

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/05-01/20**

Date: **19 March 2023**

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

Public Redacted Version of “Observations on behalf of victims on the confidential redacted version of Defence ‘Requête aux fins de report de la phase de présentation de la Défense’”

Source: The Common Legal Representative of Victims

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

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Common Legal Representative of Victims (“CLRV”), on behalf of the 489 individuals presently admitted to participate in these proceedings, and further to the Trial Chamber’s invitation,¹ files these observations on the Defence for Mr Abd-Al-Rahman’s (“Defence”) confidential redacted “Requête aux fins de report de la phase de présentation de la Défense”.²
2. These observations are necessarily limited by the information presently available to the CLRV, and are filed confidentially. A public version shall also be filed.
3. In the Motion, the Defence requests Trial Chamber I to postpone the presentation of the Defence case – presently scheduled to commence on 20 July 2023 – and related deadlines *sine die*.³ The Defence submits that impediments to its case preparation arising from an absence of cooperation from the Government of Sudan, as well as what the Defence describes as serious and continuous failures from the Immediate Office of the Registrar,⁴ justify its request for postponement.
4. The CLRV submits that, should the Trial Chamber deem it fair and appropriate to grant the Defence’s request, such a decision should also set out a clear timetable for (re-)evaluation of relevant factors and determination on the way forward in these proceedings.

II. Procedural History

5. Pre-Trial Chamber I of the Court issued a warrant of arrest against Mr Abd-Al-Rahman on 27 April 2007, on multiple counts of war crimes and crimes against humanity allegedly committed in the Wadi Salih and Mukjar localities of West

¹ Email from Legal Officer of Trial Chamber I to the parties, CLRV and Registry, 14 March 2023 at 15h38 (instructing the Registry, and inviting the Prosecution and CLRV should they wish to do so, to file observations on or responses to the Defence motion by 20 March 2023).

² Version confidentielle expurgée de la Requête aux fins de report de la phase de présentation de la Défense, 14 March 2023, ICC-02/05-01/20-902-Conf-Red (“Motion for Postponement”). A public redacted version of the Motion was filed on the same date ([ICC-02/05-01/20-902-Red](#)).

³ *Id.*, para. 1.

⁴ *Id.*, para. 5.

Darfur State, Sudan, in 2003 and 2004.⁵ A second warrant of arrest against Mr Abd-Al-Rahman was issued on 16 January 2018.⁶

6. On 15 June 2020, Mr Abd-Al-Rahman made his initial appearance before the Court – more than thirteen years after the issuance of the first arrest warrant, and more than sixteen years after the events underlying these proceedings.
7. Pre-Trial Chamber II confirmed 31 charges of war crimes and crimes against humanity against Mr Abd-Al-Rahman on 9 July 2021.⁷
8. Mr Abd-Al-Rahman’s trial opened on 5 April 2022. The Prosecution notified the conclusion of the presentation of its evidence on 28 February 2023.⁸
9. Pursuant to the Chamber’s Second Directions on the Conduct of Proceedings,⁹ the Defence must provide notification of any defences or alibi, file a trial brief, and complete the disclosure of any evidence, by 22 May 2023.¹⁰ If the Defence elects to present evidence, it must file its list of witnesses, list of evidence, and witness statements or sufficiently detailed summaries of anticipated testimony, by 23 June 2023.¹¹ The Defence’s opening statement is scheduled for 20-21 July 2023, and the start of testimony of any defence witnesses set for 28 August 2023.¹²
10. The Chamber’s decision also provided that the noted “deadlines are without prejudice to the Defence’s ability to file a justified request, on a case-by-case basis, seeking an extension of deadline and/or an adjournment to the trial hearings”, which may particularly “be the case when the Defence identifies the need to carry

⁵ Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, [ICC-02/05-01/20-17](#).

⁶ Public redacted version of ‘Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)', 16 January 2018, ICC-02/05-01/07-74- Secret-Exp, [ICC-02/05-01/20-80-Red](#).

