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No. ICC-02/05-01/20

Date: 2 November 2020

PRE-TRIAL CHAMBER II

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala**

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

Decision on the Prosecutor's Request for Postponement of the Confirmation Hearing
and related deadlines

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
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Counsel for Mr Abd-Al-Rahman

Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel
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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)* (the ‘*Abd-Al-Rahman* case’), having regard to articles 60(4), 61(1) and (3), and 67 of the Rome Statute (the ‘Statute’), rule 121(3), (4) and (7) of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines.

I. Procedural History and Submissions

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute¹ and decided² to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’) for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004 (‘First Warrant’).³
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the First Warrant pursuant to article 58(6) of the Statute,⁴ issuing a second warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, between on or about 5 to 7 March 2004 (‘Second Warrant’).⁵
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, as ordered by the Chamber,⁶

¹ Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, [ICC-02/05-56](#)).

² Decision on the Prosecution Application under Article 58(7) of the Statute, [ICC-02/05-01/07-1-Corr](#).

³ Warrant of Arrest for Ali Kushayb, [ICC-02/05-01/07-3-Corr](#).

⁴ Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”) by adding new crimes, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and [ICC-02/05-01/20-6-Red2](#)).

⁵ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, [ICC-02/05-01/07-74-Red](#)).

⁶ Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, 11 June 2020, [ICC-02/05-01/07-82](#).

Mr Abd-Al-Rahman made his first appearance before the Single Judge,⁷ at which time the confirmation of charges hearing was scheduled for Monday, 7 December 2020.⁸

4. On 17 August 2020, Judge Rosario Aitala, acting as the Single Judge on behalf of the Chamber,⁹ issued the ‘Order on disclosure and related matters’ (‘First Order on Disclosure’) in which the Single Judge, *inter alia*, ordered that any applications for non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence shall be submitted to the Chamber no later than 11 September 2020’ (the ‘11 September 2020 deadline’).¹⁰

5. On 9 September 2020, the Prosecutor submitted the ‘Prosecution’s urgent request for an extension of time’ (‘Request for Extension’),¹¹ requesting the Chamber to vacate the 11 September 2020 deadline. As instructed by the Chamber,¹² on 11 September 2020, the Defence submitted a response (‘Extension Response’),¹³ requesting that the Chamber reject the Request for Extension, arguing that it had no legal basis, and because it had been filed late.¹⁴ In the alternative, the Defence requests that the Chamber order the Prosecutor (i) to disclose, without delay, the totality of the witnesses’ statements intended to be relied upon at the confirmation hearing, redacting all information that may lead to the identification of witnesses or other persons at risk; and (ii) order the Prosecutor and the VWS to conclude, without delay, the risk assessments and implementation of measures to protect witnesses and persons at risk in order to lift the redactions sufficiently in advance to the confirmation hearing.¹⁵

⁷ Transcript of hearing of Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#) (‘Initial Appearance’).

⁸ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 22, line 23 to page 23, line 3.

⁹ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

¹⁰ Order on disclosure and related matters, 17 August 2020, [ICC-02/05-01/20-116](#) (‘First Order on Disclosure’), para. 12(iii).

¹¹ ICC-02/05-01/20-149-Conf-Exp (as instructed by the Chamber, a confidential redacted version, ICC-02/05-01/20-149-Conf-Red, and a public redacted version, [ICC-02/05-01/20-149-Red2](#), were notified on 10 September 2020).

¹² Order in relation to the ‘Prosecution’s urgent request for an extension of time’, 10 September 2020, [ICC-02/05-01/20-151](#).

¹³ Observations en Réponse à la Requête ICC-02/05-01/20-149-Red2 et à l’Ordonnance ICC-02/05-01/20-151, [ICC-02/05-01/20-152](#) (‘Extension Response’).

¹⁴ Extension Response, [ICC-02/05-01/20-152](#), paras 6-12.

¹⁵ Extension Response, [ICC-02/05-01/20-152](#), paras 15-17.

