



Original: English

No. ICC-02/05-01/20

Date: 5 May 2021

PRE-TRIAL CHAMBER II

Before:

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN

(‘ALI KUSHAYB’)

Public

Order setting the schedule for the confirmation of charges hearing and
convening annual hearing on detention

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 Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of Victims

Ms Amal Clooney
Mr Nasser Mohamed Amin Abdalla

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Ms Paolina Massidda

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

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 (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), issues this Order setting the schedule for the confirmation of charges hearing and convening annual hearing on detention.

I. PROCEDURAL HISTORY

1. The Chamber recalls the general procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.¹

2. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge.² At the hearing, the confirmation of charges hearing was scheduled to commence on Monday, 7 December 2020.³

3. On 16 September 2020, the Prosecutor submitted a request to postpone the confirmation hearing to 1 June 2021 and to adjust 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 2021.⁴

4. On 2 October 2020, the Chamber issued the ‘Second Order on disclosure and related matters’, in which it 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’.⁵

5. On 2 November 2020, the Chamber issued the ‘Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines’, in which it, *inter alia*, set the confirmation hearing to commence on 22 February 2021 and

¹ See, for example, [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, paras 1-9.

² Transcript of hearing, [ICC-02/05-01/20-T-001-ENG](#) (the ‘Initial Appearance’).

³ [Initial Appearance](#), p. 22, line 23 to p. 23, line 3.

⁴ 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’).

⁵ [ICC-02/05-01/20-169](#), para. 35.

ordered the Prosecutor to disclose by 7 December 2020 the totality of the witness statements intended to be relied upon at the confirmation hearing.⁶

6. On 3 December 2020, the Prosecutor submitted a request to postpone the confirmation to 31 May 2021, and to postpone related deadlines, including, *inter alia*, the 7 December 2020 deadline to disclose the totality of witness statements intended to be relied upon at the confirmation hearing.⁷

7. On 18 December 2020, the Chamber issued the ‘Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits’, postponing the start of the confirmation hearing until Monday, 24 May 2021 and setting a number of new deadlines.⁸

8. On 23 April 2021, the Prosecutor, Defence, Legal Representatives and Office of Public Counsel for the Victims (the ‘OPCV’), pursuant to instructions issued by the Chamber via email,⁹ submitted observations on the conduct of the confirmation of charges hearing.¹⁰

II. PRELIMINARY MATTERS

9. In its Observations, the Defence asked the Chamber to cancel the confirmation hearing and to permanently stay the proceedings against Mr Abd-Al-Rahman. This request is based on a combination of arguments that have previously been raised by the Defence in several of its filings.¹¹ In essence, the Defence claims that none of the problems in relation to the protection of victims, witnesses and other persons at risk on

⁶ [ICC-02/05-01/20-196](#).

⁷ [Prosecution’s second request to postpone the confirmation hearing and related deadlines](#), ICC-02/05-01/20-218-Conf. A public redacted version was filed on 4 December 2020 (ICC-02/05-01/20-218-Red).

⁸ [ICC-02/05-01/20-238](#).

⁹ Order instructing the filing of observations on the organisation of the confirmation hearing, sent by email on 19 April 2021 at 16:50.

¹⁰ Prosecution’s submissions regarding the conduct of the confirmation hearing, ICC-02/05-01/20-362 (the ‘[Prosecutor’s Submissions](#)’); Observations relatives à l’audience de confirmation des charges, ICC-02/05-01/20-363-Conf-Exp (a public redacted version ICC-02/05-01/20-363-Red was filed on the same day) (the ‘[Defence Observations](#)’); [Joint Observations on behalf of Victims on the conduct of the confirmation of charges hearing](#), ICC-02/01/20-364.

