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

**Date: 17 April 2023**

**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 redacted version of**

**Decision on the Defence's Request for postponement of the presentation of its  
case**

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

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**REGISTRY**

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**Counsel Support Section**

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**Detention Section**

**Victims Participation and Reparations  
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## I. Procedural background

1. On 15 December 2022, Trial Chamber I (the ‘Chamber’) issued its ‘Second Directions on the Conduct of Proceedings’ (the ‘Second Directions’),<sup>1</sup> setting out a series of staggered deadlines concerning the opening of the Defence’s case.
2. On 14 March 2023, the Defence requested the postponement *sine die* of the presentation of its case and therefore of all deadlines (the ‘Request’).<sup>2</sup>
3. On 20 March 2023, the Prosecution filed its response to the Request (the ‘Response’).<sup>3</sup>
4. On the same date, the Common Legal Representative of Victims (the ‘CLR V Observations’),<sup>4</sup> and the Registry filed their observations to the Request (the ‘Registry Observations’).<sup>5</sup>
5. On 4 April 2023, the Chamber held a status conference where it heard, *inter alia*, oral submissions by the parties, the CLR V and the Registry on the Request.<sup>6</sup>

## II. Submissions

6. At the outset, the Chamber notes that part of the Defence’s submissions relates to a previously pending decision on a finding of non-cooperation by the Government of Sudan.<sup>7</sup> Since the filing of the Request, the Chamber has rendered its decision [REDACTED].<sup>8</sup> Accordingly, the Chamber need not consider that part of the Defence’s submissions.
7. The Defence advances two reasons emanating from Article 67(1)(b) of the Rome Statute (the ‘Statute’) to justify its Request: (i) the continuous and aggravating non-cooperation from

<sup>1</sup> Second Directions on the Conduct of Proceedings, ICC-02/05-01/20-836.

<sup>2</sup> Requête aux fins de report de la phase de présentation de la Défense, ICC-02/05-01/20-902-Conf-Exp, confidential, *ex parte*, available to the Defence only (with six confidential *ex parte*, available to the Defence only, annexes). Confidential redacted and public redacted version were notified on the same date, ICC-02/05-01/20-902-Conf-Red and ICC-02/05-01/20-902-Red, respectively.

<sup>3</sup> Prosecution’s response to “Requête aux fins de report de la phase de présentation de la Défense”, ICC-02/05-01/20-906-Conf. A public redacted version was notified on 21 March 2023.

<sup>4</sup> Observations on behalf of victims on the confidential redacted version of Defence “Requête aux fins de report de la phase de présentation de la Défense” dated 19 March 2023, ICC-02/05-01/20-904-Conf. A public redacted version was notified on the same date.

<sup>5</sup> Registry’s Observations on the “Requête aux fins de report de la phase de présentation de la Défense” submitted by the Defence, ICC-02/05-01/20-907-Conf-Exp, confidential, *ex parte*, available to the Registry and the Defence only (notified on 21 March 2023).

<sup>6</sup> ICC-02/05-01/20-T-115-ENG.

<sup>7</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 6-8.

<sup>8</sup> [REDACTED].

Sudan, and (ii) the continuous and serious failure of the Registry to provide assistance pursuant to Rule 20(1)(b) of the Rules of Procedure and Evidence (the ‘Rules’).<sup>9</sup>

8. In relation to the first part of its submissions, the Defence claims that the Sudanese authorities have not complied with the Chamber’s requests for assistance, which encompass documents it deems essential to the Defence’s case.<sup>10</sup> It further contends that Sudan has not authorised any visas since July 2022. The Defence claims that a mission planned in March was cancelled as the visas are still pending.<sup>11</sup> The Defence thus argues that cooperation by Sudan has not improved, but in fact has lessened.<sup>12</sup>

9. In relation to the second part of its submissions, the Defence contends that the Registry’s actions and omissions have impeded the Defence, in violation of Rule 20(1)(b) of the Rules, owing to the Registry’s: (i) refusal to re-evaluate the security of operations of the Defence in Sudan, (given the Defence’s concern that their activities could be considered by Sudanese authorities as a threat to national security);<sup>13</sup> (ii) non-transmission to the Defence of a document of evaluation of risks issued by the Registry in November 2021;<sup>14</sup> (iii) non-transmission to the Defence of Registry protocols and/or standard operating practices applicable in case of a major security incident in Sudan;<sup>15</sup> and (iv) non-authorisation of deployment of the Defence resource person in Sudan owing to [REDACTED].<sup>16</sup> During the hearing, the Registry and the Defence confirmed that this last issue appears to have been resolved now, as the resource person has signed a waiver.<sup>17</sup>

10. The Defence provided details of methods by which they intended to seek evidence in support of their case and acknowledged that it has received support from the Prosecution to identify Prosecution witnesses it could potentially interview.<sup>18</sup> As noted in the Prosecution’s

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<sup>9</sup> Request, ICC-02/05-01/20-902-Conf-Exp, para. 5.