6. On 16 September 2020, the Prosecutor submitted a request to postpone the confirmation hearing to 1 June 2021 and set the deadline for the submission of any applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence to 1 March 2021 (the 'Postponement Request').¹⁶ The Prosecutor submits, *inter alia*, that (i) following a comprehensive assessment, it became apparent that the Office of the Prosecutor ('OTP') would not be able to adequately discharge its statutory duties vis-à-vis the defence, or victims and witnesses, in order to be ready to proceed to a confirmation hearing on 7 December 2020; (ii) an unprecedented 13 years have elapsed since the issuance of the first arrest warrant against the suspect and his initial appearance, thus the Prosecutor is now reviving a case that has been largely dormant for over a decade; (iii) the Prosecutor's investigative activities have been constrained by limited resources and a total lack of cooperation from the Government of Sudan ('Sudan'), and the Prosecutor is in the early stages of building a relationship with Sudan to allow for vital investigative activities in the territory; (iv) the ongoing COVID-19 pandemic is significantly impeding the Prosecutor's work; (v) the postponement will preserve the overall fairness, manageability and expeditiousness of the proceedings and will not cause any prejudice to the Defence, ensuring the protection of victims and witnesses, and the conduct of investigations aimed at establishing the truth.

7. On 2 October 2020, the Chamber issued the 'Second Order on disclosure and related matters' (the 'Second Order on Disclosure')¹⁷ in which the Chamber, *inter alia*, gave a series of instructions to the parties in order to ensure that disclosure takes place under satisfactory conditions and indicated that it 'would only entertain the possibility of postponing the hearing once the OTP has demonstrated that it is seriously committed to discharging its disclosure obligations *as early as possible*, in a transparent, efficient and expeditious manner'.¹⁸

¹⁶ Corrected Version of "Prosecution's request to postpone the confirmation hearing", 16 September 2020, ICC-02/05-01/20-157-Conf-Exp-Corr (a confidential redacted version, ICC-02/05-01/20-157-Conf-Red-Corr, and a public redacted version, [ICC-02/05-01/20-157-Corr-Red](#), were notified on the same date) ('Postponement Request').

¹⁷ [ICC-02/05-01/20-169](#).

¹⁸ Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 35.

8. On 5 October 2020, as authorised by the Chamber,¹⁹ the Defence submitted its response to the Postponement Request, asking the Chamber to reject it (the ‘Postponement Request Response’).²⁰ The Defence submits, *inter alia*, that (i) postponing the confirmation hearing by almost 7 months would certainly affect the suspect’s rights, as he would remain in detention throughout this period; (ii) the Prosecutor has been aware of Sudan’s lack of cooperation for some time and, in the absence of a real possibility of improvement on this front, it would be inappropriate to delay the confirmation hearing; (iii) the Prosecutor’s arguments in relation to the pandemic would only be of concern if the health of Prosecution staff or witnesses was directly affected, considering that Prosecution staff and witnesses are exempt from Covid-19 related travel restrictions; and (iv) the *Abu Garda* and *Banda and Jerbo* cases should be referred to as appropriate references for the length of time between the initial appearance and the confirmation hearing.

9. On 9 October 2020, the Prosecutor submitted the ‘Prosecution’s third progress report on the evidence review, translation and disclosure process’ (the ‘Third Report’),²¹ in which the Prosecution submits that it is making every possible effort to progress the preparation of this case as quickly and effectively as possible with the resources available to it. It further indicates, *inter alia*, that (i) out of the 33,965 items of evidence in its database, 23,638 items, i.e. 69%, still require primary and secondary review; (ii) its best estimate of the time required to complete the review of the outstanding items is 145 working days; (iii) it is prioritising the review and disclosure of the most relevant and probative evidence in the case and has narrowed the tentative list of witnesses upon which it intends to rely at the confirmation hearing to 95; and (iv) it will soon complete the disclosure of material related to 35 witnesses, the main obstacle for disclosure of items related to the remaining 60, i.e. 63%, being witness security.

¹⁹ Decision on the Defence’s ‘Requête en vertu des normes 23bis-2, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red’, 23 September 2020, [ICC-02/05-01/20-164](#).

²⁰ Observations en Réponse à la Requête ICC-02/05-01/20-157-Red, [ICC-02/05-01/20-173](#).

²¹ [ICC-02/05-01/20-179](#) (with SECRET-Exp-Anx1 and Conf-Exp-Anx2, both only available to the Prosecutor, and Conf-Anx3).

10. On 23 October 2020, the Prosecutor filed the ‘Prosecution’s fourth progress report on the evidence review, translation and disclosure process’ (the ‘Fourth Report’).²² In this report, the Prosecutor indicated, *inter alia*, that (i) out of 34,070 items in its database, primary review of 4,625 items had been completed and 333 items had been secondary reviewed, leaving 23,379 items, i.e. 68.6%, that had not been reviewed at all; (ii) the Prosecutor’s best estimate of the time required to complete the review of the outstanding items remained 145 working days; (iii) out of 95 witnesses on which the Prosecutor intends to rely at the confirmation hearing, 50, i.e. 53%, have been cleared for disclosure of their identity to the suspect. The Prosecutor further indicated that the investigation was still facing obstacles related to the COVID-19 pandemic and other causes. No concrete progress in terms of possible investigations inside Sudan had yet resulted from the Prosecutor’s visit to Khartoum, but assurances of support and cooperation had been given by the Sudanese government.

