

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/20
Date: 8 September 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 “CLR V Response to Defence ‘Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision orale relative au maintien du calendrier de l’affaire’”

Source: The Common Legal Representative of Victims

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
Ms Nazhat Shameem Khan
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

Mr Xavier-Jean Keïta
Ms Marie O'Leary

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. In compliance with the Trial Chamber's instructions,¹ the Common Legal Representative of Victims ("CLR") submits this confidential response² to the Defence for Mr Abd-Al-Rahman's ("Defence") "Demande de reconsidération ou, à titre subsidiaire, d'autorisation d'interjeter appel de la décision orale relative au maintien du calendrier de l'affaire", filed on 6 September 2023.³
2. The CLR does not object to the Defence's request for reconsideration of the Trial Chamber's oral decision of 5 September 2023,⁴ rejecting the Defence's request – submitted by way of written motion⁵ and oral clarification⁶ – for a one-month postponement of the previously established deadlines⁷ for the disclosure of the Defence's evidence, submission of the Defence trial brief, and the opening of the Defence case.
3. In the CLR's view, the Trial Chamber's misunderstanding of the request contained in the 4th Periodic Report – *while arising from a lack of clarity in the Defence filing*⁸ – provides a proper basis, in these particular circumstances, for the Chamber's reconsideration of the Oral Decision.
4. The CLR does not agree that maintaining the deadlines set or confirmed in the Oral Decision amounts to, or would result in, a breach of the defendant's fundamental fair trial rights and procedural guarantees, including the principle of equality of arms and adequate time to prepare his defence.⁹ However, the CLR, on behalf of the 725 participating victims, is deeply invested in the remainder of

¹ Email from Legal Officer of Trial Chamber I to the Prosecution and CLR, 6 September 2023 (instructing that any responses to the Defence's motion must be filed by noon on 8 September 2023).

² A public redacted version will also be filed.

³ "Demande de reconsidération ou, à titre subsidiaire, d'autorisation d'interjeter appel de la décision orale relative au maintien du calendrier de l'affaire", 6 September 2023, ICC-02/05-01/20-1010-Conf.

⁴ Status conference of 5 September 2023, ICC-02/05-01/20-T-125-ENG ET, p. 35, lines 9-20 ("Oral Decision").

⁵ [REDACTED], ICC-02/05-01/20-1008-Conf-Red ("4th Periodic Report"), para. 25.

⁶ Status conference of 5 September 2023, ICC-02/05-01/20-T-125-ENG ET, p. 34, lines 16-19, 22-23 and p. 35, lines 2-5, 7-8.

⁷ Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, 7 July 2023, ICC-02/05-01/20-990-Conf (public redacted version: [ICC-02/05-01/20-990-Red](#)).

⁸ See Request, para. 10.

⁹ *Contra* Request, paras 12-16.

the trial proceedings moving forward in as efficient and effective a manner as possible.

5. Noting the current progress in the Defence's investigations and preparations, as well as the indicated plan of action, [REDACTED] the CLRV is of the view that permitting the Defence to primarily focus its attention and resources on these outstanding investigative avenues and related work [REDACTED] holds the reasonable prospect of a more coherent and efficient presentation of the Defence case that will, on the long run, benefit the overall expeditiousness of the trial.¹⁰ Weighed against this, should the relief in the reconsideration request be granted, is the loss of ten hearing days during the current calendar year. On balance, the CLRV considers that the potential benefit arising from providing the Defence the relatively limited additional time requested outweighs the loss of the noted hearing days.
6. The CLRV takes no position on the Defence's alternative request for leave to appeal the Oral Decision.¹¹ The CLRV simply notes that given the deadlines at issue, it is likely that the time needed for the matter to be litigated before and thereafter settled by the Appeals Chamber would most probably render the matter moot.

II. Submissions

7. The CLRV recalls her submissions filed in March 2023,¹² in response to the Defence's first request to postpone the deadlines relevant to the commencement of the Defence case.¹³ The CLRV highlighted, based on the Trial Chamber's findings, the interests of the participating victims in achieving justice,¹⁴ and the

¹⁰ As such, the valid concerns raised by the Trial Chamber in respect of its responsibility to ensure the Accused's right to be tried without undue delay under Article 67(1)(c) of the Statute would also likely be advanced (Status conference of 5 September 2023, ICC-02/05-01/20-T-125-ENG ET, p. 35, lines 13-15 and p. 40, lines 19-21).

¹¹ Request, paras 16-21.

¹² 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", 19 March 2023, ICC-02/05-01/20-904-Conf (public redacted version: [ICC-02/05-01/20-904-Red](#)) ("19 March CLRV Observations").

