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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

With Secret *EX PARTE*, Prosecution Only Annexes 1-2

Public Redacted Version of “Prosecution’s second request to postpone the confirmation hearing and related deadlines”, 3 December 2020, ICC-02/05-01/20-218-Conf

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I. INTRODUCTION

1. The Prosecution respectfully requests, under rule 121(7) of the Rules of Procedure and Evidence (“Rules”), that Trial Chamber II (“Chamber”), postpone the date of the confirmation of charges hearing from 22 February 2021 to 31 May 2021. The Prosecution makes this request on an exceptional basis in light of the prevailing interest of preserving the overall personal security of the victims, witnesses and other persons at risk, as well as for other reasons outlined below.¹

2. The Prosecution has been working diligently and determinedly to meet the Chamber’s deadlines as set out on 2 November 2020 in its decision on the Prosecution’s first postponement request (“Postponement Decision”).² Despite these concerted efforts, the Prosecution is not able to meet all of the Chamber’s deadlines and must request this further postponement.

3. While regrettable, the requested postponement would not require Mr Abd-Al-Rahman to be detained for an “unreasonable period prior to trial due to inexcusable delay by the Prosecutor” under the meaning of article 60(4) of the Rome Statute. To the contrary, a confirmation hearing on 31 May 2021 would be consistent with the time periods permitted by other Pre-Trial Chambers of this Court,³ under less exceptional circumstances.

4. Pursuant to the Postponement Decision, the Prosecution will identify, disclose and file submissions on items relied on for the purpose of establishing the link between Mr Abd-Al-Rahman and the name Ali Kushayb by 7 December 2020. The Prosecution will also continue to disclose as many witness statements as possible on a rolling basis,⁴ but unfortunately, it is simply not able to fully comply with the

¹ ICC-02/05-01/20-196 (“Postponement Decision”), para. 23.

² Postponement Decision, p. 20.

³ In the *Ongwen* and *Ntaganda* cases, the period of time between the issuance of the public arrest warrant and the initial appearance of the suspect before the Court was more than nine years, and almost five years, respectively. In *Ntaganda*, the period of time between the initial appearance and the confirmation hearing was 321 days (10 months, 15 days), while in *Ongwen*, this period was 360 days (11 months, 26 days).

⁴ The Prosecution aims to have disclosed approximately 53 witness statements of the 98 witnesses on which it currently intends to rely at the confirmation hearing by 7 December 2020. The total number of witnesses on which the Prosecution intends to rely at the confirmation hearing is likely to increase as relevant individuals are screened and interviewed.

Chamber's order to disclose the totality of witnesses' statements intended to be relied upon at the confirmation hearing by 7 December 2020.⁵

5. The Prosecution has also completed its review of all materials in its collection that are subject to agreements pursuant to articles 54(3)(e), 72 and 93(8) of the Statute, identified by primary reviewers as of potential relevance to this case, and it is finalising the remaining requests to be sent to the relevant information providers for consent to lift restrictions on disclosure.

6. However, unresolved witness security concerns, recent material developments with respect to its investigative activities, disclosure challenges and the ongoing COVID-19 pandemic have inevitably delayed the Prosecution's progress with respect to other deadlines. As a result of these developments, the postponement of the confirmation hearing is necessary and justified to enable the Prosecution to discharge its duty under article 54(1)(a) of the Statute. In particular, the Prosecution highlights the new investigative opportunities and the ability to conduct risk assessments *in situ* that have been made available to it following its landmark mission to Sudan in October 2020. The Prosecution now faces its first real prospect of accessing the territory of Darfur since the referral of the situation to the Office of the Prosecutor ("OTP") by the United Nations Security Council ("UNSC") in 2005.⁶

7. Consequently, the Prosecution requests that the deadline for submitting all applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence be postponed to 1 March 2021.⁷ The Prosecution further requests that the deadline for disclosure of the remaining witness statements⁸ and non-witness related material⁹ on which it intends to rely at the confirmation hearing, as well as all evidence within the meaning of article 67(2) of

⁵ Postponement Decision, para. 34 and p. 20.

⁶ S/RES/1593 (2005).

⁷ The Prosecution will submit applications for the authorisation of the non-disclosure of witness identities and/or non-disclosure of entire items of evidence on a rolling basis.

⁸ These witness statements include witnesses of low relevance cited in the first arrest warrant application.