II. Analysis

A. Applicable Law

11. The Chamber recalls that rule 121(7) of the Rules provides for the postponement of the confirmation of charges hearing on the request by either party or *proprio motu* by the Chamber. As consistently stressed by the Court’s jurisprudence, in assessing a request made pursuant to this rule, the Chamber ‘must ensure the overall fairness and expeditiousness of proceedings bearing in mind the competing interests at stake’.²³ Such assessment must be made taking into account the reasons advanced and in light of the circumstances of each case.²⁴

²² [ICC-02/05-01/20-191](#) (with SECRET-Exp-Anx1, Conf-Exp-Anx2, Conf-Anx3, and Conf-Anx4).

²³ Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 17 June 2013, [ICC-01/04-02/06-73](#) (‘*Ntaganda* Postponement’), para. 13; Pre-Trial Chamber II, *Prosecutor v. Dominic Ongwen*, Decision Postponing the Date of the Confirmation of Charges Hearing, 6 March 2015, [ICC-02/04-01/15-206](#) (‘*Ongwen* Postponement’), para. 25, Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’, 15 May 2019, [ICC-01/14-01/18-199](#) (‘*Yekatom and Ngaïssona* Postponement’) para. 30.

²⁴ *Ongwen* Postponement, [ICC-02/04-01/15-206](#), para. 25; *Yekatom and Ngaïssona* Postponement, [ICC-01/14-01/18-199](#), para. 30.

12. The Chamber underlines that a postponement of the confirmation hearing is a serious measure that may only be taken on an *exceptional basis*, in light of its important implications on the competing interests of the parties to the proceedings.²⁵ When adjudicating such a request the Chamber must be mindful of the fundamental right of the suspect to appear promptly and without delay before the Pre-Trial Chamber in order to defend him or herself in the context of the confirmation hearing, and the pre-trial detention of the suspect must only be limited to what is strictly necessary.²⁶ As already stressed by the Chamber, it is incumbent upon the Prosecutor ‘to maintain a proper balance between its operational constraints and the rights of the suspect’.²⁷

13. The Chamber recalls that, pursuant to article 68(1) of the Statute, the protection of the safety, physical and psychological well-being, dignity and privacy of victims and witnesses is of the utmost concern to the Court as a whole. Accordingly, the need to ensure the effective protection of victims and witnesses might constitute a compelling reason warranting postponement of the confirmation hearing.²⁸

B. The Postponement Request

14. The Prosecutor argues that the postponement of the confirmation hearing is necessary to enable the OTP to comply with its statutory duties, specifically, to (i) carry out additional investigations to comply with its duty under article 54(1)(a) of the Statute to establish the truth, and to investigate incriminating and exonerating circumstances equally; (ii) review all of the material in its possession to ensure that it complies with its duty to disclose to the Defence any evidence falling under rule 77 of the Rules or article 67(2) of the Statute; (iii) re-contact witnesses, conduct individual risk assessments, and implement any necessary protection measures in order to comply with its duty under article 68(1) of the Statute to protect victims and witnesses; (iv) translate and, where necessary, transcribe witness statements in order to comply with its duty under rule 76(3) of the Rules to make statements of Prosecution witnesses available in a language which the accused fully understands

²⁵ *Yekatom and Ngaïssona* Postponement, [ICC-01/14-01/18-199](#), para. 31.

²⁶ *Yekatom and Ngaïssona* Postponement, [ICC-01/14-01/18-199](#), para. 31.

²⁷ Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 14.

²⁸ *Yekatom and Ngaïssona* Postponement, [ICC-01/14-01/18-199](#), para. 33.

and speaks; and (v) review material subject to articles 54(3)(e), 72, and 93 of the Statute and seek consent for the lifting of conditions from the relevant information providers in relation to those items identified as requiring disclosure to the Defence under rule 77 of the Rules or article 67(2) of the Statute.²⁹

15. The Chamber will hereby analyse each of the reasons advanced in order to determine whether the Prosecutor has sufficiently demonstrated that they warrant a postponement of the confirmation hearing. A postponement can only be granted if it is demonstrated that it is justified while preserving the fairness and expeditiousness of the proceedings and maintaining a proper balance between the Prosecutor's operational constraints, the rights of the suspect and of the victims, and the protection of witnesses and victims, whose overall personal security could be in danger.