<sup>10</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 7-9; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 18.

<sup>11</sup> Request, ICC-02/05-01/20-902-Conf-Exp, para. 10; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 17.

<sup>12</sup> Request, ICC-02/05-01/20-902-Conf-Exp, para. 11.

<sup>13</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 13-14.

<sup>14</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 15-16.

<sup>15</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 17-18.

<sup>16</sup> Request, ICC-02/05-01/20-902-Conf-Exp, para. 19.

<sup>17</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 23-25.

<sup>18</sup> Request, ICC-02/05-01/20-902-Conf-Exp, para. 22.

Response below, so far four out of the five Prosecution witnesses identified by the Defence have been contacted.<sup>19</sup>

11. As a result of the aforesaid matters, the Defence claims that it is impossible to know when it will be ready to start its case. It therefore requests that the Chamber postpone the Defence case and all related deadlines, *sine die*,<sup>20</sup> and proposes to periodically inform the Chamber of its advances in the preparation of its case.<sup>21</sup>

12. In its Response, the Prosecution advances two reasons to reject the Request: (i) the reasons identified by the Defence do not justify a postponement of the deadlines and (ii) that in effect the nature of the proposal amounts to a stay of proceedings, which is an exceptional remedy not justified in this case.<sup>22</sup>

13. In respect of cooperation difficulties alleged by the Defence, the Prosecution contends that the situation remains virtually identical to that which existed when the deadlines were set by the Chamber. It avers that the Defence has failed to establish how the lack of cooperation impacts its investigations and refers to the lack of information provided by the Defence in respect of other avenues explored to allow investigation and preparation of its case.<sup>23</sup> The Prosecution further argues that the Chamber was aware of the difficulties encountered by the Defence when it set the deadlines.<sup>24</sup>

14. The Prosecution claims that an adequate investigation and preparation of a case can be carried out without the cooperation of a situation country.<sup>25</sup> It contends that the Defence has not demonstrated that it has made reasonable efforts to advance its investigation other than seeking cooperation from the Sudanese authorities, even when it had time so to do.<sup>26</sup>

15. The Prosecution asserts that the Defence has only carried out one investigative mission to [REDACTED] and that it cancelled three other investigative missions between 2021-2023.<sup>27</sup>

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<sup>19</sup> Response, ICC-02/05-01/20-906-Conf, para. 23.

<sup>20</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 1, 24. *See also* Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 18.

<sup>21</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 23-24; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 15-16.

<sup>22</sup> Response, ICC-02/05-01/20-906-Conf, paras 8-32; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 34-35.

<sup>23</sup> Response, ICC-02/05-01/20-906-Conf, para. 11.

<sup>24</sup> Response, ICC-02/05-01/20-906-Conf, para. 12.

<sup>25</sup> Response, ICC-02/05-01/20-906-Conf, paras 13-15.

<sup>26</sup> Response, ICC-02/05-01/20-906-Conf, paras 16-18.

<sup>27</sup> Response, ICC-02/05-01/20-906-Conf, para. 19.

It disputes the Defence's claim that Ramadan presents an insurmountable obstacle to carry out investigative missions. The Prosecution points out that it was able to interview witnesses during Ramadan and that the first month of the Prosecution's case took place during Ramadan in 2022.<sup>28</sup>

16. In respect of the purported deficiencies of the Registry in providing assistance to the Defence, the Prosecution submits that the Defence has not shown how any of these have impacted its investigations or preparations, nor that they are of such significance as to justify a postponement of its case.<sup>29</sup>

17. In relation to the second part of the defence submissions the Prosecution submits that a stay of proceedings is 'an exceptional remedy'.<sup>30</sup> It avers that the Defence has failed to identify the unavailable evidence with sufficient specificity and, as already stated, whether it has explored other avenues to obtain it. The Prosecution contends that this lack of precision prevents the Chamber from taking any specific measures to prevent or remedy any purported prejudice to the Defence before resorting to a stay of proceedings.<sup>31</sup>