⁹ ICC-02/05-01/20-200, para. 9; ICC-02/05-01/20-207, para. 9.

the Statute and all material referred to in rule 77 of the Rules be postponed to 30 April 2021.

8. In order to ensure the “sufficient and meaningful preparation of the Defence and the Chamber,”¹⁰ the Prosecution requests that the Chamber extend the deadline for the submission of the Document Containing the Charges (“DCC”) to 16 April 2021, and the submission of the pre-confirmation brief and the list of evidence intended to be presented at the confirmation hearing to 23 April 2021.

II. CLASSIFICATION

9. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this request is classified as confidential. The Prosecution classifies Annexes 1-2 to this submission as secret, *ex parte*, only available to the Prosecution, since they contain highly sensitive information relating to witness protection issues and the Prosecution’s ongoing investigation. The Prosecution will file a public redacted version on Friday, 4 December 2020.

III. SUBMISSIONS

10. Under rule 121(7) of the Rules, the Prosecution submits this request for the postponement of the confirmation of charges hearing for Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”) on the basis of unresolved witness security concerns, recent material developments with respect to its investigation, disclosure challenges and obstacles posed by the ongoing COVID-19 pandemic.

11. As a result of these new developments, the postponement of the confirmation hearing until 31 May 2021 is necessary and justified to enable the Prosecution to discharge its duty under article 54(1)(a) of the Statute to “establish the truth,” and to investigate incriminating and exonerating circumstances equally. In seeking to establish the truth, the Prosecution must also weigh this duty together with its obligation to take appropriate measures to ensure the effective investigation and prosecution of crimes, while respecting the interests and personal circumstances of

¹⁰ Postponement Decision, para. 41.

victims and witnesses,¹¹ and the Court's overriding mandate to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.¹²

12. While the Prosecution is equally mindful of Mr Abd-Al-Rahman's right to be tried without undue delay,¹³ as the Chamber has observed, the interest of preserving the overall personal security of the victims, witnesses and any other persons at risk prevails over other competing interests.¹⁴ Therefore, on balance, postponement due to grave witness security concerns and the Prosecution's new investigative opportunities, which are expected to result in additional vital evidence, would serve to "ensure the overall fairness and expeditiousness of proceedings bearing in mind the competing interests at stake."¹⁵

13. The Prosecution principally highlights the significant impact that its recent visit to the territory of Sudan in October 2020 has had on its investigation and witness risk assessment process. The Prosecution faces the genuine prospect of interacting directly with the local communities in Darfur who were affected by Mr Abd-Al-Rahman's alleged crimes for the first time since the UNSC referral of the Darfur situation in 2005. Since 2007 until very recently, the former Government of Sudan's ("GoS") total lack of cooperation severely limited the Prosecution's ability to conduct investigative activities in the territory of Sudan. On 3 October 2020, representatives of the GoS and certain rebel movements signed a peace agreement in Juba, South Sudan, which included a number of provisions relating to the ICC. The parties agreed to full and unlimited cooperation with the ICC in relation to persons against whom arrest warrants have been issued and the facilitation of Prosecution access to victims, witnesses and investigation sites.

14. Under article 54(1)(b) of the Statute, it is imperative that the Prosecution be given a reasonable period of time to take full advantage of these new opportunities,

¹¹ Article 54(1)(b) of the Statute.

¹² Article 68(1) of the Statute.

¹³ Article 67(1)(c) of the Statute.

¹⁴ Postponement Decision, para. 23.

¹⁵ ICC-02/04-01/15-206, para. 25. *See also* ICC-01/14-01/18-199, para. 30; ICC-01/04-02/06-73, para. 13.

particularly in the midst of an ongoing pandemic and the associated complications. Set against over 13 years of hostility and non-cooperation from the previous government, it is entirely reasonable, given the changed circumstances, to request an additional few months for the Prosecution to seek to conduct *in situ* operations in its pursuit of justice for the victims of the crimes committed in Darfur.

15. In light of the legitimate interest of the victims to see these longstanding expectations fulfilled, the Prosecution further submits that postponement of the confirmation of charges hearing until 31 May 2021, for a total period of less than 12 months after Mr Abd-Al-Rahman's surrender, would constitute a reasonable amount of time under article 61(1) of the Statute and in accordance with the Chambers Practice Manual¹⁶ and established jurisprudence of this Court.¹⁷ As such, this delay on an exceptional basis to respect the paramount interest of victim and witness safety would not require Mr Abd-Al-Rahman to be detained for an unreasonable period prior to trial and would clearly not be "inexcusable" within the meaning of article 60(4) of the Statute.