First Justification: Conducting additional investigations

16. The Prosecutor argues that further investigations are necessary to replace existing evidence that has been lost or degraded due to the passage of time and to obtain additional evidence.³⁰ These, the Prosecutor submits, include vital investigative activities, for the first time, in the territory of Sudan; contact with potential witnesses with relevant information to the investigation; and re-contacting current witnesses.³¹ The Defence argues that the recently signed agreement with Sudan does not provide a sufficient basis to presume that the OTP will be able to access the territory of Sudan.³² In addition, the Defence submits that, even if the Prosecution is granted immediate access to the territory of Sudan, it appears that no investigations have yet been conducted in the country, which means that the Prosecutor would be starting from scratch investigations that should have been conducted before applying for an arrest warrant and without sufficient time to conclude them before the confirmation hearing.³³ Furthermore, the Defence submits that Sudan's lack of cooperation with the

²⁹ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), paras 6, 16-23.

³⁰ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 17.

³¹ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), paras 16-27.

³² Postponement Request Response, [ICC-02/05-01/20-173](#), para. 30.

³³ Postponement Request Response, [ICC-02/05-01/20-173](#), para. 32.

Court is nothing new, and that, in the absence of a real possibility of improvement on this front, it would be inappropriate to delay the confirmation hearing.³⁴

17. The Chamber notes that a distinction must be made between investigatory steps the Prosecutor could have taken in the past and new investigatory opportunities that have only arisen recently. As the Chamber has already underlined, while the OTP is allowed to continue its investigations, the confirmation hearing cannot be postponed to allow their completion,³⁵ let alone could a postponement be based on the mere possibility of potential future investigations *in situ*, which have only been broadly alluded to by the OTP. In relation to the investigatory steps outlined by the Prosecutor in Annex I of the Third and Fourth Reports, the Chamber notes that the OTP does not explain why it has not yet started conducting these interviews. Under these circumstances, the Chamber does not see any justification for postponing the confirmation hearing on this basis.

18. Finally, the Chamber notes that the Prosecutor has alluded to the possibility that some witnesses who were interviewed in the past may no longer be available and that other evidence may have been lost or degraded. The Chamber notes that the OTP so far has had more than four months since Mr Abd-Al-Rahman surrendered to make the necessary verifications, but has so far only identified two instances of evidence that are no longer available. The Prosecutor has not explained the matter further, or has indicated why it would not suffice to submit the lost evidence pursuant to rule 68 of the Rules. It is also worthy of note that the Prosecutor has not claimed that the currently available evidence would be insufficient for confirmation. Without further explanation, the avowed need to replace certain evidence therefore remains speculative and cannot provide a justification for postponing the confirmation hearing.

Second Justification: Reviewing all material in its possession to ensure that it complies with its duty to disclose to the Defence any evidence falling under rule 77 of the Rules or article 67(2) of the Statute

³⁴ Postponement Request Response, [ICC-02/05-01/20-173](#), paras 48-50.

³⁵ Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 19.

19. The Prosecutor originally argued that more than 37,000 items needed to be reviewed and, by its calculations, estimated that the OTP needed approximately 340 days to review them.³⁶ According to the Prosecutor's most recent update, there remain 23,379 items to be reviewed, a task that the OTP estimates it should be able to complete in approximately 145 working days,³⁷ i.e. approximately 7 months.

20. The Chamber notes that the organisational arrangements of the resources within the OTP, which fall outside the judicial scrutiny mandated to the Chamber, do not justify halting the duties of the Prosecution until the time of a suspect's surrender. As already stressed by the Chamber, it is incumbent upon the Prosecutor to maintain a proper balance between its operational constraints and the rights of the suspect³⁸ and to comply with the statutory disclosure obligations in a timely manner. The Chamber also notes that several witness statements disclosed as part of INCRIM packages 2 and 3 were collected during the years 2018 and 2020, which contradicts the Prosecution's allegation that the case was dormant. The Chamber regrets being presented with a *fait accompli* in this regard and instructs the OTP to resolve the disclosure backlog without any further delay and in accordance with the timeline set by the Chamber below.

Third Justification: Conduct individual risk assessments and implement protection measures in order to comply with its duty under article 68(1) of the Statute to protect victims and witnesses

21. The Prosecutor submits that individual risk assessments must take place reasonably close in time to the planned disclosure of the witness' identity so that changes in the personal circumstances of the witness and his or her family members can be taken into account, including the location where he or she resides. In the Prosecutor's view, this must occur after the arrest or surrender of the suspect, as this may have a negative impact on the security situation of witnesses and their family

³⁶ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), paras 28-36.