18. In her Observations, the CLRV requests that the Chamber consider the participating victims' interest in achieving justice and ensuring an expeditious trial.<sup>32</sup>

19. The CLRV notes that the Request indicates insufficient progress in the Defence's investigations, as opposed to new information becoming available or a need to carry out further investigations. She contends that in assessing the sufficiency of time granted for the Defence's case, the Chamber should consider the time since the Accused's initial appearance and the five months between the appearance of the last Prosecution witness and the scheduled Defence opening statement.<sup>33</sup>

20. The CLRV submits that the Defence's core position on 'Ali Kushayb' is of relevance when: (i) assessing the assistance sought by the Defence from the Sudanese authorities, (ii) its

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<sup>28</sup> Response, ICC-02/05-01/20-906-Conf, para. 20.

<sup>29</sup> Response, ICC-02/05-01/20-906-Conf, para. 26; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 34-35.

<sup>30</sup> Response, ICC-02/05-01/20-906-Conf, paras 27-31 referring to Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410 (hereinafter: the '*Banda* Decision on stay of proceedings'), paras 3, 80, 90, 93, 95, 100 and 102.

<sup>31</sup> Response, ICC-02/05-01/20-906-Conf, para. 32.

<sup>32</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, paras 12-14; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 36.

<sup>33</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, paras 16-17.

intended missions to Sudan, and (iii) the efficacy of the alternative solutions mentioned by the Defence. She notes that the timeline of the Defence's alternative solutions is also a relevant factor.<sup>34</sup>

21. The CLRV further submits that it is not readily apparent that Registry acted unreasonably, improperly or in breach of Rule 20(1)(b) of the Rules when it refused the Defence's requests.<sup>35</sup>

22. However, the CLRV also points out that the nature of Defence requests and interactions with the Registry are legitimate issues which require consideration by the Chamber, particularly for evaluating the Defence's claims of delays, obstacles and the impossibility of conducting investigations on the territory of Sudan.<sup>36</sup>

23. In relation to the Defence's complaints concerning the non-deployment of the Defence resource person to Sudan, the CLRV highlighted the period of fourteen months between the confirmation of charges against the Accused and the recruitment of the resource person.<sup>37</sup>

24. Finally, the CLRV submits that in the event the Chamber vacates the current schedule for the presentation of the Defence case, this could be coupled with a timetable to ensure progression of the trial proceedings.<sup>38</sup> She submits that the Chamber could consider the difficulties that the Defence is encountering, but not to the extent of postponing the case *sine die*.<sup>39</sup>

25. In its Observations, the Registry states that, in relation to the cooperation of the Sudanese authorities, it has followed up on the requests for judicial assistance submitted by the Defence in [REDACTED].<sup>40</sup>

26. The Registry states that it has taken substantial steps to assist the Defence missions in connection with visa requirements.<sup>41</sup> The Registry notes, however, that on 21 December 2022, when it informed the Defence that the [REDACTED].<sup>42</sup> During their oral submissions, the

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<sup>34</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, paras 18-20; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 36.

<sup>35</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, para. 21.

<sup>36</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, para. 23.

<sup>37</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, para. 24.

<sup>38</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, para. 26.

<sup>39</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 36.

<sup>40</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, paras 8-9.

<sup>41</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, para. 10.

<sup>42</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, para. 15.

Defence and Registry confirmed that the Defence has now agreed to the additional requirements sought by the Government of Sudan (some months after the Prosecution and Registry agreed to comply with these additional requirements) and that visas are now expected to be issued by the end of April or beginning of May 2023.<sup>43</sup>

27. In relation to its determination of security conditions of planned operations in Sudan, the Registry states that it has conducted comprehensive security assessments in Sudan, which are revised periodically. The Registry states that upon a specific security assessment of the Defence's mission plans [REDACTED], it was concluded that the mission could be carried out within acceptable physical security parameters.<sup>44</sup> The Registry also notes that the Defence has not referred any witness to the Victims and Witness Unit.<sup>45</sup>

28. The Registry submits that it has undertaken substantial efforts to assist the preparation of Defence missions to third countries. It notes that so far it has been requested to assist in the planning of one mission [REDACTED] and which was cancelled due to the Defence's concerns about potential witnesses' ability to cross the border from Sudan.<sup>46</sup> During the hearing, the Registry confirmed that existing security arrangements are sufficient to carry out missions as requested by the Defence.<sup>47</sup> The Registry notes that the last communication in this regard from the Defence is dated [REDACTED]. However, no formal request to organise this mission has been made by the Defence.<sup>48</sup>

### III. Analysis

29. At the outset, the Chamber notes that although the Defence submits that it is requesting a postponement of deadlines pursuant to Regulation 35 of the Regulations of the Court,<sup>49</sup> the Defence in reality seeks an adjournment *sine die*,<sup>50</sup> which, if granted effectively would amount to a stay of the proceedings.

