



Original: English

No. ICC-02/05-01/20

Date: 10 May 2022

Date of original: 02 May 2022

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

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

**Public redacted version of the
Decision on the Prosecution's fifth application seeking the authorisation to add
two witnesses pursuant to Regulation 35**

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

The Office of the Prosecutor

Karim A.A. Khan
Nazhat Shameem Khan
Julian Nicholls

Counsel for the Defence

Cyril Laucci
Iain Edwards

Legal Representatives of Victims

Natalie von Wistinghausen
Anand Shah

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Philipp Ambach

Other

I. Procedural history

1. On 8 September 2021, Trial Chamber I (the ‘Chamber’) set the commencement date of trial and corresponding deadlines thereto, including the deadline to disclose all evidence it intends to rely on at trial, and provide a list of witnesses (the ‘LoW’) and list of evidence (the ‘LoE’) by 5 January 2022.¹
2. On 16 December 2021, the Prosecution filed a request seeking an extension of time limit beyond the 5 January 2022 deadline,² to disclose and add items to the LoW and LoE pursuant to Regulation 35 of the Regulations of the Court (the ‘Regulations’).³
3. On 24 December 2021, the Chamber partially granted the First Regulation 35 Application (the ‘First Decision’).⁴
4. On 5 January 2022, the Prosecution filed its LoW and LoE.⁵
5. On 10 and 29 March and 4 April 2022, the Prosecution filed its second, third and fourth applications seeking authorisation to add witnesses and material to its LoW and LoE.⁶ On 11 April 2022, the Chamber granted the aforesaid Regulation 35 applications (the ‘Second Decision’).⁷

¹ Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

² Transcript of the hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

³ Prosecution’s request for an extension of time to disclose materials of seven witnesses and a report pursuant to regulation 35 of the Regulations of the Court, ICC-02/05-01/20-541-Conf-Exp-Corr (the ‘First Regulation 35 Application’). Confidential redacted version, ICC-02/05-01/20-541-Conf-Red-Corr; public redacted version, ICC-02/05-01/20-541-Red2-Corr.

⁴ Decision on the Prosecution’s request for an extension of time limit to disclose and add items to its list of evidence and list of witnesses, ICC-02/05-01/20-545-Conf.

⁵ Prosecution’s submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551 + Conf-Exp-Anxs 1 and 2 & Conf-Anx3 and Conf-Anx1-Red & Conf-Anx2-Red. An updated list was filed on 19 April 2022, ICC-02/05-01/20-665 with confidential annexes 1-3.

⁶ Prosecution’s application under regulation 35 to extend the disclosure and witness list deadlines, 10 March 2022, ICC-02/05-01/20-624-Conf. A public redacted version was notified on 15 March 2022, ICC-02/05-01/20-624-Red (‘Second Regulation 35 Application’); Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material and to introduce into evidence P-0922’s new statement under rule 68(3), 29 March 2022, ICC-02/05-01/20-652-Conf (with annex ICC-02/05-01/20-652-Conf-AnxA). A public redacted version was notified on 31 March 2022, ICC-02/05-01/20-652-Red. (‘Third Regulation 35 Application’); Prosecution’s urgent application under regulation 35 for variation of time limits related to the introduction of a document concerning Witness P-0903, 4 April 2022, ICC-02/05-01/20-662-Conf (‘Fourth Regulation 35 Application’).

⁷ Decision on the Prosecution’s applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, ICC-02/05-01/20-668-Conf.

6. On 8 April 2022, the Prosecution filed a fifth application pursuant to Regulation 35, seeking the authorisation to add two witnesses and related material to its LoW and LoE (the ‘Fifth Regulation 35 Application’).⁸

7. On 19 April 2022, the Defence filed a response, opposing the Fifth Regulation 35 Application in its entirety (the ‘Response’).⁹

8. On 20 April 2022, the common legal representatives for victims (the ‘CLRVs’), filed observations supporting the Fifth Regulation 35 Application (the ‘Victims’ Observations’).¹⁰

II. Analysis

9. The Chamber incorporates by reference the general framework applicable to the assessment of a request for extension of a time limit pursuant to Regulation 35(2) of the Regulations.¹¹