³⁷ Third Report, [ICC-02/05-01/20-179](#), paras 8-12, 15. Fourth Report, ICC-02/05-01/20-191, paras 9 and 11.

³⁸ Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 14.

members.³⁹ The Prosecutor has recently indicated that disclosure is still pending for items related to 59 witnesses,⁴⁰ and the OTP's best estimate is that it will be able to complete its applications for the non-disclosure of witness identities by February 2021.⁴¹

22. In the Extension Response, the Defence argues that the dual imperative of witnesses' security and fairness of the proceedings in relation to Mr Abd-Al-Rahman are not contradictory and may be reconciled by implementing new solutions, and considers that it is the duty of the Defence to take a proactive approach on this issue.⁴² Accordingly, the Defence suggests that the Chamber order (i) the Prosecutor to disclose, without delay, the totality of the witnesses' statements intended to be relied upon at the confirmation hearing, provisionally redacting all information that may lead to the identification of witnesses or other persons at risk; and (ii) the Prosecutor and the VWS to conclude, without delay, the risk assessments and implementation of protective measures in order to lift the redactions sufficiently in advance of the confirmation hearing.⁴³

23. The Chamber stresses that the protection of witnesses is a fundamental duty of the Court that applies at all relevant times, which should be managed and adjusted according to the circumstances underlying each particular case.⁴⁴ As previously stated by this Chamber, the protection of victims and witnesses may constitute a compelling reason to postpone a confirmation hearing.⁴⁵ The Chamber is mindful of the significant challenges, which the Defence has acknowledged, involved with the assessment of the risks to witnesses and the implementation of measures ensuring their security and that of their family members. The Chamber, while not being in a position to evaluate the risks faced by each of the witnesses, considers that the interest of preserving the overall personal security of the victims, witnesses, and any other persons at risk prevails over other competing interests. Therefore, a limited

³⁹ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 38.

⁴⁰ Fourth Report, ICC-02/05-01/10-191, para. 12.

⁴¹ Third Report, [ICC-02/05-01/20-179](#), paras 15.a) and 19.

⁴² Response to Request for Extension, [ICC-02/05-01/20-152](#), para. 14.

⁴³ Response to Request for Extension, [ICC-02/05-01/20-152](#), paras 15-17.

⁴⁴ *Ntaganda* Postponement, [ICC-01/04-02/06-73](#), para. 41.

⁴⁵ *Yekatom and Ngaïssona* Postponement, [ICC-01/14-01/18-199](#), para. 33.

postponement of the confirmation hearing is warranted in these circumstances and can be properly implemented factoring in the Defence's proposal, and ensuring the overall fairness and expeditiousness of the proceedings.

Fourth Justification: Issues of Translation

24. The Chamber notes with concern that, in the Third Report, the Prosecutor reiterated that it was 'unfortunately impossible' for the OTP's Language Services Unit to prepare reviewed translations into Arabic of all required witness statements and transcripts in time for the 7 December 2020 confirmation hearing.⁴⁶

25. The Chamber has clearly instructed the Prosecutor to disclose to the Defence, on a rolling basis, all witness statements intended to be relied upon for the purposes of the confirmation hearing, in their original language if no translations are available, in order for the Defence to identify the specific portions which require translation as being 'core to the preparation of the defence'.⁴⁷ The Chamber notes with concern that, apparently without complying with the Chamber's clear order, i.e., without having yet disclosed all statements of witnesses cleared by PSU in its original language or actively engaging with the Defence in order to expedite translation, the Prosecution has simply indicated that it 'has not received information from the Defence on specific sections of statements to prioritise for translation'.⁴⁸ In light of the above, the Chamber instructs the Prosecutor and the Defence to immediately and fully comply with the Chamber's orders. In these circumstances, the Chamber considers that translation cannot provide a justification for postponing the confirmation hearing.

Fifth Justification: Review of material subject to confidentiality agreements and seeking consent for the lifting of conditions from information providers

26. The Prosecutor argues that the OTP needs a considerable amount of time to review thousands of documents subject to confidentiality agreements in its Darfur collection, identify those related to the allegations against Mr Abd-Al-Rahman, particularly any material falling under rule 77 of the Rules or article 67(2) of the

⁴⁶ Third Report, [ICC-02/05-01/20-179](#), para. 23.

⁴⁷ Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 34.