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<sup>43</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 28-29.

<sup>44</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, paras 24-33; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 20-21.

<sup>45</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, para. 35.

<sup>46</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, paras 46-48.

<sup>47</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 22.

<sup>48</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, para. 49.

<sup>49</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 14, 18. *See also* Request, ICC-02/05-01/20-902-Conf-Exp, para. 2.

<sup>50</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 16.



30. The Chamber notes that none of the legal texts of the Court provide explicitly for a chamber's power to stay proceedings.<sup>51</sup> The Chamber recalls the Appeals Chamber's finding that a stay of proceedings may be the appropriate remedy to ensure a fair trial,<sup>52</sup> but that it is a 'drastic remedy'.<sup>53</sup> As observed by the Appeals Chamber, '[u]nfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial.'<sup>54</sup> The Chamber further observes that in stating that a stay of proceedings is a drastic remedy, trial chambers have taken into account the Accused's right to be tried without undue delay.<sup>55</sup>

31. As will be analysed below, the Defence has not demonstrated how this drastic remedy is appropriate in this case. Moreover, as noted by the CLRV,<sup>56</sup> it is not apparent how the lack of cooperation is preventing the Defence from investigating its core position on 'Ali Kushayb'.

32. The Chamber emphasises that continuation of trial proceedings at this Court cannot be contingent upon a State's cooperation being forthcoming.<sup>57</sup> As pointed out by the Prosecution,<sup>58</sup> and the CLRV,<sup>59</sup> some of the difficulties faced by the Defence are inherent in the nature of proceedings at this Court. Moreover, as noted by the Presiding Judge during the status conference, the continuation of the trial proceedings cannot be solely dependent on the

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<sup>51</sup> Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on Defence Request for a Temporary Stay of Proceedings, 21 September 2021, ICC-01/09-01/20-176, para. 12; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of 'Decision on the Defence request to terminate the proceedings and related requests', 29 October 2020, ICC-01/12-01/18-1009 (original filed on 24 August 2020), para. 50; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 77 (hereinafter: the '*Lubanga Decision on non-disclosure*').

<sup>52</sup> *Lubanga Decision on non-disclosure*, ICC-01/04-01/06-1486, para. 76.

<sup>53</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, para. 55.

<sup>54</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 39.

<sup>55</sup> Trial Chamber V, *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 77 (hereinafter: the '*Kenyatta Decision on Article 64(4)*'); Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence's Application to Suspend the Proceedings, 18 September 2009, ICC-01/05-01/08-530, para. 16.

<sup>56</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, paras 18-19. Regarding the main lines of the expected Defence case, see Clarification relative au paragraphe 27 du Mémoire de la Défense préalable au procès (ICC-02/05-01/20-616), 18 March 2022, ICC-02/05-01/20-636 para. 4; Mémoire préalable au procès, 4 March 2022, ICC-02/05-01/20-616, paras 5, 18.

<sup>57</sup> *Banda Decision on stay of proceedings*, ICC-02/05-03/09-410, para. 100.

<sup>58</sup> Response, ICC-02/05-01/20-906-Conf, para. 14.

<sup>59</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 36.

Defence's assessment of when it is ready to start its case,<sup>60</sup> or the Defence's assessment of the 'ideal' conditions necessary to carry out an investigation.<sup>61</sup>

33. The Chamber is not persuaded by the Defence's submission that non-cooperation by the Sudanese authorities merits an indeterminate adjournment of the current proceedings. The Chamber recognises the assistance which would be provided by the documents which have been requested from the Sudanese authorities.<sup>62</sup> However, as noted by the CLRV,<sup>63</sup> it is not readily apparent to the Chamber how these documents may be considered to be so essential as to prevent the defence from putting forward any kind of a case. The claim that these documents are essential for giving notice of an alibi defence,<sup>64</sup> is not one which the Chamber finds persuasive at this stage of the proceedings.

