



Original: **English**

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

Date: **3 May 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-1073 and P-1074, ICC-02/05-01/20-667-Conf”,
19 April 2022, ICC-02/05-01/20-674-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:

The Office of the Prosecutor

Mr Karim A. A. Khan QC
Mr Julian Nicholls

Counsel for Mr Ali Muhammad Ali

Abd-Al-Rahman
Dr Cyril Laucci, Lead Counsel
Mr Iain Edwards, Associate Counsel

Legal Representatives of Victims

Ms Natalie von Wistinghausen
Mr Nasser Mohamed Amin Abdalla
Mr. Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

I. INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1073 and P-1074 (“Application”).¹ The Prosecution seeks: (i) an extension to 8 April 2022 of the lapsed disclosure deadline to disclose newly obtained material relating to P-1073 and P-1074 (“New Witnesses”); (ii) leave for the addition of material related to the New Witnesses to the Prosecution’s List of Evidence; and (iii) leave for the addition of the New Witnesses to the Prosecution’s List of Witnesses.

2. The Application is opposed on the grounds that the evidence of the New Witnesses has been collected too late. The trial has started. The Prosecution was ordered to disclose all evidence and a list of all witnesses upon which it intends to rely at trial over three months ago, by 5 January 2022 (“Deadline”).² When setting the Deadline, the Trial Chamber expressed in the clearest terms its strong discouragement of the disclosure of evidence after that date.³ In addition, granting the Application will occasion prejudice to the Defence.

3. Pursuant to Regulation 23bis(2) of the Regulations of the Court (“RoC”), this response is filed as confidential, mirroring the classification of the Application. A public redacted version will be filed shortly thereafter.

II. SUBMISSIONS

A. *Granting the Application would render the Deadline meaningless*

4. The Trial Chamber set the Deadline well in advance of the beginning of the trial. That was undeniably done for the purpose of allowing it and the Defence to know with certainty what the parameters of the Prosecution’s case would be, and what evidence the Prosecution would rely on in order to seek to prove that case. Notwithstanding the Trial Chamber’s clear admonition by which it strongly

¹ Prosecution’s application under regulation 35 to extend to extend the disclosure and associated deadlines concerning newly obtained material of P-1073 and P-1074, ICC-02/05-01/20-667-Conf, 8 April 2022; public redacted version [ICC-02/05-01/20-667-Red](#).

² Status Conference, [ICC-02/05-01/20-T-013-ENG](#), pp 17-18, 78, 8 September 2021.

³ [ICC-02/05-01/20-T-013-ENG](#), p. 78.

discouraged the disclosure of evidence after the Deadline, the Prosecution has made four applications pursuant to Regulation 35 of the RoC.⁴ The justifications advanced by the Prosecution have invariably been founded on claimed difficulties stemming from the *coup d'état* in Sudan of 25 October 2021 and travel restrictions related to the Covid-19 pandemic. The same purported justifications have been advanced in the Application.⁵ No reasons to believe that the instant Application is the last Regulation 35 application have been provided.

5. On 11 April 2022, the Trial Chamber delivered its Decision on the Prosecution's applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence ("Decision").⁶ The Trial Chamber granted the Prosecution's various applications in their entirety, finding them all to be justified. By its Decision, the Trial Chamber has essentially signalled that, so long as the Prosecution continues its investigations in Sudan (or presumably any other country for which travel restrictions relating to the Covid-19 pandemic have applied), the Deadline is meaningless and exists in name only. By its Decision, the Trial Chamber has to all intents and purposes given the Prosecution *carte blanche* to drip-feed more and more disclosure out of time. The question now that must be asked is, when will the Defence definitively know the evidence that it must confront? When will further disclosure end? If the instant Application is granted, this risks amounting to further confirmation – as the Prosecution will reasonably understand it – that the Deadline can be ignored with impunity.