Witness security concerns

16. Under article 68(1) of the Statute, the Court shall "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" and the Prosecution shall take these measures particularly during the investigation and prosecution of crimes. The Chamber has observed that "the interest of preserving the overall personal security of the victims, witness and any other persons at risk prevails over other competing interests."¹⁸ Due to factors outside of its control, the Prosecution has not yet been able to implement the appropriate protective measures despite its tireless efforts. The Prosecution submits

¹⁶ Chambers Practice Manual, para. 13 ("Indeed, in certain circumstances, allowing more time for the parties' preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.")

¹⁷ See ICC-02/05-01/20-157-Conf-Exp-Corr (and a confidential redacted version, ICC-02/05-01/20-157-Conf-Red-Corr, and a public redacted version, ICC-02/05-01/20-157-Conf-Red-Corr) ("Postponement Request"), para. 5.

¹⁸ Postponement Decision, para. 23.

that an additional three month postponement of the confirmation hearing to 31 May 2021 is reasonable and justified to ensure the security and personal well-being of the victims and witnesses.

17. The Prosecution is continuing to conduct witness risk assessments as rapidly as possible while maintaining high quality, reliable work. Although re-establishing contact with witnesses for risk mitigation is not always affected by security considerations, many witnesses have not been contacted in several years or longer, and tracking down their updated contact details takes considerable time and effort coupled with various difficulties posed by the pandemic. Thus far, the Prosecution has cleared a total of 75 witnesses for disclosure out of an estimated 98 witnesses¹⁹ on which it currently intends to rely at the confirmation hearing.

18. However, due to persistent security concerns, many of the Prosecution's most critical witnesses for the confirmation hearing have not yet been cleared [REDACTED]²⁰ [REDACTED]. The Prosecution also continuously adds new witnesses who require clearance as a result of its ongoing investigations, outreach efforts and other leads provided by non-governmental organisations and partners.

19. Likewise, the Prosecution is not able to significantly accelerate its review and disclosure of witness statements on which it intends to rely at the confirmation hearing. The Prosecution notes that, under article 68(1) of the Statute, implementation of victim and witness protective measures must not be prejudicial or inconsistent with the rights of the accused to a fair and impartial trial. While the Prosecution retains the option to create witness summaries or apply redactions,²¹ given the significant redactions required to protect the identities of several of its core witnesses and their family members, the relevant statements would need to be redacted so thoroughly as to make them of limited value to the preparation of the

¹⁹ The total number of witnesses on which the Prosecution intends to rely at the confirmation hearing is likely to increase as relevant individuals are screened and interviewed.

²⁰ [REDACTED].

²¹ Postponement Decision, para. 34.

Defence case. The Prosecution requires additional time to attempt to resolve these issues.

20. Annex 1 contains additional information regarding witness security issues that necessitate a postponement of the confirmation hearing.

Recent material developments in investigative opportunities

21. Since the Prosecution submitted its postponement request on 16 September 2020 (“Postponement Request”), there have been significant developments in its concrete investigative opportunities that necessitate more time to fully exploit. Although the Prosecution recognises that the confirmation hearing cannot be postponed simply to allow for the completion of investigations, these new developments give rise to investigative opportunities that did not previously exist and constitute a material change in circumstances. Moreover, these concrete opportunities extend beyond a “mere possibility” of conducting interviews *in situ*.²² For the first time since the UNSC referral of the situation in 2005, the Prosecution faces the tangible and imminent prospect of conducting investigative operations in the territory of Darfur, which would allow it to gather vital evidence.

22. Since the Postponement Request, the Prosecution has conducted [REDACTED] screenings and [REDACTED] interviews of witnesses in various locations. The Prosecution has identified an additional [REDACTED] witnesses and [REDACTED] witnesses relevant to the case against Mr Abd-Al-Rahman, which it is making all efforts to interview in the next three months, as well as a total of [REDACTED] potential screenings to be conducted to determine their relevance to the case.

23. From 17 to 20 October 2020, the Prosecution carried out its first visit to the territory of Sudan in over 13 years. During this visit, the Prosecution established links with high-ranking officials in the GoS, including the Prime Minister, the Chairman of the Sovereignty Council, the Minister of Justice and the Attorney-

²² Postponement Decision, para. 17.

