

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **19 April 2024**

**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 “CLRv Observations on the Defence Request for  
Extension of Deadline to submit its Lists of Witnesses and Evidence”**

**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**

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Mr Julian Nicholls

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**Legal Representatives of the Victims**

Ms Natalie von Wistinghausen  
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**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**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. Further to Trial Chamber I's instructions,<sup>1</sup> the Common Legal Representative of Victims ("CLR") submits these observations<sup>2</sup> on the Defence for Mr Abd-Al-Rahman's ("Defence") "Mise à jour de la liste des témoins de la Défense et demande d'extension de délai pour le dépôt de sa liste définitive".<sup>3</sup>
2. In the Extension Request, the Defence submits its updated list of witnesses and evidence,<sup>4</sup> and concurrently requests an extension of one month from the current deadline of 15 April 2024, to submit its final lists.
3. In the CLR's view, the Extension Request does not satisfy the good cause standard under Regulation 35(1) of the Regulations of the Court ("Regulations"). Nor, in the CLR's submission, are the accused's rights to adequate time and facilities for the preparation of his defence,<sup>5</sup> or to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him,<sup>6</sup> implicated by the Extension Request.
4. Instead, should the Trial Chamber exercise its discretion to allow any extension of the deadline for submission of the final Defence lists of witnesses and evidence, the legal basis for doing so should, in the CLR's view, be founded elsewhere in the Court's legal framework – for example, the Chamber's authority under articles 64(6)(d) or 69 of the Statute regarding the production of evidence, or the Chamber's overarching responsibility to ensure fair and expeditious proceedings,<sup>7</sup> if the Chamber finds it necessary or otherwise appropriate to grant the Extension Request notwithstanding the absence of good cause.
5. A party or participant that seeks relief under Regulation 35(1) of the Regulations cannot itself have significantly contributed to the circumstances underlying the request for an extension of deadline. The Extension Request sets out a myriad of

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<sup>1</sup> Trial Chamber I's email to the parties and CLR, 16 April 2024 at 13h13.

<sup>2</sup> In accordance with Regulation 23 *bis* (2) of the Regulations of the Court, these observations are classified as confidential. A public redacted version will also be submitted.

<sup>3</sup> 15 April 2024, ICC-02/05-01/20-1111-Conf (public redacted version [ICC-02/05-01/20-1111-Red](#)) ("Extension Request").

<sup>4</sup> Annexes 1 (list of witnesses) and 2 (list of evidence) to the Extension Request. A corrected version of Annex 2 was submitted on 16 April 2024.

<sup>5</sup> Rome Statute, Article 67(1)(b).

<sup>6</sup> *Id.*, Article 67(1)(e).

<sup>7</sup> *Id.*, Article 64(2).

factors as purported good cause justifications for the one-month extension sought, including the outbreak and continuation of devastating civil war in Sudan as of 15 April 2023, [REDACTED], and the capacity of witnesses located in Sudan to travel to testify in view of conditions on the ground.<sup>8</sup> In its submissions on the production of a final list of Defence witnesses, the Defence further relies on: what it qualifies as the ‘continuous and systematic absence’ of cooperation from the Sudanese authorities; the lack of a ‘valid’ agreement between the Court and Sudan setting out a clear, sufficient and binding framework on Sudan in respect of its cooperation with the Court; the ‘refusal’ of the Chamber to refer a discrete category of non-cooperation by Sudan to the Security Council pursuant to Article 87(5)(b) of the Statute; and the ‘impossibility’ of protecting witnesses within Sudan.<sup>9</sup>

6. The CLRV acknowledges, as outlined in today’s fifth periodic report from the Defence,<sup>10</sup> that the Defence has now set out a more definitive schedule and plan for the appearance of its remaining witnesses. However, the Defence’s own responsibility for the current state of affairs is entirely absent from the Extension Request. The Trial Chamber has repeatedly determined that the Defence could and should have acted in a much more diligent manner in the conduct of its investigations and case preparations, and that the delays in the presentation of the Defence case – and the subsequent multiple deadline extensions and adjournments granted by the Chamber – primarily arise from the Defence’s own conduct.<sup>11</sup> Furthermore, in respect of the [REDACTED], and the security conditions said to impact on the capacity of Defence witnesses to travel out of Sudan to testify, the Trial Chamber ([REDACTED]<sup>12</sup>) has rejected the necessity of the former, and has not indicated its acceptance of the latter in respect of the

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<sup>8</sup> Extension Request, para. 4.

<sup>9</sup> *Id.*, para. 8.

<sup>10</sup> Cinquième Rapport Périodique soumis en vertu de la Décision ICC-02/05-01/20-1057-Conf, 19 April 2024, ICC-02/05-01/20-1112-Conf (“Fifth Periodic Defence Report”), paras 5, 8-11.