⁴ Prosecution's request for an extension of time to disclose materials of seven witnesses and a report pursuant to regulation 35 of the Regulations of the Court, 16 December 2021, ICC-02/05-01/20-541-Conf-Exp; see also ICC-02/05-01/20-541-Conf-Exp-Corr, ICC-02/05-01/20-541-Conf-Red-Corr, public redacted version [ICC-02/05-01/20-541-Red2-Corr](#); Prosecution's application under regulation 35 to extend the disclosure and witness list deadlines, 10 March 2022, ICC-02/05-01/20-624-Conf, public redacted version [ICC-02/05-01/20-624-Red](#); Prosecution's application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material and to introduce into evidence P-0922's new statement under rule 68(3), 29 March 2022, ICC-02/05-01/20-652-Conf, public redacted version [ICC-02/05-01/20-652-Red](#); Prosecution's urgent application under regulation 35 for variation of time limits related to the introduction of a document concerning Witness P-0903, 4 April 2022, ICC-02/05-01/20-662-Conf.

⁵ Application, para. 8.

⁶ ICC-02/05-01/20-668-Conf.

6. This creates significant prejudice for Mr Abd-Al-Rahman. The Defence has already had to spend significant and precious time and resources responding to the Regulation 35 applications filed to date, including the instant Application. The message given to the Prosecution is that, so long as the *coup d'état* in Sudan and Covid-19 difficulties are cited in support of Regulation 35 applications in the future, they will be “nodded through”. This provides little comfort to the Defence that the Prosecution will not subject it to an avalanche of further requests to add witnesses to its List of Witnesses even though the trial has started, and Defence efforts are focussed on trial preparation in general and cross-examination of witnesses in particular.

7. As a general proposition, unpredictability about the final compass of the Prosecution’s evidence is another cause of prejudice. The Defence must have certainty about what evidence is coming in conducting its investigations, research, and preparing for its cross-examination of more immediate witnesses. It would be highly undesirable for the Defence to be forced into a position of having to request the recall of a witness for further cross-examination as a result of similar dilatory Prosecution applications under Regulation 35.

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

8. Along with its strong discouragement of any disclosure beyond the Deadline, the Trial Chamber underscored that it would “expect that any disclosure after 5 January would be accompanied by *a full explanation of the reason for the delay.*”⁷ However, in the instant Application the Prosecution has simply fallen back on generalised excuses for its failure to identify the New Witnesses before the Deadline.⁸ No explanations have been provided as to how or why the Prosecution first became aware of the New Witnesses on 10 March 2022. It has not been suggested, for example, that the New Witnesses identified themselves, unsolicited, to the Prosecution. The Trial Chamber may think that if this is how the Prosecution

⁷ [ICC-02/05-01/20-T-013-ENG](#), p. 78 (emphasis added).

⁸ Application, para. 8.

first became aware of the New Witnesses, it would have been made clear in the Application.

9. If, alternatively, the Prosecution became aware of the New Witnesses by virtue of ongoing investigations – whether in Sudan or elsewhere – a full explanation should be given. It has not been. The Prosecution has failed to provide the sort of information the Trial Chamber would need to adequately assess its diligence in carrying out its ongoing investigations (no doubt in the hope that the Trial Chamber will simply rubber-stamp the Application). It is clear that the Prosecution has been investigating alleged rapes perpetrated in Bindisi for many years. The Prosecution sought the confirmation of rape as a crime against humanity and a war crime in Bindisi, among other places, in its pre-confirmation brief of 16 April 2021.⁹ Rape in Bindisi is charged in counts 8-9 in the document containing the charges. It is submitted that, had the Prosecution carried out its investigations with diligence, and had it not committed the four *Négligences* identified by the Defence, there is no reason the New Witnesses should not have come to its attention or have been interviewed sooner.

10. The Trial Chamber has also failed to consider the Defence's earlier submissions regarding the repeated *Négligences* of the Prosecution over the last 17 years ("the *Négligences*")¹⁰, thus rendering the consistent case law on the continuation of investigations after the Confirmation Hearing moot. No doubt such diverging from the Court's case law will not resist an examination by the Appeals Chamber, whenever it will eventually be offered an opportunity to rule on it.

C. The interests of justice do not require the late addition of the New Witnesses or their related material

11. Contrary to the Prosecution's submission,¹¹ the interests of justice do not demand that the New Witnesses provide [REDACTED] in Bindisi and surrounding areas. [REDACTED] in Bindisi is not legally required for the Trial Chamber to find

⁹ Prosecution's Pre-Confirmation Brief, ICC-02/05-01/20-346-Conf-AnxA, public redacted version [ICC-02/05-01/20-346-Red](#).