⁴⁸ Fourth Report, ICC-02/05-01/20-191, para. 20.

Statute, have such restrictions lifted, and comply with the disclosure obligations prior to the confirmation hearing.⁴⁹

27. As provided for in the Second Order on Disclosure,⁵⁰ the Prosecutor has presented the Chamber with some information on these types of items.⁵¹ However, in light of the limited information so far provided, the Chamber can only conclude that the Prosecutor has not expeditiously reviewed the relevant items and, in addition, has only requested the corresponding lifting of confidentiality agreements the day before or the same day of filing the reports to the Chamber, and has failed to provide the Chamber with all information requested. Under these circumstances, the Chamber considers that the review of material subject to confidentiality agreements and corresponding requests for lifting them, cannot provide sufficient justification for postponing the confirmation hearing.

Additional submissions

Issues addressed in separate decisions

28. The Prosecutor argues that the postponement would not cause undue delay under article 67(1)(c) of the Statute, nor would it cause Mr Abd-Al-Rahman to be detained for an unreasonable period prior to trial within the meaning of article 60(4) of the Statute.⁵² Noting that Mr Abd-Al-Rahman has not been granted interim release, the Defence argues that postponing the confirmation hearing by almost 7 months would certainly affect the suspect's rights, seeing as he would remain in detention throughout this period.⁵³ The Chamber recalls that the issue of interim release has been addressed in separate decisions and, as such, it will not consider this matter in the present decision.

The impact of Covid-19

29. The Prosecutor also submits that the Covid-19 pandemic has significantly impeded the OTP's work in the assessment and implementation of witness protection,

⁴⁹ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), paras 55-58.

⁵⁰ Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 28.

⁵¹ ICC-02/05-01/20-179-Conf-Exp-Anx2; ICC-02/05-01/20-191-Conf-Exp-Anx2.

⁵² Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 8.

⁵³ Postponement Request Response, [ICC-02/05-01/20-173](#), paras 35-40.

the conduct of additional investigations, and the collection of evidence, due to remote working arrangements, travel and contact restrictions, quarantine measures, and the impact of the pandemic on the work of external agencies. The Prosecutor argues that privileges and immunities do not mitigate the impact of the Covid-19 challenges faced by the OTP, as they have no bearing on the health and safety restrictions imposed by States on the travel and movement of people.⁵⁴

30. The Defence submits that a postponement is not a suitable response to the Covid-19 pandemic, as it is not possible to predict whether the difficulties caused by the pandemic will be over by the time the hearing is conducted. The Defence also argues that the restrictions related to the pandemic only apply to immigration and registration formalities, from which OTP staff and witnesses are exempt due to privileges and immunities, which is reflected by the fact that the Court has continued with its work during the pandemic. It further submits that the only direct impact that the pandemic could have on the proceedings is that on the health of OTP staff and witnesses, which has not been claimed or demonstrated.⁵⁵

31. The Chamber notes that the Court's staff and witnesses are exempt from travel restrictions due to privileges and immunities and that the impact of the Covid-19 pandemic cannot retroactively justify the Prosecutor's delays. However, the Chamber considers that it is not unreasonable to take the circumstances surrounding the pandemic into consideration in the present decision.

Conclusion

32. Having analysed the parties' submissions and arguments and taken into account the overall fairness and expeditiousness of the proceedings, the rights of the suspect, the protection of victims, witnesses and other persons at risk, and the circumstances of the case, the Chamber determines that the date of the confirmation shall be postponed in view of ensuring the safety and overall security of victims and witnesses. During this extended timeframe, the Prosecutor is instructed to fully comply with the statutory obligations and the Chamber's orders.

⁵⁴ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), 4, 18, 25-26, 46-48

⁵⁵ Postponement Request Response, [ICC-02/05-01/20-173](#), paras 19-23.

33. The Postponement Request is partly granted on an exceptional basis and the confirmation hearing in the present case shall commence on Monday, 22 February 2021. Having balanced the need to postpone the proceedings against the prejudice that may result to the suspect, the Chamber finds that the need to postpone the proceedings outweighs any potential prejudice to the suspect.

34. As the date for the confirmation hearing shall be postponed, regarding the Request for Extension, the Chamber decides to partly grant it while granting the Defence's alternative request in the Extension Response, ordering the Prosecutor (i) to disclose by Monday, 7 December 2020 at the latest, the totality of the witness statements intended to be relied upon at the confirmation hearing, in their original language if their translations have not been completed; (ii) regarding those statements related to witnesses for which PSU has not yet provided clearance for disclosure, the Prosecutor should redact all information that may lead to the identification of witnesses or other persons at risk; and (iii) by Friday, 18 December 2020 at the latest, the Prosecutor must conclude the risk assessments and implementation of measures to protect witnesses and persons at risk and submit any and all applications for the authorisation of the non-disclosure of witness identities and/or the non-disclosure of entire items of evidence.

