by the Prosecutor are linked solely or even primarily to witnesses inside Sudan.

25. As regards the 4 December 2020 Request, the Chamber notes that the Prosecutor should have notified the Chamber sufficiently in advance if the Prosecutor was unable to meet the deadline and should have provided concrete and specific examples demonstrating the concern that redactions would make the statements 'of limited value

to the preparation of the Defence case'.<sup>27</sup> The Chamber notes, furthermore, that the Prosecutor's 4 December 2020 Request does not even address this issue. The Chamber therefore cannot but conclude that the Prosecutor has violated the Chamber's instructions.

## **B. Material developments with respect to the Prosecutor's investigation**

### *1. Submissions*

26. The Prosecutor's second ground for requesting the postponement of the confirmation hearing relates to new investigative opportunities that are expected to result in additional vital evidence. The Prosecutor claims that recent developments have given rise to new investigative opportunities that did not previously exist. According to the Prosecutor, this constitutes a material change in circumstances, and it is argued that it is in the interest of the Chamber and all parties that these 'vital new leads' be followed and that the Prosecutor is given enough time to collect evidence which may assist the Chamber in reaching a fair and just outcome. In particular, the Prosecutor asserts that more time is necessary to comply with its duties under article 54(1)(a) and (b) of the Statute.

27. The Defence refutes the Prosecutor's claim that there is a material change in circumstances by arguing that the rapprochement between the Prosecutor and the current Sudanese government was already known when the Chamber rendered the First Decision on Postponement and claims that no significant progress has been made since then. The Defence further points out that there is nothing to prevent the Prosecutor from continuing to investigate in the period leading up to and following the confirmation hearing and that there is therefore no need to postpone the latter.

### *2. Analysis*

28. Having considered the Prosecutor's submissions on this point, the Chamber recalls its finding in the First Decision on Postponement that, while the OTP is allowed to continue its investigations, the confirmation hearing cannot be postponed to allow their completion, let alone could a postponement be based on the mere possibility of

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<sup>27</sup> Second Postponement Request, para. 19.

potential future investigations *in situ*.<sup>28</sup> Accordingly, the Chamber sees no valid ground to postpone the confirmation hearing on the basis that the Prosecutor wants to conduct additional investigations.

### C. Disclosure challenges

#### 1. Submissions

29. The Prosecutor submits that four issues are impacting its ability to comply with the Chamber's disclosure orders outlined in the First Decision on Postponement: (i) the volume of the evidence currently held by the Prosecutor; (ii) the 7 December 2020 deadline imposed by the Chamber; (iii) the 15 January 2020 deadline imposed by the Chamber; and (iv) realistic opportunities for the Prosecutor to meaningfully discharge its statutory disclosure obligations.

30. The Prosecutor submits that there is a high volume of evidence to be disclosed, including audio/video material and handwritten Arabic notes that require a significant amount of time and resources to review. The OTP submits that each of the 98 witnesses it intends to rely upon at the confirmation hearing have provided additional materials along with their statements, and that disclosing the witness statements together with the related disclosable material is necessary to ensure that the Chamber is able to rely on a complete set of evidence when rendering its decision under article 61(7) of the Statute. As to the 15 January 2021 deadline, the Prosecutor submits that it would not be possible to fully comply with the current deadline while ensuring that the appropriate degree of accuracy and diligence is maintained. The Prosecutor calculates that at least 100 working days are required to complete the primary review of the required materials, and therefore requests that the deadline for disclosure of the remaining witness statements and non-witness related material on which it intends to rely at the confirmation hearing, as well as all evidence within the meaning of article 67(2) of the Statute and all materially referred to in rule 77 of the Rules be postponed to 30 April 2021.

31. The Defence submits that the Prosecutor has already been instructed in prior decisions to prioritise the quality and relevance of disclosures rather than quantity, and to limit redactions to documents that are truly relevant for the preparation of the

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<sup>28</sup> First Decision on Postponement, para. 17.

confirmation hearing. The Defence also argues that the Prosecutor has disclosed documents that are irrelevant, which in its view, demonstrates the OTP's lack of seriousness towards the review process towards disclosure. On this basis, the Defence submits that the volume of documents referred to by the Prosecutor, and the time required for their review, cannot justify a further postponement of the confirmation hearing.

32. The Defence further contends that the concerns raised by the Prosecutor are theoretical in nature, and thus that the request to postpone the confirmation hearing is premature. Should the OTP encounter tangible problems in meeting its deadlines in the future, the Defence submits that it may submit a regulation 35 request at that stage.

## 2. Analysis

33. The Chamber has considered the Prosecutor's submissions regarding the volume of material for review and the estimated time required, also taking into account the bi-weekly progress reports that have been submitted to date.<sup>29</sup> The Chamber notes with concern the current pace of review, particularly in light of the fact that the volume of evidence in the OTP database continues to increase.