¹⁰ [ICC-02/05-01/20-636](#), par. 35.

¹¹ Application, para, 14.

the Prosecution's case in respect of counts 8-9 to be made out. The Prosecution is already in a position to rely on the corroborating and cumulative evidence of, *inter alios*, witnesses P-0007, P-0011, P-0015, P-0085, P-0834, P-0874, P-0878, P-0882, P-0921 and P-0927 to prove counts 8-9, subject to the receivability of their evidence. Further, even if the New Witnesses [REDACTED] in Bindisi, it is incorrect to say that they are [REDACTED]:

During the attack on Bindisi, P-0007 saw Militia/*Janjaweed* and/or GoS Forces rape two women [REDACTED] and a third woman [REDACTED] was killed because she resisted being raped.¹²

[...]

[REDACTED] saw Militia/*Janjaweed* and/or GoS Forces take four girls known to her as [REDACTED] and rape them. [REDACTED] states that [REDACTED] was raped in her view, while the other three girls were taken further away, but she could hear their screams and when next she saw them their "clothes were torn and bloody."¹³

[...]

[REDACTED] witnessed Militia/*Janjaweed* and/or GoS Forces select women and girls, including [REDACTED] and a girl called [REDACTED], and take them to "an area where groundnuts were being grown" to be raped. As some of the women and girls were being raped, [REDACTED] heard members of the Militia/*Janjaweed* and/or GoS Forces saying, "we have taken Tora Bora's wives, praise be to God". Some fired guns in the air and shouted, "I have found a virgin woman". [REDACTED] states that the "rape and detention" went on for about 30 minutes after which she "heard the sound of gunshots and sirens and some people calling" the Militia/*Janjaweed* and GoS Forces away.¹⁴

12. It is submitted that the Trial Chamber will not be assisted by hearing from additional testimony about the same matters as a large number of other witnesses. Doing so will be unreconcilable with any notion of judicial economy and will only serve to unduly prolong the presentation of the Prosecution's case, and thus of the trial as a whole. There is a common interest in "trimming the fat" in terms of the volume of cumulative evidence to be adduced by the Prosecution in the course of this trial.¹⁵

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

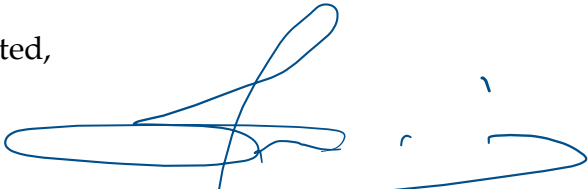
¹⁵ ICC-02/05-01/20-T-022-CONF-ENG ET, 8 February 2022, pp 37-38.

13. The Defence notes that Trial Chamber did not address this specific argument regarding the undue prolongation of the trial in its Decision. Its conclusions about the necessity of hearing yet more witnesses providing cumulative evidence were arrived at, it is submitted, without any or any adequate reasoning. Instead, the Trial Chamber used the very fact that the additional witnesses were corroborative and cumulative of other witnesses to find that no prejudice would be suffered by the Defence.¹⁶ It is respectfully submitted that in so finding, the Trial Chamber adopted entirely the wrong approach. In addition to the prejudice referred to in paragraphs 6 and 7 above, the late inclusion of new and unnecessary witnesses prejudices the Defence precisely because of the resulting protraction of the trial process. Mr Abd-Al-Rahman's right to be tried without undue delay is provided for by Article 67(1) of the Rome Statute. By allowing the List of Witnesses to become overloaded with witnesses who do little more than corroborate the evidence of others, the Trial Chamber is overseeing an unjustifiable ballooning of this trial.

III. CONCLUSIONS

14. For the foregoing reasons, it is submitted that the Application should be dismissed in its entirety on the grounds that it is inadequately justified and that the interests of judicial economy require that the trial should not be unduly prolonged. Further, the Trial Chamber should seize the opportunity to reiterate its admonition to the Prosecution by which it strongly discourages the late disclosure of new evidence after the Deadline.

Respectfully submitted,



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

Dated this 3rd day of May 2022 at The Hague, The Netherlands.

¹⁶ *eg.* Decision, paras. 35, 55, 61, 66 and 70.