⁷ 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](#).

⁸ Notice of the conclusion of the Prosecution’s presentation of evidence, 28 February 2023, [ICC-02/05-01/20-887](#).

⁹ Second Directions on the conduct of proceedings, 15 December 2022, [ICC-02/05-01/20-836](#) (“Second Directions on the conduct of proceedings”).

¹⁰ *Id.*, para. 20.

¹¹ *Id.*, para. 21.

¹² *Id.* Para. 20.

out further investigations and/or new information or evidence becomes available which could be of assistance to the Defence's case".¹³

11. On 14 March 2023, the Defence filed the Motion for Postponement, requesting the Trial Chamber to vacate *sine die* the above-noted schedule for the presentation of the Defence case, and proposes to submit periodic updates to the Trial Chamber on the status of Defence preparations.¹⁴

III. Submissions

12. Among the core interests and obligations implicated by the Motion for Postponement are the accused's rights to adequate time and facilities to prepare his defence and to be tried expeditiously, and the Chamber's obligation to guarantee a fair and expeditious trial.¹⁵ In this context, and as previously underlined by the Trial Chamber in setting the schedule for the presentation of the Defence case, the Chamber "must also bear in mind the interests of justice", which include "[i]n particular, participating victims [...] interest in achieving justice".¹⁶
13. As set out in the brief procedural history, the participating victims have been awaiting justice for more than nineteen years. This includes the past two years and nine months since the accused's initial appearance before the Court, an event that many participating victims informed the CLRV rekindled a hope for justice that had faded to embers in the long intervening period. In the CLRV's consultations and interactions with the participating victims, they underline that the trial should proceed as quickly as feasible, and justice must take its course.
14. The CLRV respectfully requests the Trial Chamber, when balancing relevant rights, obligations, and interests,¹⁷ to always keep in mind these essential views and concerns of the participating victims.

¹³ Second Directions on the conduct of proceedings, para. 24.

¹⁴ Motion for Postponement, para. 24.

¹⁵ Second Directions on the conduct of proceedings, para. 19.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

15. With the caveat that the CLRV is not privy to all of the circumstances and information underlying the Motion for Postponement, she provides the following observations to assist the Chamber in its determination of this matter.
16. The CLRV notes, with concern, that the Motion for Postponement does not entail a situation of the Defence having identified a “need to carry out further investigations” or “new information or evidence becom[ing] available which could be of assistance to the Defence’s case”.¹⁸ Rather, the Motion indicates that, in the Defence’s view, its investigations have not progressed sufficiently at a more fundamental level.¹⁹
17. As highlighted above, proceedings before the Court since Mr Abd-Al-Rahman’s initial appearance will stand at close to three years at the time of the first deadline for the Defence case (22 May 2023). This period, and the five months between the appearance of the last Prosecution witness and the scheduled Defence opening statement, is of relevance in assessing the sufficiency of time granted Mr Abd-Al-Rahman for the preparation of his defence.
18. The CLRV further understands that, per the explanations provided and lines of cross-examination taken by the Defence during the presentation of the Prosecution’s case, the core of Mr Abd-Al-Rahman’s position in respect to the charges is that, at the very least, he is not the same person identified by the Prosecution’s witnesses and in the Prosecution’s evidence as “Ali Kushayb”. Accordingly, per this expressed position, Mr Abd-Al-Rahman was not involved in any of the charged events or relevant underlying facts and circumstances.
19. The CLRV submits that this core Defence position is a relevant factor when assessing the nature, content and scope of the assistance sought by the Defence from the Government of Sudan, including the Defence’s submission that the requested information and documents are ‘essential’ to the conduct of the

¹⁸ Second Directions on the conduct of proceedings, para. 24.

¹⁹ Motion for Postponement, para. 5 (submitting that the Defence has been prevented from making significant progress in its preparations).

