



**Original: English**

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

**Date: 7 July 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 redacted version of the  
Decision on the Second Defence Application for Postponement of its case and the  
Notice of an Alibi Defence**

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

**The Office of the Prosecutor**

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**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**

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**Registrar**

Oswaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Procedural background and submissions

1. On 15 December 2022, Trial Chamber I (the ‘Chamber’) issued its ‘Second Directions on the Conduct of Proceedings’ (the ‘Second Directions’),<sup>1</sup> setting out a series of staggered deadlines concerning the opening of the Defence’s case.
2. On 17 April 2023, the Chamber rejected a Defence request seeking the postponement *sine die* of the presentation of its case and therefore of all deadlines (‘First Postponement Request’),<sup>2</sup> but nonetheless amending the aforesaid deadlines to provide more time to the Defence (‘First Postponement Decision’).<sup>3</sup>
3. On 11 May 2023, the Chamber rejected the Defence’s request seeking reconsideration or alternatively leave to appeal the First Postponement Decision.<sup>4</sup>
4. On 23 and 24 May 2023, the Chamber held *inter partes* and *ex parte* status conference to receive updates from the Defence on the preparation of its case.<sup>5</sup>
5. On 7 June 2023, the Chamber held a further status conference to receive an update on the Defence case.<sup>6</sup>
6. On 22 June 2023, the Defence filed a submission under Rule 79(1)(a) of the Rules of Procedure and Evidence (the ‘Rules’), indicating that it ‘is not in a position to submit a proper notice of alibi’ (‘Alibi Submission’).<sup>7</sup> However, it provides notice that it intends to raise an alibi defence in respect of the Mukjar and Deleig incidents.<sup>8</sup>

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<sup>1</sup> Second Directions on the Conduct of Proceedings, ICC-02/05-01/20-836.

<sup>2</sup> Requête aux fins de report de la phase de présentation de la Défense, ICC-02/05-01/20-902-Conf-Exp, confidential, *ex parte*, available to the Defence only (with six confidential *ex parte*, available to the Defence only, annexes). Confidential redacted and public redacted version were notified on the same date, ICC-02/05-01/20-902-Conf-Red and ICC-02/05-01/20-902-Red, respectively.

<sup>3</sup> Decision on the Defence’s Request for postponement of the presentation of its case, ICC-02/05-01/20-916-Conf-Exp. Confidential redacted and public redacted versions were notified on the same date.

<sup>4</sup> Decision on the Defence’s request for reconsideration or, alternatively, leave to appeal the Decision on the Defence’s Request for postponement of the presentation of its case, ICC-02/05-01/20-902-Conf. A public redacted decision was notified on 31 May 2023.

<sup>5</sup> Transcript of hearing, 23 May 2023, ICC-02/05-01/20-T-117; Transcript of hearing, 24 May 2023, ICC-02/05-01/20-T-118.

<sup>6</sup> Transcript of hearing, 7 June 2023, ICC-02/05-01/20-T-121.

<sup>7</sup> SUBMISSION UNDER RULE 79(1)(A) OF THE RULES OF PROCEDURE AND EVIDENCE, ICC-02/05-01/20-978-Conf, para. 1.

<sup>8</sup> Alibi Submission, ICC-02/05-01/20-978-Conf, para. 2. For further details on the intended notice of alibi, *see also* paras. 15-18.

7. On 3 July 2023, the Prosecution filed a response to the Alibi Submission, opposing its timing, the general and unspecific nature of its contents; and seeking a ruling from the Chamber in this regard.<sup>9</sup>

8. On 28 June 2023, the Defence filed a request seeking a further postponement of its case (the ‘Second Postponement Request’).<sup>10</sup> The Defence seeks a further two-month postponement of the deadlines relating to the opening of its case.<sup>11</sup> The Defence submits it has ‘achieved very little progress in the preparation of its case’,<sup>12</sup> particularly due to the ongoing armed conflict in Sudan, the non-reliable telephone and internet network, the absence of a resource person in Sudan, and pending cooperation requests.<sup>13</sup>

9. On 5 July 2023, the Chamber held a further *inter partes* and *ex parte* status conference to discuss, among other issues, the Alibi Submission and the Second Postponement Request.<sup>14</sup> During the hearing, the Prosecution and the Common Legal Representative for Victims (‘CLRV’) stated that they were neutral as regards the Second Postponement Request and would leave this decision to the Chamber.<sup>15</sup>

## II. Analysis

10. The Chamber has now received detailed information about actions taken by the Defence in preparation of its case. At the outset, the Chamber reiterates the observation that the Defence has been ‘engaging in endless discussions and arguments with the Registry’,<sup>16</sup> instead of taking timely and appropriate actions to secure witnesses’ testimonies and other evidence, as determined by the Chamber in its First Postponement Decision. The conclusions of the Chamber in that decision in this regard remain unchanged.<sup>17</sup> However, as noted by the

<sup>9</sup> Prosecution’s response to “Submission under rule 79(1)(a) of the Rules of Procedure and Evidence”, ICC-02/05-01/20-986-Conf.

<sup>10</sup> REQUEST FOR POSTPONMENT OF DEFENCE CASE, ICC-02/05-01/20-983-CONF.

<sup>11</sup> Second Postponement Request, ICC-02/05-01/20-983-CONF, para. 13.

<sup>12</sup> Second Postponement Request, ICC-02/05-01/20-983-CONF, para. 8. *See also* Update on Progress in the Defence Preparation, 22 June 2023, ICC-02/05-01/20-977-Conf+Conf-Anxs.

