

Original: **English**No.: **ICC-02/05-01/20**Date: **24 July 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**

**Public redacted version of “Prosecution’s response to ‘Note for the Record in relation to Paragraph 10 of the Decision on the Second Application for Postponement of the Defence Case (ICC-02/05-01/20-990-CONF)’”, 21 July 2023, ICC-02/05-01/20-997-Conf**

**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. On 7 July 2023, the Chamber issued its decision on the Defence's second request to postpone its case ("Second Postponement Decision"),<sup>1</sup> in which it reiterated the observation that "the Defence has been 'engaging in endless discussions and arguments with the Registry', instead of taking timely and appropriate actions to secure witnesses' testimonies and other evidence".<sup>2</sup> The Chamber further affirmed that the conclusions in its decision on the Defence's first request to postpone its case ("First Postponement Decision"), regarding delays in the preparation of the Defence's case,<sup>3</sup> remained unchanged.<sup>4</sup>

2. While the Chamber was "not satisfied that the actions taken by the Defence towards the preparation of its case have been adequate or appropriate",<sup>5</sup> it nevertheless postponed the deadlines in respect of the presentation of the Defence's case, taking into account the current state of the Defence's investigations.<sup>6</sup>

3. On 14 July 2023, the Defence filed the "Note for the Record in relation to Paragraph 10 of the Decision on the Second Application for Postponement of the Defence Case (ICC-02/05-01/20-990-CONF)" ("Note for the Record"),<sup>7</sup> in which it takes issue with the Chamber's findings, as detailed in paragraph one above.

4. Since the Defence does not request any remedy from the Chamber, the Prosecution responds only to correct certain inaccuracies and mischaracterisations in the Note for the Record.

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<sup>1</sup> Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, [ICC-02/05-01/20-990-Conf](#) ("Second Postponement Decision").

<sup>2</sup> [Second Postponement Decision](#), para. 10 (fn. omitted).

<sup>3</sup> Decision on the Defence's Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf-Red](#), para. 41 ("First Postponement Decision").

<sup>4</sup> [Second Postponement Decision](#), para. 10, fn. 17.

<sup>5</sup> [Second Postponement Decision](#), para. 10.

<sup>6</sup> [Second Postponement Decision](#), paras. 10, 15-17.

<sup>7</sup> Note for the Record in relation to Paragraph 10 of the Decision on the Second Application for Postponement of the Defence Case (ICC-02/05-01/20-990-CONF), [ICC-02/05-01/20-991-Conf](#) ("Note for the Record").

## II. CLASSIFICATION

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document, as well as the Annex, is filed as confidential since it responds to a filing with the same classification.

## III. SUBMISSIONS

6. The Prosecution corrects the following inaccuracies and mischaracterisations in the Note for the Record.

7. At paragraphs 8 to 9, the Defence lists multiple matters which it submits are not in dispute.<sup>8</sup> The Prosecution does not agree that all of these matters are not in dispute. For example, the Miscellaneous Amendments Act of 2020 *did* abolish provisions of the Criminal Procedure Act of 1991 which criminalised cooperation with the Court.<sup>9</sup> The Prosecution will fully respond to any factual and legal issues arising from these matters at the appropriate time, that is, if and when they are properly before the Chamber or the Appeals Chamber for resolution.

8. At paragraphs 10, 11, 13 and 17,<sup>10</sup> the Defence submits that the principal reason why its planned missions to Sudan were cancelled, with the exception of one mission [REDACTED], was due to the lack of entry visas.<sup>11</sup> Although the Prosecution is not privy to the *ex parte* information provided by the Defence to the Chamber, it has summarised the available information into a chart, to provide the Chamber with a more complete overview of the circumstances surrounding the cancellation of the planned missions. This chart is contained in the Annex.

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<sup>8</sup> [Note for the Record](#), paras. 8-9. The Prosecution notes that the content of footnote 6 is missing from the filing.

<sup>9</sup> Registry's Second Report on the current status of cooperation with the Republic of Sudan, [ICC-02/05-01/20-496](#), para. 23; [REDACTED]; Annex V to the Registry's Second Report on the current status of cooperation with the Republic of Sudan, [ICC-02/05-01/20-496-AnxV-tENG](#), paras. A-B. [REDACTED].

<sup>10</sup> [Note for the Record](#), paras. 10-11, 13, 17.

<sup>11</sup> [Note for the Record](#), para. 13.