Defence's investigations,²⁰ and the availability and accessibility of this information from other sources or avenues. This core Defence position is similarly of relevance to assessing the nature, scope and object of intended Defence missions on the territory of Sudan, as well the efficacy of the "alternative solutions" mentioned by the Defence.²¹

20. In respect of the noted "alternative solutions", and given the redactions applied, it is unclear to the CLRV when the Defence began to seriously contemplate and seek to concretely move forward with such solutions. The timeline of the Defence's actions in this regard is a relevant factor for the Trial Chamber's consideration in the context of the Defence motion.
21. As regards the Defence's complaints against the Immediate Office of the Registrar, it is not readily apparent to the CLRV that the Immediate Office acted unreasonably, improperly or in breach of Rule 20(1)(b) of the Rules of Procedure and Evidence when it disagreed with the Defence's [REDACTED].²² On its face, [REDACTED].²³ The Registry's finding that [REDACTED]²⁴ accordingly appears reasonable and based in fact.
22. The CLRV notes the further Defence complaints that the Immediate Office: (i) refused to [REDACTED];²⁵ (ii) [REDACTED] the Defence's request for provision of the Registry Crisis Management Team's protocols or practices in the event of a 'major security incident' impacting Defence team members in Sudan;²⁶ and (iii) declined to explain how, in the event of the arrest of Defence team members in Sudan, the Registry would rely upon the 'confidential' Cooperation Agreement when requesting the intervention of third parties, such as the United Nations, to diplomatically resolve such a situation.²⁷

²⁰ Motion for Postponement, para. 9.

²¹ *Id.*, para. 21.

²² *Id.*, paras 12-14.

²³ [REDACTED].

²⁴ Motion for Postponement, para. 13 and fn. 21 (citing confidential Annex B to the Motion for Postponement).

²⁵ Motion for Postponement, paras 15-16.

²⁶ *Id.*, para. 17.

²⁷ *Id.*, para. 18.

23. The CLRV takes no issue with the Defence making relevant inquiries and taking prudent steps to assess and plan for missions on the territory of Sudan, especially as concerns the safety and security of Defence team members [REDACTED]. However, the relevance, necessity, reasonableness – and where applicable hypothetical nature – of these specific Defence requests and interactions *vis-à-vis* the Immediate Office of the Registrar are legitimate subjects of consideration and assessment by the Chamber. This is of particular importance in evaluating the Defence’s claims of ‘delaying factors’ and ‘obstacles’,²⁸ and its ultimate position on the ‘impossibility’ of conducting investigations on the territory of Sudan.²⁹ For example, it is not clear to the CLRV why the confidential status of the Cooperation Agreement – the existence of which is in the public domain and public court record – would impede the Court from seeking the assistance of third parties under the hypothetical proposed by the Defence.

24. In respect to the Defence’s final complaint on the circumstances surrounding the [REDACTED],³⁰ the CLRV has insufficient information to provide useful observations. The CLRV simply notes that according to her understanding of the Motion for Postponement, [REDACTED],³¹ [REDACTED].

25. The CLRV submits that should the Chamber, after considering the submissions of the Defence, Prosecution, and CLRV, and the information provided by the Registry, determine that vacating the current schedule for the presentation of the Defence case is justified and necessary, such decision should also set out a clear timetable for (re-)evaluation of relevant factors and determination on the way forward in these proceedings.

IV. Conclusion

26. The CLRV respectfully requests the Trial Chamber to take into consideration the above observations in assessing and determining the Motion for Postponement.

²⁸ *Ibid.*

²⁹ *Id.*, para. 20.

³⁰ *Id.*, para. 19.

³¹ Motion for Postponement, para. 19.

Should the Trial Chamber decide to vacate the current schedule for the presentation of the Defence case, the CLRV submits this should be coupled with a clear timetable to ensure the progression of these important trial proceedings, and take into account the participating victims' core interest in achieving justice.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a stylized flourish at the end.

Natalie v. Wistinghausen

Common Legal Representative of Victims

Dated this 19 March 2023

At Berlin, Germany