34. However, as previously communicated by the Chamber, the confirmation hearing cannot be postponed until the Prosecutor has had time to fully review every last item of evidence contained in its database.<sup>30</sup> The Prosecutor is once again urged to prioritise the review and disclosure of the most relevant and probative evidence in its collection.<sup>31</sup> Given the limited time available, the Prosecutor should now focus efforts on ensuring

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<sup>29</sup> 'Prosecution's first progress report on the evidence review, translation and disclosure process', 24 August 2020, [ICC-02/05-01/20-131](#); 'Prosecution's second progress report on the evidence review, translation and disclosure process', 7 September 2020, [ICC-02/05-01/20-146](#); 'Prosecution's third progress report on the evidence review, translation and disclosure process', 9 October 2020, [ICC-02/05-01/20-179](#), with secret, *ex parte*, Annex 1, confidential, *ex parte*, Annex 2, and confidential Annex 3; 'Prosecution's fourth progress report on the evidence review, translation and disclosure process', 23 October 2020, [ICC-02/05-01/20-191](#), with secret, *ex parte* Annex 1, confidential, *ex parte* Annex 2, and confidential Annexes 3 and 4; 'Prosecution's fifth progress report on the evidence review, translation and disclosure process', 6 November 2020, [ICC-02/05-01/20-200](#), with secret, *ex parte* Annex 1, confidential, *ex parte*, Annex 2, and confidential Annexes 3 and 4; 'Prosecution's sixth progress report on the evidence review, translation and disclosure process', 20 November 2020, [ICC-02/05-01/20-207](#), with secret, *ex parte* Annex 1, confidential, *ex parte* Annex 2, and confidential Annexes 3 and 4; 'Prosecution's Seventh progress report on the evidence review, translation and disclosure process', 4 December 2020, [ICC-02/05-01/20-220](#), with confidential, *ex parte* Annex 1, and confidential annexes 2 and 3.

that all significant exonerating evidence is disclosed to the Defence in time before the confirmation hearing.

**D. Obstacles posed by the ongoing COVID-19 pandemic**

*1. Submissions*

35. The Prosecutor submits that while the pandemic itself may not justify a postponement of the confirmation hearing, the complications presented by the restrictions on travel, and in particular, on the ability of witnesses to travel, unavoidably delays the OTP's progress in respect of its investigations. The Prosecutor indicates that two OTP staff members, and at least one witness, have already contracted COVID-19.

36. The Prosecutor further submits that the privileges and immunities of OTP staff do not extend to witnesses or contractors, and do not exempt OTP staff from all COVID-19 related travel restrictions; issues related to insurance, PCR test costs, and the provision of protective gear all take time; and that many interpreters are reluctant to deploy on missions due to the risks involved.

37. While the OTP submits that it is continuing to explore other options, it has found that the alternatives are also problematic. For example, the Prosecutor submits that arranging for face to face interviews in third countries requires witnesses to travel across borders and assume the risk of exposure to COVID-19, and that OTP staff who travel for interviews are also subject to the risk of infection. As to remote screenings, the Prosecutor submits that these have been unsatisfactory, and that remote interviews have not been feasible for many witnesses due to security reasons and witness vulnerability. The Prosecutor indicates that permission to conduct remote interviews is reliant on the submission of a request for assistance from national authorities, and that even if assistance is obtained, the poor technological infrastructure of some locations adds uncertainty and delay to the interview and screening process.

38. In response to the arguments raised by the Prosecutor, the Defence refers to its submissions in a previous filing relating to the financing of the Court pursuant to article 115(1) of the Statute. The Defence further argues that since the Chamber previously determined that Court staff and witnesses are exempt from COVID-19 related travel restrictions, and as the Prosecutor did not appeal against this decision, the matter cannot be raised again in this manner.

## 2. *Analysis*

39. The Chamber has considered the Prosecutor's submissions regarding the impact that the pandemic has had on witness screenings and travel. While acknowledging these challenges, the Chamber considers that this cannot form the basis for a postponement of the confirmation hearing, because the difficulties faced by the Prosecutor must be weighed against the suspect's right to be tried without undue delay.

### **E. The Regulation 35 Requests**

40. Seeing that the Chamber has addressed the substantive arguments that underpin the Prosecutor's 4 December 2020 Request and 11 December 2020 Request, there is no need to repeat the analysis.

41. In relation to the 4 December 2020 Request, the Chamber refers to its earlier finding<sup>32</sup> that the Prosecutor has failed to provide a convincing explanation for why it has failed to comply with the Chamber's instruction to disclose all witness statements that are currently in the Prosecutor's possession and which the Prosecutor intends to rely upon for the confirmation hearing, with redactions if necessary.