9. At paragraph 12, the Defence, again,<sup>12</sup> mischaracterises the decision of Pre-Trial Chamber II on several Defence requests and procedural challenges.<sup>13</sup> While the Pre-Trial Chamber observed that, given the limited function of confirmation proceedings, “there is no imperative for the Chamber to rule on all challenges to the admissibility of evidence, which can always be raised again by either party before the Trial Chamber and may be assessed anew”,<sup>14</sup> it *did* adjudicate the requests and procedural challenges brought by the Defence (by rejecting each of them).<sup>15</sup> Whether to bring these challenges again before the Trial Chamber was therefore entirely at the Defence’s discretion.

10. At paragraph 14, the Defence appears to submit that it did not plan for possible difficulties in securing cooperation from Sudan because it hoped or expected that Sudan would cooperate.<sup>16</sup> Putting aside the question of why the Defence did not pursue other avenues *in parallel* with its efforts to obtain cooperation from Sudan, this submission is not consistent with previous submissions made by the Defence,<sup>17</sup> or with the fact that the Defence has requested findings of non-cooperation against Sudan regularly throughout the course of the proceedings: on 19 January 2021,<sup>18</sup> 18 January 2022,<sup>19</sup> 25 April 2022,<sup>20</sup> 12 October 2022<sup>21</sup> and 16 January 2023.<sup>22</sup>

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<sup>12</sup> See Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-916-CONF-EXP, [ICC-02/05-01/20-920-Red](#), para. 30. The Prosecution corrected this mischaracterisation in the “Prosecution’s response to ‘Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-916-CONF-EXP’”, [ICC-02/05-01/20-926-Red](#), para. 24.

<sup>13</sup> [Note for the Record](#), para. 12.

<sup>14</sup> Decision on Defence requests and procedural challenges, [ICC-02/05-01/20-402](#), para. 37 (fn. omitted).

<sup>15</sup> Decision on Defence requests and procedural challenges, [ICC-02/05-01/20-402](#), p. 17.

<sup>16</sup> [Note for the Record](#), para. 14.

<sup>17</sup> See e.g. Requête aux fins d’arrêt ou de suspension temporaire des procédures, 5 October 2020, [ICC-02/05-01/20-174](#), para. 17 (“*la non-coopération du Soudan est connue, ancienne, patente, totale [...]. Il n’existe à ce jour aucun motif sérieux de penser qu’elle s’améliore dans un avenir prévisible, sous réserve des informations non communiquées à la Défense*”); Requête en vertu de l’Article 87-5-b du Statut de la Cour, 19 January 2021, [ICC-02/05-01/20-263-Red2](#), para. 17 (“*Ces annonces alléguées selon lesquelles les autorités Soudanaises auraient déclaré avoir l’intention de coopérer un jour avec la Cour sont balayées comme dénuées de matérialité et/ou crédibilité*”); [T-15-ENG CT](#), 25 October 2021, 5:6-9 (“And, as you know, we, of the Defence, had reasons to complain about the insufficiency or lack of cooperation from the Sudanese government in this case so far and, in spite of that, I must say that with this new development [the military takeover of 25 October 2021], we fear that the situation might even worsen in matters of cooperation”).

<sup>18</sup> Requête en vertu de l’Article 87-5-b du Statut de la Cour, [ICC-02/05-01/20-263-Red2](#).

<sup>19</sup> Requête relative à la non-coopération du Soudan, [ICC-02/05-01/20-557-Red](#).

<sup>20</sup> Requête en vertu de l’Article 87-5-b du Statut, [ICC-02/05-01/20-678-Red](#) (notified on 25 April 2022).

<sup>21</sup> Nouvelle Requête en vertu de l’Article 87-5-b du Statut à la lumière des Observations ICC-02/05-01/20-707-Conf-Exp-Anx1, [ICC-02/05-01/20-768-Conf-Red](#) (notified on 12 October 2022).

<sup>22</sup> Troisième Requête aux fins de constat de la non-coopération du Soudan, [ICC-02/05-01/20-849-Conf](#).

11. At paragraph 19, the Defence submits that it “would not be productive for the Defence to expend precious time and resources exploring ‘other avenues’ by searching for eye-witnesses that speak to the heart of the Defence case in location [REDACTED].”<sup>23</sup> This mischaracterises the Chamber’s finding that the Defence had “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.”<sup>24</sup> The Chamber did not assert that “other avenues to obtain evidence” meant simply searching for witnesses [REDACTED]. Other avenues of investigation would clearly encompass a variety of possibilities, including [REDACTED].

#### IV. CONCLUSION

12. The Prosecution provides the above information to correct the record and for the assistance of the Chamber.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 24<sup>th</sup> day of July 2023

At The Hague, The Netherlands

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<sup>23</sup> [Note for the Record](#), para. 19.

<sup>24</sup> [First Postponement Decision](#), para. 41.