10. The Chamber rejects the Defence contention that ‘the Deadline is meaningless and exists in name only’. Its conclusion in the First Decision,¹² (that the ongoing situation in Sudan after the *coup d’état* on 25 October 2021, as well as the Covid-19 pandemic and resulting travel restrictions in principle justify the extension of a time limit), recognises *inter alia* that these factors could not have been foreseen when the deadline was set. However, as with its earlier decisions, the Chamber will evaluate the Fifth Regulation 35 Application bearing in mind the nature of the evidence for which an extension of time limit is sought, while giving due regard to the rights of the

⁸ Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1073 and P-1074, ICC-02/05-01/20-667-Conf. A public redacted version was notified on 13 April 2022, ICC-02/05-01/20-667-Red. On 26 April 2022, the Prosecution sent an e-mail clarification (see E-mail from the Prosecution at 12:44. In their e-mail, the Prosecution clarifies that in addition to P-1073 and P-1074, P-0011 is the only other witness on the Prosecution’s list LoW who also provides both direct accounts of rape and is also a direct victim of rape, in Bindisi and surrounding areas.

⁹ Defence response to Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1073 and P-1074, ICC-02/05-01/20-667-Conf, ICC-02/05-01/20-674-Conf.

¹⁰ Observations on behalf of Victims on the “Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1073 and P-1074”, ICC-02/05-01/20-676-Conf (notified on 21 April 2022)

¹¹ First Decision, ICC-02/05-01/20-545-Conf, para. 3.

¹² First Decision, ICC-02/05-01/20-545-Conf, para. 5.

accused.¹³ Whilst deploring the emotive language used in the Response,¹⁴ the Chamber notes the Defence's submissions that now that the trial has started, the Defence must know with certainty the parameters of the Prosecution's case and the evidence it intends to rely on to prove its case so it can prepare for trial and the cross-examination of upcoming witnesses.¹⁵

11. The Fifth Regulation 35 Application relates to two witnesses of rapes allegedly committed in Bindisi and surrounding areas at the time of the charges.¹⁶ These alleged facts form the basis of the charges of rape as a crime against humanity and rape as a war crime under counts 8-9 of the charges as confirmed.¹⁷

12. The Chamber notes and has taken account of, (as it did in its previous decisions) the Defence's submissions that the Prosecution acted with negligence,¹⁸ and could have interviewed the witnesses sooner.¹⁹ However, whilst acknowledging that the prosecution could have provided more detailed reasons for the late interviews e.g. when the witnesses first came forward, in respect of victims of sexual violence, 'cultural or communal stigmatisation, shame and fear, as well as the general lack of trust in authorities [are] factors which can explain the difficulties faced in coming forward, especially in a conflict or post-conflict area'.²⁰ The Chamber also notes and takes into account, the CLRV's reference to the recent expert testimony of P-1042, who stated that crimes of sexual violence are often underreported in Sudan, particularly because of stigma and a sense of shame.²¹

13. The Chamber notes the Defence's submission that direct accounts of rape are not legally required and that the Prosecution is already in a position to rely on corroborating and cumulative evidence of other witnesses to prove the counts of rape in Bindisi and

¹³ First Decision, ICC-02/05-01/20-545-Conf, para. 5.

¹⁴ Response, ICC-02/05-01/20-674-Conf. See e.g. para.5 'given the Prosecution *carte blanche* to drip-feed', 'the Deadline can be ignored with impunity', and para. 6 'applications with be nodded through'.

¹⁵ Response, ICC-02/05-01/20-674-Conf, paras 4, 6-7.

¹⁶ Fifth Regulation 35 Application, ICC-02/05-01/20-667-Conf, para. 3.

¹⁷ Corrected version of 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')', 9 July 2021, ICC-02/05-01/20-433, 23 November 2021, ICC-02/05-01/20-433-Corr, p. 68.

¹⁸ See Clarification relative au paragraphe 27 du Mémoire de la Défense préalable au procès (ICC-02/05-01/20-616), 18 March 2022, ICC-02/05-01/20-636, para. 35.

¹⁹ Response, ICC-02/05-01/20-674-Conf, para. 9.

²⁰ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, para. 88.