General.²³ The Prosecution is now in the process of consulting with the GoS to facilitate immediate on the ground operations in Sudan and secure direct contact with witnesses and evidence. The Prosecution has transmitted various requests for cooperation to the GoS emphasising the need for expedited, safe and unimpeded access for its investigators throughout Sudan, and in particular, Darfur. Discussions in relation to these requests are ongoing.

24. The Prosecution's visit to Sudan generated significant interest among victims and witness groups, some of whom have reached out to offer their accounts of events related to Mr Abd-Al-Rahman. A number of concrete investigative leads have also emerged since its visit that have unfortunately not been fully actionable to date due to its lack of access to the territory of Sudan. Once the Prosecution is able to secure access for its investigators to Sudan, and Darfur in particular, evidence gathering is expected to begin immediately.

25. Under article 54(1)(a) of the Statute, the Prosecution must take every possible investigative step necessary in order to obtain additional evidence, both incriminating and exonerating, which will enable it to establish the truth. It is in the interest of all parties that the Prosecution be given the opportunity to follow these vital new leads and allow it to collect evidence which may assist the Chamber in reaching a fair and just outcome.

26. Annex 2 contains a detailed summary of the concrete material developments in vital investigative opportunities that necessitate more time for the Prosecution to exploit.

Disclosure challenges

27. While the Prosecution has endeavoured to meet all the deadlines set out by the Chamber in its Postponement Decision to the best of its abilities, it is not feasible to maintain the necessary quality and comprehensiveness of the materials that it discloses to the Defence within the current timeframe. The volume of the materials

²³ ICC-02/05-01/20-191, paras. 16-17.

that remain to be reviewed, and the degree of specificity that the Chamber has required in its respective orders on disclosure and reporting requirements,²⁴ make it hugely challenging for the Prosecution to individually assess each item of evidence in its database that is potentially relevant to Mr Abd-Al-Rahman. A hastened review could also jeopardise Mr Abd-Al-Rahman's right to be sufficiently informed of the evidence on which the Prosecution intends to rely at the confirmation hearing under article 61(3)(b) of the Statute. Ultimately, this could cause further delay to the proceedings because a rushed review would invariably result in some oversights.

28. The Prosecution is fully cognisant of the Chamber's instruction to resolve the disclosure backlog without delay in accordance with the timeline set out in the Postponement Decision.²⁵ Since Mr Abd-Al-Rahman's surrender, the Prosecution has worked, and will continue to work, steadfastly to clear this disclosure backlog, despite the time and resource constraints. The Prosecution regrets that, combined with its numerous other duties particularly the preparation of the DCC and the pre-confirmation brief, it is not feasible to meet all the existing deadlines. The further postponement of the confirmation of charges hearing until 31 May 2021 would allow the Prosecution to "maintain a proper balance between its operational constraints and the rights of the suspect."²⁶

29. As the Prosecution has previously reported,²⁷ at the time of Mr Abd-Al-Rahman's surrender in June 2020, the case was in near dormancy, including the disclosure review process.²⁸ As soon as Mr Abd-Al-Rahman made his initial appearance before the Chamber on 15 June 2020, the Prosecution undertook substantial measures to revive the case.

30. The Prosecution outlines below four pressing issues that are having a direct bearing on its ability to comply with the Chamber's disclosure orders outlined in the

²⁴ ICC-02/05-01/20-116; ICC-02/05-01/20-169.

²⁵ Postponement Decision, para. 20.

²⁶ Postponement Decision, para. 12. *See also* ICC-02/05-01/20-169, para. 14.

²⁷ [REDACTED]. *See also* Postponement Decision, para. 20.

²⁸ The Prosecution acknowledges that while some investigations continued during this period, notably during the years 2018 and 2020, the main exception was the limited investigative effort required to supplement the evidence required for the second arrest warrant application.

Postponement Decision: i) the volume of the evidence currently held by the Prosecution; ii) the 7 December 2020 deadline imposed by the Chamber; iii) the 15 January 2020 deadline imposed by the Chamber; and iv) realistic opportunities for the Prosecution to meaningfully discharge its statutory disclosure obligation.

Large volume of evidence to be reviewed

31. To date, there are 34,323 items (172,944 pages) of evidence in the Prosecution's Ringtail database relating to Darfur situation. Of these items, 404 are audio/video material. This type of evidence requires a significant amount of time and resources to review. Of the 34,323 items, the Prosecution has registered 1,186 items (2,911 pages) in Ringtail since 15 June 2020.