¹¹ See, in particular, [Requête en vertu des Articles 4-2 et 68-1 du Statut](#), 14 December 2020, ICC-02/05-01/20-231-Conf-Exp (a public redacted version was filed on the same day – ICC-02/05-01/20-231-Red); [Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour](#), 26 January 2021, ICC-02/05-01/20-269; [Requête en vertu de l’Article 43-1 du Statut et de la Règle 13 du Règlement de Procédure et de Preuve](#); 29 January 2021, ICC-02/05-01/20-272-Conf-Exp (a public redacted version was filed on the same day – ICC-02/05-01/2-272-Red); Réponse aux Observations du Greffe ICC-02/05-01/20-339-Conf-Exp, 13 April 2021, ICC-02/05-01/20-340-Conf-Exp.

account of the Court's activities – including the Defence - have been resolved, making it impossible for the Defence to conduct investigations in Sudan in preparation for the confirmation hearing. The Defence asserts, in this regard, that it was unable to accept the Chamber's offer to assist in obtaining cooperation from the Sudan, because doing so would be incongruous with the Defence's position in relation to the admissibility of evidence collected in Sudan. According to the Defence, this situation leads to a violation of Mr Abd-Al-Rahman's right under article 67(1)(b) of the Statute to have adequate time and facilities for the preparation of his defence. The Defence further alleges a violation of the equality of arms because the Prosecutor concluded a Memorandum of Understanding on cooperation with Sudan that only benefits the Office of the Prosecutor and excludes other organs of the Court as well as the Defence.

10. The Chamber considers that these issues are unrelated to the subject matter of this order, which is limited to the organisation of the confirmation hearing. To the extent that they fall under rule 122 of the Rules, they will be treated accordingly and are subject to the relevant procedures and instructions below.

III. ANALYSIS

11. The Chamber recalls articles 61 and 68 of the Rome Statute (the 'Statute'), rules 79, 91, 118, 121, and 122 of the Rules of Procedure and Evidence (the 'Rules'), and regulations 37(1) and 64(1) of the Regulations of the Registry.

A. Hearing on the confirmation of charges

12. The Chamber recalls the principle of fairness which encompasses the notion of equality of arms and requires that the parties be placed on equal footing, and that the Defence should have the last word, as prescribed under rule 122(8) of the Rules.

13. The Chamber further notes the second sentence of rule 122(1) of the Rules, which states that:

The Presiding Judge shall determine how the hearing is to be conducted and, in particular, may establish the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented.

14. The Chamber notes the observations of the parties and participants.

15. The Chamber underlines that, in light of the principle of expeditiousness and to ensure the efficiency of the proceedings, the oral submissions of the parties and participants must be concise in nature, and repetition should be avoided. Final statements may not be used to raise new arguments, but parties and participants may use this opportunity to respond to arguments and questions raised during the hearing.

16. In light of the above, and upon consideration of the observations of the parties and participants, the Chamber hereby allocates the following time for oral presentations:

- The Prosecutor and the Defence are each granted 4 hours to present their arguments on the merits and 45 minutes for final statements;
- The OPCV and the joint legal representatives of the victims are together granted 2 hours to present their arguments on the merits and 1 hour for final statements, to be allocated as they see fit.

17. Concerning the possible invocation of an alibi defence, grounds for excluding criminal responsibility, etc., the Chamber sees no reason to vary the time limit provided in rule 121(9) of the Rules. However, the Chamber recalls that rule 79(2) of the Rules obliges the Defence to notify the Prosecutor ‘sufficiently in advance to enable the Prosecutor to prepare adequately and respond’. Moreover, to the extent that the Defence is already in possession of evidence supporting any claimed alibi or other defence, which it intends to present during the confirmation hearing, this must be disclosed to the Prosecutor at least 15 days prior to the commencement of the confirmation hearing.

18. As regards Rule 122(3) observations, the Chamber encourages the parties and participants to provide their submissions to the Chamber in writing in advance of the hearing, by no later than 16:00 on 17 May 2021. The Chamber reminds the parties and participants that rule 122(3) of the Rules provides an opportunity for raising issues or objections that were not previously brought to the Chamber’s attention. The parties and participants shall therefore refrain from repeating or reformulating previous submissions.

19. The Chamber rejects the Defence’s renewed request to hold one minute of silence during the confirmation hearing. The Chamber considers the request

injudicious, especially in light of the fact that the Appeals Chamber has recently confirmed in this very case that the holding of memorial ceremonies does not form part of the Court's procedural framework.