C. Disclosure of Items related to the name of the suspect

35. The Chamber notes that, from the date of his first appearance, the suspect and his defence counsel have indicated that he does not recognise himself as 'Ali Kushayb'.⁵⁶ In response to the Defence request for an amendment to the name of the case,⁵⁷ the Prosecutor acknowledged that 'Ali Kushayb' 'is a "nickname" or "alias" and not a legal name'.⁵⁸ The Chamber, while directing that the suspect shall be addressed as 'Abd-Al-Rahman' or 'Mr Abd-Al-Rahman' rather than 'Ali Kushayb' in court proceedings, official court documents and filings, and public information material emanating from the Court, decided to defer the issue until such time that the

⁵⁶ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), p. 3, lines 19-23 and p. 5, line 15.

⁵⁷ Requête aux fins de modification du nom porté au dossier de l'affaire ICC-02/05-01/20, [ICC-02/05-01/20-1](#).

⁵⁸ Prosecution's Response to "Requête aux fins de modification du nom porté au dossier de l'affaire ICC-02/05-01/20", [ICC-02/05-01/20-4](#).

Chamber would be in a position to make an informed decision (the ‘26 June 2020 Decision’).⁵⁹

36. In its Postponement Request Response, the Defence also submits that, whilst the alias ‘Ali Kushayb’ has constantly been used by the Court and in particular by the OTP when referring to this case, no reliable item justifying or otherwise explaining the use of this alias has yet been disclosed, whether in the context of the request for amendment of the name of the case or in the request for interim release.

37. As already noted in the 26 June 2020 Decision, neither the Prosecutor, nor previous Chambers provided any detailed reasons for using the name ‘Ali Kushayb’ as a short form when referring to Mr Abd-Al-Rahman, or for deciding to include this ‘nickname’ or ‘alias’ in the name of case ICC-02/05-01/07 in the context of the issuance of either the First or the Second Warrant of Arrest.

38. The Chamber notes that the link between Mr Abd-Al-Rahman and the nickname or alias ‘Ali Kushayb’, and the reasons warranting the reference of the latter to the suspect, do not seem to form the specific subject matter of any of the materials disclosed so far by the Prosecutor, whereas various spelling alternatives of it appear in many of the disclosed items, including several witness statements. In the view of the Chamber, the issue of the existence of a link between the suspect and the nickname, and the determination of the extent to which references to ‘Ali Kushayb’ can or should be read as referring to the suspect, is of such a fundamental nature as to make it necessary for the Chamber to address it as a matter of priority. Accordingly, the Prosecutor is instructed, as a matter of urgency, (i) to proceed to the identification of all items relied upon for the purposes of establishing this link; (ii) to disclose all such items no later than Monday, 7 December 2020; and (iii) to file detailed submissions on that day, exhaustively illustrating the way in which each of the disclosed items would support the conclusion that the suspect is, or was at the time of the relevant events, (also) known as ‘Ali Kushayb’.

⁵⁹ Decision on the Defence request to amend the name of the case, [ICC-02/05-01/20-8](#).

D. Metadata of Disclosed Items

39. The Chamber recalls that, in the Second Order on Disclosure, the Prosecutor was instructed to indicate, for each disclosed item, which sections are deemed to contain incriminating and/or exonerating information.⁶⁰ The Prosecutor was given the option to either highlight the relevant sections of documents or to provide the relevant information by indicating the page and paragraph numbers in a dedicated metadata field. The Prosecutor opted for the latter option, and created a new metadata field ('Disclosure Notes') for this purpose. The Chamber accepts that, in some instances, the relevance of a particular exhibit will be apparent on its face. For example, when a witness has provided a sketch map that is discussed at length in his or her testimony, there is no need for much explanation in the metadata. However, in most cases it is not at all clear which parts of a document the Prosecutor intends to rely on as incriminating evidence or considers potentially exonerating. This is especially the case when the information is not directly related to any of the charged incidents and/or is based on (anonymous) hearsay. It is the Prosecution's responsibility to indicate, for each exhibit disclosed as incriminating evidence, which passages contain, in its estimation, information that is both relevant to the case and has sufficient probative value.