<sup>13</sup> Second Postponement Request, ICC-02/05-01/20-983-CONF, para. 11.

<sup>14</sup> Transcripts of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG and ICC-02/05-01/20-124-RT-ENG.

<sup>15</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, pp. 43-44.

<sup>16</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, pp. 25-26.

<sup>17</sup> First Postponement Decision, ICC-02/05-01/20-916-Conf-Exp, para. 41. The Chamber determined as follows: In respect of the delay, it should be noted that the Defence: (i) allocated significant time and resources to litigate before the Chamber issues adjudicated by the Pre-Trial Chamber; (ii) has been aware of possible difficulties in securing cooperation from Sudan since 2020 and should have planned accordingly; (iii) recruited its resource person fourteen months after the charges against Mr Abd-Al-Rahman were confirmed; (iv) without proper justification, postponed missions to Sudan on the basis of non-transmission of security-related documents by the Registry; (v) requested assistance for missions to third countries only in 2023; and (vi) has provided no

Presiding Judge during the status conference on 5 July 2023, whilst the Chamber is not satisfied that the actions taken by the Defence towards the preparation of its case have been adequate or appropriate, the Chamber is now ‘faced with the situation as it presently exists’.<sup>18</sup> Accordingly, the Chamber must assess the Second Postponement Request bearing in mind the current state of Defence investigations.

11. Considering the present submissions before the Chamber it is clear that the Defence is simply unable of complying with the current deadlines. As confirmed by the Defence during the status conference on 5 July 2023, [REDACTED].<sup>19</sup>

12. Whilst this state of affairs has largely been brought about as a result of the Defence’s strategy during the past years, the current armed conflict in Sudan has undoubtedly created further challenges concerning its on- site investigations in Sudan, which are beyond its control. Given the nature of this court, neither an ongoing conflict nor a lack of State cooperation are exceptional in nature and should not be insurmountable, nor lead to impunity, nor prevent achieving justice for victims.<sup>20</sup>

13. Moreover, the Chamber notes that the Registry confirms that it can facilitate [REDACTED].<sup>21</sup> The Registry can also provide [REDACTED].<sup>22</sup> The Chamber further welcomes the Prosecution’s repeated offers to assist the Defence in the preparation of its case,<sup>23</sup> which, as noted by the Presiding Judge during the status conference on 5 July 2023, could be beneficial to the Defence.<sup>24</sup> The Chamber also notes that during the *ex parte* status conference on 5 July 2023, the Defence affirmed that cooperation from the Prosecution in ongoing and has proved effective.<sup>25</sup>

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information in respect of its exploration of other avenues to obtain evidence, notwithstanding it has been aware of the factual contours of the case since confirmation of charges against the accused in 2021.

<sup>18</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, p. 26.

<sup>19</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, p. 31. *See also ex parte* Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-124-RT-ENG.

<sup>20</sup> *See* First Postponement Decision, ICC-02/05-01/20-916-Conf-Exp, para. 32.

<sup>21</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, p.47. *See also ex parte* Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-124-RT-ENG, in which the Defence provided further information on its potential witnesses.

<sup>22</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, p. 49.

<sup>23</sup> *See* e-mails from the Prosecution to Trial Chamber I Communications on 14 June 2023 at 15:25 and on 21 June 2023 at 16:51.

<sup>24</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, pp. 30-31.

<sup>25</sup> *Ex parte* Transcript of hearing, 5 July 2023, ICC-02/05-01/20-T-124-RT-ENG, p. 23.

14. Although, as stated above the Prosecution and the CLRVs have adopted a neutral stance to the Second Postponement Request,<sup>26</sup> the Chamber must bear in mind that the accused has been in custody for more than three years and that victims have been seeking justice for almost 20 years.

15. Accordingly, the Chamber postpones the deadlines in respect of the presentation of the Defence case as follows:

**28 August 2023:** filing of a provisional list of witnesses

**18 September 2023:** filing of a trial brief and disclosure of all evidence to be relied upon by the Defence (final list of witnesses and list of evidence)

**16 October 2023:** Opening statements, and immediately after, start of testimony of first group of Defence witnesses, up until 27 October 2023

**13 November to 15 December 2023:** Continuation of testimony of any Defence witnesses.

16. The Defence is to provide all further details of its alibi defence, pursuant to Rule 79(1)(a) of the Rules, as and when it receives them.

17. The Defence is encouraged to file any Rule 68 applications insofar as the requirements of this provision are met. Such applications may be filed on a rolling basis, as witness statements become available.

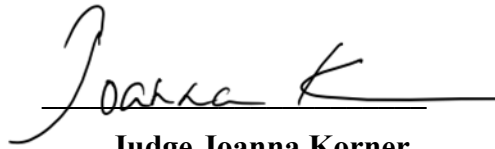
18. The Defence is further instructed to submit bi-monthly updates on the preparation of its case. The first report is due on **20 July 2023**.<sup>27</sup>

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<sup>26</sup> Transcript of hearing, 5 July 2023, ICC-02/05-01/20-123-RT-ENG, pp. 43-44.

<sup>27</sup> The updates can be transmitted via e-mail to the Chamber in an *ex parte* basis. A redacted version should be transmitted simultaneously to the Prosecution and the CLRVs.

19. Considering the upcoming summer recess, the Chamber will not schedule a further status conference. However, it should be immediately informed if any difficulties arise which require its immediate intervention.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 7 July 2023

At The Hague, The Netherlands