B. Hearing on review of detention

20. The Chamber notes that the one-year period referred to in rule 118(3) of the Rules will expire on 15 June 2021. It is therefore required to hold a hearing prior to that date. The Chamber is of the view that it is expedient to organise said hearing in conjunction with the hearing on the confirmation of charges. The hearing shall be held before the Single Judge in a public hearing in the presence of the Prosecutor and the Defence. In addition, pursuant to article 68(3) of the Statute and rule 91(2) of the Rules, the Chamber is of the view that the interests of the victims admitted to participate in the present case could be affected by the issue at stake and that their participation in the hearing would not be prejudicial to or inconsistent with the rights of the suspect. Accordingly, the Chamber will give the OPCV and the joint legal representatives an opportunity to be heard.

21. The Chamber will hear submissions from the Prosecutor (30 minutes), the OPCV/joint legal representatives/ (20 minutes) and, lastly, from the Defence (30 minutes).

22. The Chamber considers that the oral observations of the parties and participants will be sufficient. It is therefore not necessary to receive further submissions in writing, unless the parties wish to rely on new evidence, in which case this should be made available at least three days before the hearing.

C. Schedule

23. In light of the above, the Chamber has determined that the hearing on the confirmation of charges will commence on the morning of Monday, 24 May 2021, and will be organised as follows:

Monday, 24 May 2021

First Session: 09:30-11:00

- i. After the opening of the hearing by the Judges, the charges shall be read out pursuant to rule 122(1) of the Rules. [30']
- ii. The Parties and Participants shall present observations pursuant to rule 122 of the Rules, and responses thereto. [60']

Second Session: 11:30-13:00

- iii. The Prosecutor shall commence her oral submissions on the merits. [90']

Third Session: 14:30-16:00

- iv. The Prosecutor shall continue to present her oral submissions. [90']

Tuesday 25 May 2021

First Session: 09:30-11:00

- i. The Prosecutor shall conclude her oral submissions. [60']
- ii. The OPCV and the Joint Legal Representatives and the shall commence their oral submissions on the merits. [30']

Second Session: 11:30-13:00

- iii. The OPCV and the Joint Legal Representatives shall conclude their oral submissions. [90']

Third Session: 14:30-16:00

- iv. The Defence shall commence its oral submissions on the merits. [90']

Wednesday 26 May 2021

First Session: 09:30-11:00

- i. The Defence shall continue its oral submissions on the merits. [90']

Second Session: 11:30-13:00

- ii. The Defence shall conclude its oral submissions on the merits. [60']
- iii. The Judges may pose questions to the parties and participants.

Third Session: 14:30-16:00

- iv. The Judges may pose questions to the parties and participants.
- v. The Prosecutor shall make her closing statements. [45']

Thursday 27 May 2021

First Session: 09:30-11:15

- i. The OPCV and the Joint Legal Representatives shall make their closing statements. [60']
- ii. The Defence shall make its closing statements. [45']

Second Session: 11:45-13:15

- iii. The second session is reserved in the calendar in the event that any further time is required.

Third Session: 14:30-16:00

- iv. Hearing on the review of detention.

24. The Chamber underlines that for the sake of efficiency, in the event that a party or participant does not fully use the time allotted to it in the schedule, the Chamber will automatically move to the next presentation, even if that presentation is scheduled for the following day. Thus, the Chamber expects the parties and participants to be flexible and fully prepared to present their submissions at any time. In the event that the parties wish to use audio or video material, the Chamber expects that they will liaise with the Registry ahead of time. Finally, the Chamber notes that the schedule for the Confirmation Hearing is subject to change if warranted by developments in the proceedings.

FOR THESE REASONS, THE CHAMBER HEREBY

ESTABLISHES the schedule of the Confirmation Hearing, as set out in the present decision;

REJECTS the Defence request to hold one minute silence;

CONVENES a hearing on the review of detention of Mr Abd-Al-Rahman on Thursday 27 May 2021 at 14:30; and

ENCOURAGES the parties and participants to provide any Rule 122 submissions to the Chamber in writing by no later than 16:00 on 17 May 2021.

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



Judge Rosario Salvatore Aitala



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Wednesday, 5 May 2021

At The Hague, The Netherlands