40. The Chamber has noted that, in relation to certain witness statements, the Prosecutor has essentially referred to the entirety of the substantive testimony of the witness, regardless of whether the information provided was based on direct observation by the witness or anonymous hearsay and regardless of whether the information relates to the charged incidents or not. Although the Chamber cannot impose a methodology on the Prosecutor for selecting evidence, it regrets the low level of discernment that is demonstrated in some instances. In order to allow for efficient and effective preparation of the hearing, the Chamber encourages the Prosecutor to be more judicious in the future and select only passages that are clearly relevant and probative. The purpose of this exercise is not to restrict the Prosecutor in any way, but to have a better idea of the exact content and nature of the evidence the Prosecutor is actually relying on to support the charges. Blanket references to large

⁶⁰ Second Order on Disclosure, [ICC-02/05-01/20-169](#), para. 24.

portions of a statement or document, irrespective of relevance or probative value, does not assist the Chamber and defeats the purpose of providing Disclosure Notes.

E. Deadline and Format of the Document Containing the Charges and Pre-Confirmation Brief

41. The Chamber finds it appropriate, in order to allow time for the sufficient and meaningful preparation of the Defence and the Chamber, to order the Prosecutor to submit the Document Containing the Charges (the ‘DCC’) by Monday, 4 January 2021 at the latest. In addition, the Chamber specifies that the DCC should be structured in a narrative style, with relevant facts presented in detail and in chronological order. As a guide, the Chamber directs the Prosecutor to the DCC submitted in the *Ongwen* case.⁶¹ The Prosecutor must be sufficiently specific and exhaustive in the presentation and description of events relating to the alleged crimes and shall endeavour to pinpoint the places, times, and (approximate) number of victims corresponding to each charge, and to provide the necessary particulars that comprise the elements of the crimes.⁶²

42. In addition to the DCC, the material in support of the charges shall be presented in a separate pre-confirmation brief, where each statement of fact should have a corresponding footnote referring specifically, with hyperlinks, to the most probative supporting evidence, duly explaining which evidence is believed to support each charge and the reason why that would be the case. The pre-confirmation brief shall be submitted by Friday, 15 January 2021, at the latest, together with the list of evidence the OTP intends to present at the confirmation hearing.

43. The Prosecutor and the Defence are hereby encouraged to explore whether the latter contests every aspect of the charges or whether there is scope for agreement as to evidence in the terms of rule 69 of the Rules.

⁶¹ Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Prosecution’s submission of the document containing the charges, the pre-confirmation brief, and the list of evidence, 21 December 2015, [ICC-02/04-01/15-375](#), see also confidential annexes A and C.

⁶² See also Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges, 5 October 2018, [ICC-01/12-01/18-143-tENG](#), para. 30.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Prosecutor to immediately and fully comply with all orders included in the Second Order on Disclosure;

PARTLY GRANTS the Request for Postponement;

PARTLY GRANTS the Request for Extension;

GRANTS the Defence's alternative request in the Extension Response;

SETS the date for the confirmation hearing to commence on Monday, 22 February 2021;

ORDERS the Prosecutor to, by:

(i) Monday, 7 December 2020 at the latest:

- Disclose the totality of the witnesses' statements intended to be relied upon at the confirmation hearing, as specified in paragraph 34 above; and
- Disclose all items to be relied upon for the purposes of establishing the link between Abd-Al-Rahman and 'Ali Kushayb', including detailed submissions as instructed in paragraph 38 above;

(ii) Friday, 18 December 2020 at the latest:

- Conclude risk assessments and implementation of measures to protect witnesses and persons at risk; and
- Submit any and all applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence;

(iii) Monday, 4 January 2021, submit the DCC;

(iv) Friday, 15 January 2021, at the latest:

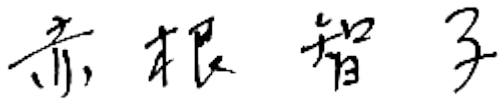
- Submit the pre-confirmation brief;
- Submit the list of evidence intended to be presented at the confirmation hearing; and
- Disclose all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules; and

ORDERS the Prosecutor to structure the DCC and the pre-confirmation brief in accordance with paragraphs 41 and 42 of the present decision.

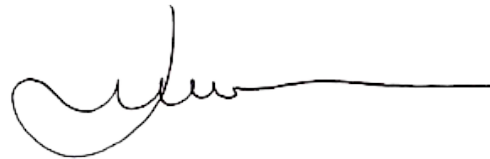
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Monday, 2 November 2020

At The Hague, The Netherlands