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No. ICC-02/05-01/20

Date: 20 May 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

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

Public

Decision on variation of the time limit for presenting evidence

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

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Court’),¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, having regard to article 61(6) of the Rome Statute (the ‘Statute’), rule 121(6) of the Rules of Procedure and Evidence (the ‘Rules’) and regulations 24, 35, and 83 of the Regulations of the Court (the ‘Regulations’), issues this Decision on variation of the time limit for presenting evidence.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the general procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.²
2. On 18 December 2020, the Chamber issued a decision on the latest postponement of the confirmation hearing, which was set to start on Monday, 24 May 2021.³
3. On 5 May 2021, the Chamber issued an order in which it confirmed that the time limit provided in rule 121(6) of the Rules applies to evidence in support of any alibi or other defence Mr Abd-Al-Rahman may wish to present during the confirmation hearing (the ‘Confirmation Hearing Order’ and the ‘Time Limit’, respectively).⁴
4. On 7 May 2021, the Defence filed its list of evidence (the ‘LOE’) upon which it intends to rely for the confirmation hearing. It also sought a variation of the Time Limit to disclose an expert report pertaining to the alias ‘Ali Kushayb’. (the ‘Request’ and the ‘Expert Report’, respectively).⁵ In the Request, the Defence asserts that it was unable

¹ [Decision on the designation of a Single Judge](#), 17 March 2021, ICC-02/05-01/20-307.

² See, e.g., [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, paras 1-9; [Decision on two requests to vary the time limit for disclosing incriminating evidence](#), 6 May 2021, ICC-02/05-01/20-379, paras 1-13.

³ [Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), ICC-02/05-01/20-238. On 27 December 2020, the Defence filed a request for leave to appeal the Decision: [Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-238](#), ICC-02/05-01/20-245. The Chamber denied leave to appeal on 25 January 2021: [Decision on the request for leave to appeal the Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), ICC-02/05-01/20-266.

⁴ [Order setting the schedule for the confirmation of charges hearing and convening annual hearing on detention](#), ICC-02/05-01/20-378, para. 17.

⁵ [Soumission de l’inventaire des preuves de la Défense en vertu de la Règle 121-6](#), ICC-02/05-01/20-381.

to disclose the Expert Report by the Time Limit due to a number of procedural hurdles to finding a suitable expert and having him included in the Registry's list of experts.

5. On 12 May 2021, the Prosecutor filed a response to the Request (the 'Response').⁶ In the Response, the Prosecutor objects to the request for variation of the Time Limit to disclose the Expert Report. On the same day, the Defence filed a reply to the Response (the 'Reply').⁷

6. On 18 May 2021, the Defence filed an updated list of evidence and informed the Chamber that it had meanwhile received the Expert Report and disclosed it to the Prosecutor.⁸

II. ANALYSIS

A. Preliminary issues

7. Before analysing the merits of the Request and Response, the Single Judge must first determine whether the Reply is admissible. Although the Defence is correct in saying that it would have been entitled to respond if the Prosecutor had formulated new requests in the Response, this is not the case here. In fact, the Reply provides additional information and arguments in relation to the request for variation of time limit, which is clearly not a new issue but rather a reaction to arguments raised by the Prosecutor in the Response.

8. Under these circumstances, the Defence should have petitioned the Chamber for authorisation to submit a reply pursuant to regulation 24(5) of the Regulations. Its failure to do so compels the Chamber to disregard the Reply in its entirety.

B. Variation of the Time Limit

9. At the outset, the Single Judge recalls the Chamber's duty to ensure that the confirmation proceedings are conducted in a fair and impartial manner and with full

⁶ [Prosecution's response to "Soumission de l'inventaire des preuves de la Défense en vertu de la Règle 121-6"](#), ICC-02/05-01/20-385. See Email Order on shortened time limit for response, 10 May 2021, at 14:12.

⁷ [Réponse à la Requête ICC-02/05-01/20-385](#), ICC-02/05-01/20-388.

⁸ [Soumission de l'inventaire consolidé des preuves de la Défense](#), 18 May 2021, ICC-02/05-01/20-392.

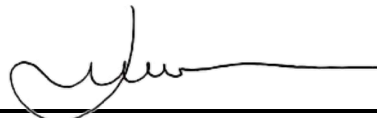
respect for the rights of the suspect. Regulation 35(2) of the Regulations provides for the possibility of extending a time limit if good cause is shown.

10. The Single Judge notes that the Request was filed within the Time Limit.⁹ The Single Judge further notes that the Defence has been faced with a number of obstacles outside its control which prevented it from disclosing the Expert Report within the Time Limit. The Single Judge accepts that good cause has thus been shown and finds that the Prosecutor will not suffer undue prejudice from the delayed disclosure of the Expert Report.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the variation of Time Limit to disclose the Expert Report.

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



Judge Rosario Salvatore Aitala
Single Judge

Dated this Thursday, 20 May 2021

At The Hague, The Netherlands

⁹ Trial Chamber II, *Prosecutor v. Katanga*, [Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List \(ICC-01/04-01/07-1537\)](#), 3 November 2009, ICC-01/04-01/07-1590, para. 13; Trial Chamber II, *Prosecutor v. Katanga*, [Decision on Witnesses 002, 030, 323 and 373](#), 14 May 2009, ICC-01/04-01/07-1135-tENG, para. 18.