42. In relation to the 11 December 2020 Request, the Chamber observes that the affected deadlines have been superseded by the new schedule outlined in the present decision. The 11 December 2020 Request has therefore become moot.

### **F. Submission of the Document Containing the Charges**

43. The Chamber has considered the Prosecutor's request to move the deadline for the submission of the Document Containing the Charges to 16 April 2021. The Chamber notes that, pursuant to rule 121(3) of the Rules, the latest moment for the Prosecutor to provide the Document Containing the Charges is 30 days before the date of the confirmation hearing. However, in light of the large amount of evidence the Prosecutor intends to rely on at the confirmation hearing and the need to ensure that the suspect has sufficient time to prepare his defence, the Chamber instructs the Prosecutor to submit the Document Containing the Charges no later than 29 March 2021.

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<sup>32</sup> See paragraph 25 above.

## **G. Translation of witness statements**

44. The Chamber recalls its instruction, set out in the Second Order on Disclosure, that the Defence shall liaise with the Prosecutor to identify portions of witness statements that are considered to be core to the preparation of the Defence, and require translation into Arabic.<sup>33</sup> In the Sixth Progress Report, the Prosecutor indicated that no such requests had been received from the Defence.<sup>34</sup> On 24 November 2020, the Defence indicated by email that it does not intend to address specific requests for the priority translation of specific portions of witness statements prior to the confirmation hearing, although it does not exclude the possibility of making very limited requests in this regard in the future.<sup>35</sup>

45. The Chamber considers that Arabic translations must be provided to ensure that the suspect is informed in detail of the nature, cause and content of the charges against him. The Chamber further notes that based on the information provided in the Prosecutor's progress reports, it appears that the Prosecutor has already prepared draft translations for numerous witness statements. The Prosecutor is instructed to provide those draft translations already available to the Defence as soon as possible, and for all remaining translations to be provided on a rolling basis, with revised versions to be provided in due course. Furthermore, while the Prosecutor shall endeavour to provide revised translations of all witness statements, the Chamber considers that draft translations are sufficient in order for the suspect to know in detail the nature, cause and content of the charges against him. Translations into Arabic of all witness statements for witnesses intended to be relied upon at the confirmation hearing shall be provided by no later than 29 March 2021. Any statements for which the Prosecutor has not provided a draft translation, at minimum, will not be relied upon at the confirmation hearing.

## **H. DETERMINATION OF THE CHAMBER**

46. In light of the above, the Chamber, having balanced the rights of the suspect and the need to ensure the protection of witnesses, partially grants the postponement request and sets the date of the confirmation hearing to commence on 24 May 2021. As a

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<sup>33</sup> Second Order on Disclosure, para. 34.

<sup>34</sup> Sixth Progress Report, para. 20.

<sup>35</sup> Email from the Defence to the Chamber and Prosecution, sent on 24 November 2020 at 14:56. The Defence reiterated this point in the 11 December Response, para. 14.

consequence of this postponement the Chamber hereby sets a new series of deadlines, which supersede all previous time limits. The Prosecutor must now disclose all evidence by 29 March 2021 at the latest. Any items of evidence submitted after 29 March 2021 will not be taken into account for the purposes of the confirmation hearing; without prejudice to the Prosecutor's ongoing duty to provide the Defence with potentially exonerating evidence in accordance with article 67(2) of the Statute.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**PARTIALLY GRANTS** the Second Postponement Request;

**SETS** the date for the confirmation hearing to commence on Monday, 24 May 2021;

**ISSUES** the following revised deadlines:

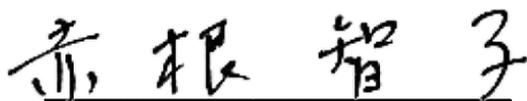
- By 26 February 2021 at the latest, the Prosecutor must file:
  - any and all applications for the authorisation of the non-disclosure of witness identities and/or the non-disclosure of entire items of evidence,
- By 29 March 2021, at the latest, the Prosecutor must:
  - disclose the Document Containing the Charges, in English as well as in Arabic;
  - disclose all the evidence it intends to rely upon for the confirmation hearing,
  - disclose all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules,
  - provide Arabic translations of the witness statements for witnesses that the Prosecutor expects to rely on at the confirmation hearing, as set out at paragraph 45 above;
- By 16 April 2021 at the latest, the Prosecutor must submit the Pre-Confirmation brief, in English as well as in Arabic, and the list of evidence intended to be presented at the confirmation hearing.

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



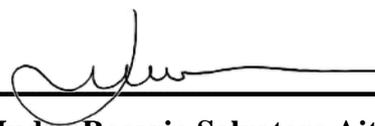
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**Judge Antoine Kesia-Mbe Mindua**



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**Judge Tomoko Akane**



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**Judge Rosario Salvatore Aitala**

Dated this Friday, 18 December 2020

At The Hague, The Netherlands