<sup>11</sup> *See, e.g.*, Trial Chamber decisions ICC-02/05-01/20-916-Conf-Red, paras 40-42 (public redacted version [ICC-02/05-01/20-916-Red](#)); ICC-02/05-01/20-938-Conf, para. 16 (public redacted version [ICC-02/05-01/20-938-Red](#)); ICC-02/05-01/20-990-Conf, paras 10, 12 (public redacted version [ICC-02/05-01/20-990-Red](#)); [REDACTED].

<sup>12</sup> [REDACTED].

Defence being unduly burdened or disadvantaged in arranging the travel of its witnesses for purposes of testimony.<sup>13</sup> The Defence's *choice* to plan and pursue its investigations and case preparations in the manner that it has during these proceedings does not satisfy the good cause test.

7. Similarly, in respect of the Defence's specific submissions on its final list of witnesses,<sup>14</sup> the factors catalogued therein<sup>15</sup> do not establish good cause for grant of a deadline extension. The Trial Chamber has dismissed the Defence's contention that Sudan's non-cooperation in respect of certain Defence requests for assistance could justify an adjournment or otherwise preclude the Defence from putting on a case,<sup>16</sup> further concluded that exercise of the Chamber's discretionary authority to refer Sudan to the Security Council would not be "the most effective way of obtaining cooperation in the concrete circumstances at hand",<sup>17</sup> and has rejected the Defence's repeated assertion that the cooperation agreement between the Court and Sudan lacks legal validity.<sup>18</sup> The 'impossibility' of the Court to protect witnesses (or participating victims) on the territory of Sudan is not a circumstance unique to the Defence in the context of the present proceedings, and has been an ongoing issue for the Court since the opening of the Sudan Situation in June of 2005. Lastly, the Trial Chamber has already granted the Defence significant additional time to conduct its investigations and prepare its case following the outbreak of civil war on 15 April of last year.
8. Given this legal and factual reality, the CLRV submits that it would be improper to grant the requested extension of deadlines on a 'good cause' basis. In the CLRV's consultations with her clients, it is apparent to the CLRV that the fairness of the proceedings from the standpoint of the participating victims includes – as the Trial Chamber has very properly done – the provision of clear legal and

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<sup>13</sup> [REDACTED].

<sup>14</sup> Extension Request, paras 7-8.

<sup>15</sup> *Id.*, para. 8.

<sup>16</sup> Decision on the Defence's Request for postponement of the presentation of its case, ICC-02/05-01/20-916-Conf-Red, paras 31-35 (public redacted version [ICC-02/05-01/20-916-Red](#)).

<sup>17</sup> Decision on the Defence's requests for a finding of non-compliance by Sudan, 31 March 2023, ICC-02/05-01/20-913-Conf, paras 28-30 (public redacted version [ICC-02/05-01/20-913-Red](#)).

<sup>18</sup> *See, e.g.*, Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf (public redacted version [ICC-02/05-01/20-561-Red](#)).

factual bases and explanations in the record of the case when deadline extensions or adjournments are granted, particularly given the two decades that have now passed since the events underlying this case, and Mr Abd-Al-Rahman's initial appearance before the Court almost four years ago.

9. The accused's right to adequate time and facilities to prepare his defence, and to obtain the evidence of witnesses on his behalf, have also been more than respected in these proceedings. As the [REDACTED].<sup>19</sup>
10. The CLRV recalls again her previous consistent submissions,<sup>20</sup> on behalf of the participating victims, that these proceedings must move to a conclusion in an expeditious and fair manner, and that, in the CLRV's view, the Defence has been afforded more than adequate time and facilities to prepare and present the accused's defence.
11. For the reasons above, it is the CLRV's opinion that the Extension Request has failed to demonstrate 'good cause' for the deadline extensions sought. Should the Trial Chamber nonetheless determine it is necessary or appropriate – on a different legal basis – to grant an extension of deadlines, the CLRV submits that the current hearing schedule, with a final date for evidentiary hearings set for 14 June 2024, should be maintained unless both "exceptional circumstances" and "good cause" exist<sup>21</sup> to justify any further variation in the conclusion of the Defence's presentation of witness evidence. The CLRV notes and welcomes that the Defence has indicated as much [REDACTED].<sup>22</sup>

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<sup>19</sup> [REDACTED].

<sup>20</sup> See, e.g., CLRV Observations on confidential redacted version of Defence "Réponse aux observations du Bureau du Procureur, des Représentants des Victimes et du Greffe", 12 January 2024, ICC-02/05-01/20-1054-Conf, para. 10.

<sup>21</sup> [REDACTED].

<sup>22</sup> Quatrième Rapport Périodique soumis en vertu de la Décision ICC-02/05-01/20-1057-Conf, 5 April 2024, ICC-02/05-01/20-1108-Conf, para. 12; Fifth Periodic Defence Report, para. 5.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a long horizontal flourish extending to the right.

Natalie v. Wistinghausen  
Common Legal Representative of Victims

Dated this 19 April 2024  
At Berlin, Germany