32. Immediately after Mr Abd-Al-Rahman's initial appearance on 15 June 2020, the Prosecution sought to develop tailored disclosure review guidelines and templates for use in the Ringtail document review.²⁹ Pending the issuance of the redaction and the E-court protocols by the Chamber, between 15 June and 17 August 2020, the Prosecution managed to review 2,274 items (14,772 pages). The Prosecution disclosed to the Defence 852 open source items (6,288 pages) on 31 August 2020. Furthermore, between 17 August 2020 and today, the Prosecution has reviewed 15,600 items (78,150 pages)³⁰ and disclosed 6,407 items (43,270 pages) to the Defence.

7 December 2020 deadline – less than four months after the issuance of the protocols

33. In the Postponement Decision, the Chamber ordered the Prosecution to disclose by 7 December 2020 at the latest: i) the totality of the witnesses' statements intended to be relied upon at the confirmation hearing ("First Disclosure Order");

²⁹ The Prosecution notes these guidelines and templates could only be finalised after the Chamber issued the redaction and E-court protocols on 17 August 2020, impacting the Prosecution's ability to conduct an efficient disclosure process for the first two months after Mr Abd-Al-Rahman's surrender. Furthermore, the review of non-public material could only be properly conducted after receipt of the redaction and E-court protocols. The development of the guidelines and templates, and the accompanying evidence review, largely rely on the protocols adopted by the Chamber.

³⁰ This includes 5,018 items (31,020 pages) from the United Nations Commission of Inquiry collection and 3,763 items (14,945 pages) within the collection of documents that are subject to agreements pursuant to article 54(3)(e) of the Statute.

and ii) all items to be relied upon for the purposes of establishing the links between Mr Abd-Al-Rahman and the name Ali Kushayb (“Second Disclosure Order”).³¹

34. In relation to the First Disclosure Order,³² the Prosecution is doing its utmost to fully comply, but as stated above, it is unfortunately not able to do so. Each of the 98 witnesses³³ on whom the Prosecution currently intends to rely at the confirmation hearing have provided other materials in addition to their statements. Witnesses often provide several annexes, reports and other material related to the case. In addition, the Prosecution has recorded all communications with these witnesses in the form of screenings notes, investigation notes, investigation reports and their health and security assessments. As such, there are 9,323 items related to witness statements (49,020 pages) in the Prosecution’s Ringtail database, and 7,170 items (40,378 pages) still need to be reviewed for disclosure purposes.

35. Disclosing the witnesses’ statements together with the related disclosable material is necessary to ensure that the Chamber is able to rely on a complete set of evidence when rendering its decision under article 61(7) of the Statute. Therefore, the Prosecution must be afforded adequate time to be diligent with its review and disclosure process. With respect to the Second Disclosure Order, the Prosecution will identify, disclose and file submissions on items relied on for the purpose of establishing the link between Mr Abd-Al-Rahman and the name Ali Kushayb by 7 December 2020. The Prosecution will also continue to disclose, on a rolling basis, as many witness statements as possible.³⁴

³¹ Postponement Decision, p. 20 and paras. 34 and 38.

³² There are 218 statements and transcripts.

³³ The total number of witnesses on which the Prosecution intends to rely at the confirmation hearing is likely to increase as relevant individuals are screened and interviewed.

³⁴ The Prosecution aims to have disclosed approximately 53 witness statements of the 98 witnesses on which it currently intends to rely at the confirmation hearing by 7 December 2020. The total number of witnesses on which the Prosecution intends to rely at the confirmation hearing is likely to increase as relevant individuals are screened and interviewed.

*15 January 2021 deadline – less than five months after the issuance of the protocols*³⁵

36. In the Postponement Decision, by 15 January 2021 at the latest the Chamber ordered the Prosecution to: i) submit the list of evidence intended to be presented at the confirmation hearing (“Third Disclosure Order”); and ii) disclose all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules (“Fourth Disclosure Order”).³⁶

37. In order to comply with the Third and Fourth Disclosure Orders, the Prosecution would have to review the remaining 22,498 items (109,784 pages) not subject to the First and Second Disclosure Orders. The Prosecution has pursued alternate means of efficiently reviewing these large volumes of evidence, such as using keyword searches³⁷ and prioritising the review of the items that were produced within the relevant period of charges.³⁸ Nevertheless, the Prosecution believes that it would still not be possible to fully comply with the current deadline as set out by the Chamber in the Postponement Decision while ensuring that the appropriate degree of accuracy and diligence is maintained.