²¹ Victims' Observations, ICC-02/05-01/20-676-Conf, para. 8, referring to Transcript of hearing, 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 11, lines 8-16.

surrounding areas.²² However, it hardly needs stating that there is a marked difference between evidence from the [REDACTED] and those who witnessed, or were told about, the crime. P-1073 and P-1074 are the sole witnesses who have come forward with direct accounts of rape in Bindisi. Thus, as submitted by the Prosecution, they provide ‘critical evidence’ regarding the alleged rapes.²³

Both witnesses provide direct evidence as to how they were [REDACTED].²⁴ Moreover, as noted by the CLRVs, both victims provide a unique perspective as [REDACTED] at the time of the alleged crimes.²⁵ Furthermore, in relation to the accused and his individual criminal responsibility, P-1073 refers to Ali Kushayb’s alleged presence in the Bindisi area on the day [REDACTED].²⁶ Thus, although other witnesses may provide evidence about alleged acts of rape in Bindisi and surrounding areas, currently there is only one witness (P-0011) in the Prosecution’s LoW who provides testimony [REDACTED] the alleged rapes. As noted by the CLRVs,²⁷ P-1073 and P-1074 will be able to provide distinctive evidence on the short-term and long-term impacts of the crime of rape on victims.

14. The Chamber notes the Defence’s argument that adding more witnesses to the LoW will delay the trial process and therefore violate the accused’s right to be tried without undue delay. However, the Chamber expects that these witnesses will be called within the time allocated to the Prosecution to present its case.²⁸

15. The Chamber thus deems it is in the interests of justice and the determination of the truth to authorise the addition of P-1073 and P-1074 and their related material to the Prosecution’s LoW and LoE.

16. At the same time, the Chamber notes that the witness statements and related material were disclosed to the Defence on 5 and 8 April 2022.²⁹ The Chamber also

²² Response, ICC-02/05-01/20-674-Conf, para. 11, *referring to* P-0007, P-0011, P-0015, P-0085, P-0834, P-0874, P-0878, P-0882, P-0921 and P-0927.

²³ Fifth Regulation 35 Application, ICC-02/05-01/20-667-Conf, para. 14.

²⁴ P-1073, DAR-OTP-0222-5026, paras 28-32; P-1074, DAR-OTP-0224-0441, paras 34-39.

²⁵ Victims’ Observations, ICC-02/05-01/20-676-Conf, paras 3 and 11.

²⁶ Fifth Regulation 35 Application, ICC-02/05-01/20-667-Conf, para. 15; DAR-OTP-0222-5026 at 5031, para. 24.

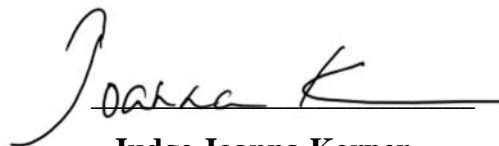
²⁷ Victims’ Observations, ICC-02/05-01/20-676-Conf, para. 11.

²⁸ Decision on the length and timing of the Prosecution case, 29 March 2022, ICC-02/05-01/20-648.

²⁹ Fifth Regulation 35 Application, ICC-02/05-01/20-667-Conf, paras 16, 18. *See also* Prosecution’s notification of the disclosure of evidence, 13 April 2022, ICC-02/05-01/20-670, with confidential Annex A.


notes the Prosecution's submission that it is prepared to call these witnesses later in trial so as to mitigate any potential prejudice to the accused.³⁰ Bearing in mind rights of the accused to have adequate time to prepare his defence, the Chamber instructs the Prosecution to call P-1073 and P-1074 to testify entirely *viva voce* at a later point in the trial and not before January 2023.

17. In light of the above, the Chamber grants the Fifth Regulation 35 Application.
18. The Chamber instructs the Prosecution to file an updated LoW and LoE immediately, and no later than 7 days after notification of this decision.
19. The parties and participants are instructed to file public redacted versions of their aforementioned submissions no later than 7 days after notification of this decision.




Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 02 May 2022

At The Hague, The Netherlands

³⁰ Fifth Regulation 35 Application, ICC-02/05-01/20-667-Conf, para. 19.