¹³ Version confidentielle expurgée de la Requête aux fins de report de la phase de présentation de la Défense, 14 March 2023, ICC-02/05-01/20-902-Conf-Red (public redacted version: [ICC-02/05-01/20-902-Red](#)).

¹⁴ 19 March CLRV Observations, para. 12 (internal citations omitted).

consistent view received from the participating victims that, almost two decades after the events in question, and the accused's initial appearance in June 2020, the trial should proceed as quickly as feasible and justice take its course.¹⁵

8. In the March 2023 submissions, the CLRV also raised concerns regarding the basis, relevance, and validity of various reasons put forward by the Defence in support of its request to vacate the commencement of its case *sine die*.¹⁶ Among these concerns was the indication in the Defence motion that its investigations had not progressed sufficiently at a fundamental level.¹⁷
9. The current situation, as presented [REDACTED], appears – on the basis of the information available to the CLRV – different. The [REDACTED], as well as [REDACTED],¹⁸ indicate that the Defence has made tangible progress in its investigations. The Defence also advises on the outstanding steps it intends to undertake [REDACTED] to further progress its investigations and preparations, of particular importance [REDACTED].
10. As submitted in the introduction, and for some of the reasons set out in the 19 March CLRV Observations, the CLRV does not agree that the maintenance of the deadlines set or confirmed in the Oral Decision would necessarily amount to or result in a breach of the defendant's fundamental fair trial rights and procedural guarantees under the Rome Statute.
11. Instead, the CLRV, on behalf of the participating victims, is strongly desirous of the Defence case and the remainder of these trial proceedings progressing in as efficient and effective a manner as possible. Therefore, the CLRV takes the pragmatic view that granting the Defence the relatively limited additional requested postponement of deadlines, particularly if weighed against the loss of

¹⁵ 19 March CLRV Observations, para. 13.

¹⁶ *Id.*, paras 16-24.

¹⁷ *Id.*, para. 16.

¹⁸ [REDACTED].

ten trial hearing dates during the current calendar year,¹⁹ is likely to further this goal, and is accordingly commensurate with the interests of justice.

12. While all parties and participants in judicial proceedings must be able to balance and concurrently carry out their respective multitude of tasks and responsibilities, the CLRV considers that in the particular circumstances of this case, including the situation on the ground in Darfur and Sudan, that the division of the Defence's time and resources among the continuation of its investigations on the one hand, and the preparation of its disclosure, trial brief, opening statement, and case presentation on the other, may have a less than salutary impact on the larger goal of efficient and effective conduct of the remainder of these trial proceedings.
13. To be clear, the CLRV's position is based on a pragmatic consideration of how best to advance these proceedings in the long run and noting the timeline of activities set out by the Defence for its outstanding investigative efforts. The CLRV understands the Defence's underlying written and oral submissions, and the Request, to constitute a final plea for accommodation to place the Defence house in order prior to the opening of its case.
14. The CLRV does not accept, for example, that any further delays in [REDACTED] purported *alibi* [REDACTED] would provide valid grounds for a postponement of the commencement of the Defence case beyond 13 November 2023.²⁰ Should the Request be granted, the CLRV would adamantly oppose any further appeal for postponement that might be submitted on similar grounds. Even in the current difficult circumstances that the Defence – like the Prosecution and CLRV – is operating in, and as underlined by the Presiding Judge at this week's status conference,²¹ there must eventually be a strict deadline and a start of the Defence

¹⁹ Namely, the hearings scheduled for the weeks of 16 and 23 October 2023.

²⁰ See submissions at Request, para. 14.

²¹ Status conference of 5 September 2023, ICC-02/05-01/20-T-125-CONF-ENG ET, p. 35, lines 10-20 ("This case has been delayed and delayed and delayed, and I'm not going to rehash the reasons why it's been delayed. It should have started in May. I appreciate that the events in Sudan then supervened, but there have been months and months gone by. Your client, as I'm sure he's aware and you're aware, is in custody, and this case has got to start on the 15th, and you do have some witnesses you can call. As I have already said, although the Rules require that you disclose all your witnesses, plus what you want to say, we are willing to make an exception, and

case, like in every other ICC trial, and whatever the difficulties and the state of the investigations and preparations are.

III. Conclusion

15. For the reasons above, the CLRV advises that she does not oppose the Defence's request for reconsideration of the Oral Decision concerning the current deadlines associated with the commencement of the Defence case.

Respectfully submitted,



Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 8 September 2023
At Berlin, Germany

so that you can disclose on a rolling basis. But by 26 September, we anticipate that you will be able, at least, to give some idea of what these witnesses are going to say. And, as I said, this has gone on long enough and [...] the Defence case has got to start.”).