38. While sometimes useful, keyword searches are not always an appropriate substitute for the individualised review of each item of evidence to identify relevant information. Furthermore, at least 10,540 items (32,775 pages) in the Prosecution’s collection are not electronically searchable. Many of these items are handwritten notes in Arabic which require the Prosecution to conduct a much more time-consuming review than electronically typed items in order to fully comply with the Chamber’s orders.

³⁵ The Prosecution interprets the Chamber’s orders in the Postponement Decision to mean that it will be required to disclose all the remaining non-witness related material which is not part of the First Disclosure Order and on which it intends to rely at the confirmation hearing by 22 January 2021. *See also* ICC-02/05-01/20-200, para. 9; ICC-02/05-01/20-207, para. 9.

³⁶ Postponement Decision, p. 20.

³⁷ In relation to the keyword searches, the Prosecution has focused on the name of the five incidents alleged in the arrest warrants for Mr Abd-Al-Rahman. The Prosecution has identified [REDACTED].

³⁸ In relation to the items that were produced within the relevant period of charges, the Prosecution has identified 4,836 items (33,853 pages). Although there are overlapping items in the searched results, the number of items and pages that the Prosecution needs to review are still voluminous. To comply with the Chamber’s order on disclosure, and subsequent instructions regarding the “Disclosure Note” field, the Prosecution must review all items responsive to the keyword searches in full.

Realistic opportunities for the Prosecution to meaningfully discharge its statutory disclosure obligation

39. The Prosecution has taken steps to allocate as many reviewers as possible to the disclosure process in Mr Abd-Al-Rahman's case. However, on the basis of existing progress, the Prosecution calculates that it will still require at least 100 working days to complete the primary review of the 22,498 items (109,784 pages) mentioned above.³⁹ Therefore, the Prosecution requests that the deadline for disclosure of the remaining witness statements⁴⁰ and non-witness related material⁴¹ on which it intends to rely at the confirmation hearing, as well as all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules be postponed to 30 April 2021.

COVID-19 related obstacles

40. The ongoing COVID-19 pandemic has presented, and continues to present, unprecedented challenges in the Prosecution's attempts to make adequate preparations for confirmation. The Prosecution observes that the rate of COVID-19 infections and related impediments have markedly increased since the submission of its Postponement Request on 16 September 2020. The Prosecution notifies the Chamber that two staff members, and at least one of its witnesses, have already contracted COVID-19, and these incidences of illness have resulted in material delays to its ability to advance the case.

41. While the COVID-19 pandemic itself may not justify a postponement of the confirmation hearing,⁴² the complications presented by the resulting restrictions on travel, in particular the ability of witnesses to travel, do unavoidably delay the Prosecution's progress with respect to its investigations. Although members of the Prosecution staff benefit from certain privileges and immunities under the

³⁹ In addition, the Prosecution will need at least an additional 10 working days to complete its secondary review process as well as to deal with new evidence that has been regularly collected.

⁴⁰ These witness statements include witnesses of low relevance cited in the first arrest warrant application.

⁴¹ ICC-02/05-01/20-200, para. 9; ICC-02/05-01/20-207, para. 9.

⁴² Postponement Decision, para. 31.

Headquarters Agreement with the Host State, these exemptions do not extend to witnesses or contractors in a number of the countries where the Prosecution is attempting to conduct witness interviews.

42. Moreover, the privileges and immunities accorded to Prosecution staff do not necessarily exempt staff from all COVID-19 related travel restrictions. The Prosecution reiterates that both its own staff and witnesses remain subject to quarantine in the countries where investigative interviews take place, as well as upon their return to the Netherlands.⁴³

43. Each country in which the Prosecution conducts interviews maintains its own COVID-19 related travel restrictions, [REDACTED] many onerous restrictions and registration requirements remain for its staff members. As a result, certain mission deployment modalities throughout the Court, including for contracted interpreters, are taking time to settle and finalise. These modalities include COVID-19 related insurance, PCR test costs, provision of protective gear and other matters.