34. The Chamber further observes that, as noted by Registry, the Defence refused to accept the additional visa requirements imposed by the Government of Sudan, at a time when the Prosecution and the Registry had so accepted them; it was the defence decision to cancel the planned mission.<sup>65</sup>

35. The Defence's assertion, that [REDACTED],<sup>66</sup> is unsupported by any kind of evidence. The Chamber accepts the submission of the Registry and therefore there are no indications suggesting that Sudan regards a [REDACTED].<sup>67</sup> The Chamber therefore rejects the Defence's submissions in this regard.

36. The Chamber further notes that the non-transmission by the Registry of the documents requested by the Defence<sup>68</sup> is based on existing confidentiality agreements between the Registry and external partners for the protection of existing arrangements that do not allow for their disclosure.<sup>69</sup> The Chamber recalls its previous finding that 'the assessment of the security situation, the issuance of JTAG recommendations for a State, the timing and procedure of conducting such assessments, and determining the logistical and operational conditions for

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<sup>60</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 15.

<sup>61</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 25-26.

<sup>62</sup> Request, ICC-02/05-01/20-902-Conf-Exp, para. 7.

<sup>63</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, para. 19.

<sup>64</sup> Request, ICC-02/05-01/20-902-Conf-Exp, para. 9; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 18.

<sup>65</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 20-21.

<sup>66</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 13-14.

<sup>67</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, para. 33.

<sup>68</sup> Request, ICC-02/05-01/20-902-Conf-Exp, paras 15, 17.

<sup>69</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, para. 26.

missions, is the prerogative of the Registry and is fully within its mandate.<sup>70</sup> Security is a matter for the Registry, (ultimately not the parties), and the Chamber therefore dismisses the Defence's submission that the non-transmission of these Registry internal documents amounts to an obstacle to the preparation of its case.

37. In relation to the Defence's resource person, who, as noted by the CLRV, was recruited only in September 2022, thus fourteen months after the charges against Mr Abd-Al-Rahman were confirmed.<sup>71</sup> The Chamber notes that the difficulties relating to his deployment arose from [REDACTED] and it is unclear to the Chamber why his recruitment took place at such a late stage and why, given the problems, no attempt was made to seek a replacement.<sup>72</sup> The Registry has now agreed to authorise the deployment of the Defence's resource person.<sup>73</sup>

38. The Chamber is unpersuaded by the Defence's submission that it has not been able to interview potential witnesses.<sup>74</sup> As noted by the Prosecution, 21 out of the 56 witnesses who testified before this Chamber reside in Sudan.<sup>75</sup> In any event, as noted above, the Defence is now exploring alternatives, albeit late, such as contacting witnesses in third countries<sup>76</sup> and interviewing prosecution witnesses not called to give evidence.<sup>77</sup>

39. The Chamber further observes that [REDACTED] is not an issue novel to the Defence. As noted by the Prosecution, the Defence has been aware of this issue since at least 2020,<sup>78</sup> when the Accused first appeared before this Court. Both the Prosecution,<sup>79</sup> and the CLRV,<sup>80</sup> have explored other avenues in the preparation of their respective cases. According to the Registry, it was not until February 2023 that the Defence requested assistance with a mission to a third country.<sup>81</sup> The Chamber finds that the Defence failed to explore these avenues diligently and in a timely manner.

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<sup>70</sup> Decision on Defence request for reconsideration of 'Decision on Defence submissions on cooperation with Sudan', 29 March 2022, ICC-02/05-01/20-650-Red, para. 26.

<sup>71</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, para. 24. *See also* Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 22.

<sup>72</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, paras 36-45.

<sup>73</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 23-25.

<sup>74</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 13-14.

<sup>75</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 34.

<sup>76</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 25.

<sup>77</sup> Response, ICC-02/05-01/20-906-Conf, para. 23.

<sup>78</sup> Response, ICC-02/05-01/20-906-Conf, para. 17.

<sup>79</sup> Response, ICC-02/05-01/20-906-Conf, paras 15-16.

<sup>80</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 36.

<sup>81</sup> Registry Observations, ICC-02/05-01/20-907-Conf-Exp, para. 47.

40. The Chamber considers inappropriate in the circumstances, the *in terrorem* suggestion by the Defence, that ‘if we do not obtain postponement, then we really will have to say that we are not in a position to do what we have decided to do [...] present evidence worthy of this name as a Defence case.’<sup>82</sup> Not only is it clear from the submissions received, that many of the delays in the preparation of, and investigations relating to, the Defence’s case are attributable to the Defence. But equally it is clear that there are other methods, as yet not properly explored, by which they may obtain evidence in support of their case.