44. Additionally, it is a challenge for contracted field interpreters on whom the Prosecution relies for conducting its interviews to get insurance to travel to certain countries. While the OTP's Language Services Unit has thus far been able to provide interpreters for the missions conducted by the Prosecution, many interpreters have been reluctant or unwilling to deploy on missions due to concerns for their own health and safety, as well as that of their families, especially for locations outside of Europe. Similarly, interpreters have feared the potential loss of income due to strict quarantine requirements imposed upon return to their countries of residence. Interpreters who are willing to travel face additional challenges. They are required to secure an adequate COVID-19 PCR test locally within the timeframe required by the destination country or airline. The closure of embassies and diplomatic missions has at times hampered the process of obtaining the required visas.

⁴³ ICC-02/05-01/20-200, paras. 14-15.

45. As previously reported,⁴⁴ the Prosecution team continues to explore alternative interview options and other solutions, but the success of these mitigation measures is not guaranteed, particularly as the pandemic worsens.⁴⁵ Some of the possible mitigation measures that the Prosecution has implemented offer imperfect and even dangerous solutions. For example, even with the suitable measures in place, arranging for face-to-face interviews in third countries requires witnesses to travel across borders and assume the risk of exposure to COVID-19 infection. Prosecution staff who are required to travel for these interviews are also equally subject to risk of infection.

46. For face-to-face interviews, the Court's Organisational Health Unit is required to do a Mission Medical Risk assessment and provide directions to the team deploying. All staff members need medical clearance prior to departure, and they will not be cleared if they fall into any of a wide range of health risk categories. The Prosecution must obtain sufficiently large meeting rooms to maintain proper social distancing between the witness, investigators and interpreters. Witnesses are also required to conduct a PCR test before interacting with members of the Prosecution staff.

47. Finally, remote screenings and interviews have offered unsatisfactory solutions. For practical and security reasons, as well as issues relating to witness vulnerability, remote interviews are assessed as not feasible for many of the Prosecution's witnesses.⁴⁶ For other witnesses, permission to conduct remote interviews is reliant on the submission of a request for assistance from national authorities. Even when this permission has been obtained, the poor technological infrastructure of some witness locations adds considerable uncertainty and delay to the interview and screening process.

⁴⁴ ICC-02/05-01/20-207, para. 14.

⁴⁵ See also Annex 2, describing potential mitigation measures and their complications as they relate to the Prosecution's investigative activities.

⁴⁶ Postponement Request, para. 25.

IV. CONCLUSION

48. Despite the difficulties that it has encountered, the Prosecution is committed to discharging its disclosure obligations as early as possible in a transparent, efficient and expeditious manner.⁴⁷ In its effort to establish the truth,⁴⁸ the Prosecution must ultimately also consider these obligations alongside its duty to take appropriate measures to ensure the effective investigation and prosecution of crimes, while respecting the interests and personal circumstances of victims and witnesses,⁴⁹ and the Court's overriding mandate to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.⁵⁰ The Prosecution submits that further postponement of the confirmation hearing is necessary and justified to fulfil these duties due to unresolved witness security concerns and recent material developments in its investigative opportunities.

49. For the aforementioned reasons, the Prosecution respectfully requests that the Chamber postpone the date of the confirmation of charges hearing from 22 February 2021 until 31 May 2021 on an exceptional basis under rule 121(7) of the Rules. This postponement of just over three months will still ensure that Mr Abd-Al-Rahman is tried within approximately 12 months of his surrender after over 13 years of evading justice. The Prosecution submits that, both in the unique circumstances of this case and in the context of similar cases before the Court, this postponement would still represent a reasonable timeline between initial appearance and the confirmation of charges hearing.

50. The Prosecution further requests that the other deadlines set out in the Postponement Decision be suspended, and the Chamber postpone the deadlines for:

- a. Submission of 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;

⁴⁷ ICC-02/05-01/20-169, para. 35.

⁴⁸ Article 54(1)(a) of the Statute.

⁴⁹ Article 54(1)(b) of the Statute.

⁵⁰ Article 68(1) of the Statute.

- b. Submission of the DCC to 16 April 2021;
- c. Submission of the pre-confirmation brief and the list of evidence intended to be presented at the confirmation hearing to 23 April 2021;
and
- d. Disclosure of the remaining witness statements⁵¹ and non-witness related material⁵² on which it intends to rely at the confirmation hearing, as well as all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules to 30 April 2021.



James Stewart
Deputy Prosecutor

Dated this 4th day of December 2020

At The Hague, The Netherlands

⁵¹ These witness statements include witnesses of low relevance cited in the first arrest warrant application.

⁵² ICC-02/05-01/20-200, para. 9; ICC-02/05-01/20-207, para. 9.