41. In respect of the delay, it should be noted that the Defence: (i) allocated significant time and resources to litigate before the Chamber issues adjudicated by the Pre-Trial Chamber;<sup>83</sup> (ii) has been aware of possible difficulties in securing cooperation from Sudan since 2020 and should have planned accordingly; (iii) recruited its resource person fourteen months after the charges against Mr Abd-Al-Rahman were confirmed; (iv) without proper justification, postponed missions to Sudan on the basis of non-transmission of security-related documents by the Registry; (v) requested assistance for missions to third countries only in 2023; and (vi) has provided no information in respect of its exploration of other avenues to obtain evidence, notwithstanding it has been aware of the factual contours of the case since confirmation of charges against the accused in 2021.

42. Accordingly, as noted by the CLRV,<sup>84</sup> this is not a situation whereby new information has become available or a need exists to carry out **further** investigations. Nor has there been a problem in respect of prosecution disclosure.

43. However, the Chamber is obliged to remedy any prejudice that the present state of affairs may have caused to the Accused. Whilst this state of affairs, for the reasons set out above, does not mandate an adjournment *sine die*, the Chamber deems it appropriate to amend the deadlines relating to the Defence case in order to allow further time for preparation. The deadlines, set out below, will be kept under careful review through monthly status conferences to ascertain the Defence’s progress in the preparation of its case. The first status conference, *ex parte*,

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<sup>82</sup> Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 31.

<sup>83</sup> See Decision on Defence request for reconsideration of ‘Decision on Defence submissions on cooperation with Sudan’, 29 March 2022, ICC-02/05-01/20-650-Conf. A public redacted version was notified on the same date; Decision on the Defence request for cooperation pursuant to Article 57(3)(b) of the Statute, 11 February 2022, ICC-02/05-01/20-590-Conf-Exp. A public redacted version was notified on the same date; Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf. A public redacted version was notified on the same date.

<sup>84</sup> CLRV Observations, ICC-02/05-01/20-904-Conf, para. 16.

Defence and Registry, will take place immediately after the conclusion of the CLRV's case. Any further postponement of any of the deadlines below will be exceptional and will be granted solely when the Defence has shown good cause and provided specific reasons for the postponement of a given deadline.

44. The Chamber hereby amends the following deadlines set out in the Second Directions concerning the Defence's case:

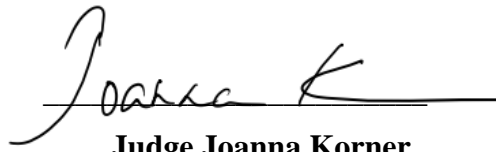
- A. **22 June 2023**: notification of any Defences or alibi;
- B. **20 July 2023**: filing of a trial brief and disclosure of evidence (and any witnesses) to be relied upon by the Defence;
- C. **14 August 2023**: filing of applications for use of prior recorded testimony which has been obtained pursuant to Rule 68 of the Rules;
- D. **28 August 2023**: Opening statements, and immediately after, start of testimony of any Defence witnesses up to 31 August 2023;
- E. **4-15 September 2023**: Continuation of testimony of any Defence witnesses;
- F. **2 October-20 October 2023**: Continuation of testimony of any Defence witnesses.

#### **IV. Conclusion**

45. For the above reasons the Chamber:

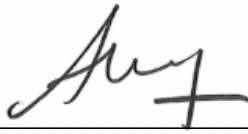
**REJECTS** the Defence's Request as formulated, and

**AMENDS** the deadlines concerning the Defence's case, as set out in paragraph 44 above.

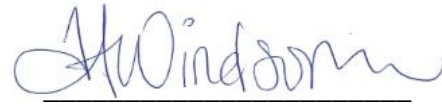
A handwritten signature in black ink, appearing to read 'Joanna K', written over a horizontal line.

**Judge Joanna Korner**

**Presiding Judge**

A handwritten signature in black ink, appearing to read 'Reine', written over a horizontal line.

**Judge Reine Alapini-Gansou**

A handwritten signature in blue ink, appearing to read 'Althea Windsor', written over a horizontal line.

**Judge Althea Violet Alexis-Windsor**

Dated this 17 April 2023

At The Hague, The Netherlands