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No.: ICC-02/05-01/20
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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 “Prosecution’s response to ‘Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision orale relative au maintien du calendrier de l’affaire’” 8 September 2023,
ICC-02/05-01/20-1012**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Prosecution opposes the Defence's Request.¹ The Trial Chamber's Decision on the Second Defence Application for Postponement on 7 July 2023² ("Second Postponement Decision") set out the deadlines for the preparation of the Defence case. The Defence did not appeal, or ask for reconsideration of the Second Postponement Decision, nor have they made a proper new request for a further postponement. Accordingly, the Defence's Request should be rejected. The Request should also be dismissed on its merits since there is no justification for a further postponement of the Defence case.³

II. SUBMISSIONS

2. On 14 March 2023, the Defence requested the Chamber to indefinitely postpone the deadlines for the presentation of the Defence's case.⁴ The Prosecution responded on 20 March 2023.⁵ In its Decision, the Chamber found that there was no basis to adjourn the presentation of the Defence's case *sine die*, but granted the Defence further time to prepare by amending certain deadlines.⁶

3. On 28 June 2023, the Defence filed their second request to postpone the Defence case.⁷ The Prosecution responded orally on 5 July 2023.⁸ In its Second Postponement Decision, the Chamber postponed various deadlines and re-scheduled the opening of the Defence case to 16 October 2023.⁹

¹ Demande de reconsidération ou, à titre subsidiaire, d'autorisation d'interjeter appel de la décision orale relative au maintien du calendrier de l'affaire, [ICC-02/05-01/20-1010-Conf](#) ("Request").

² Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, [ICC-02/05-01/20-990-Red](#).

³ Pursuant to Regulation 23bis(2) of the Regulations of the Court, this response is filed as confidential since it responds to a filing with the same classification.

⁴ Requête aux fins de report de la phase de présentation de la Défense, [ICC-02/05-01/20-902-Conf-Red](#).

⁵ Prosecution's response to "Requête aux fins de report de la phase de présentation de la Défense", [ICC-02/05-01/20-906-Conf](#).

⁶ Decision on the Defence's Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf-Red](#), paras. 31, 33, 43-45.

⁷ Request for Postponement of Defence Case, [ICC-02/05-01/20-983-Red](#), paras. 5, 13.

⁸ Status Conference, [T-123-CONF-ENG](#), [33-35:10-20](#).

⁹ Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, [ICC-02/05-01/20-990-Red](#), para. 15.

4. The Defence did not appeal or request reconsideration of the Second Postponement Decision. Subsequently, the Defence have not made a proper new request for a further postponement of the deadlines relating to the presentation of their case.

5. The Defence's Fourth Periodic Report on the preparation of its case was not a new motion for postponement.¹⁰ In this report, the Defence obliquely refer to consequences of *realised and anticipated progress by the Defence on the current case schedule*¹¹ and set out proposed timelines for upcoming investigations. This is not a motion for postponement and evidently the Chamber did not consider it to be.¹² Furthermore, the Prosecution was not given a proper opportunity to respond.¹³

6. At the Status Conference on 5 September 2023, the Defence also did not make a new oral motion for postponement. Instead the Defence claimed the supposed request was "implicit" in the Fourth Periodic Report, and suggested the dates set out in that report meant that the presentation of the Defence case would "naturally mechanically begin in November".¹⁴ In relation to this general confusion, the Defence acknowledge a "clear misunderstanding" between the Defence and the Chamber during the Status Conference.¹⁵

7. In these circumstances, the Prosecution takes the position that the Chamber was not at any point properly seized of a new Defence motion to postpone the deadlines relating to their case. As the Presiding Judge observed, it is important that parties file motions that the Chamber can rule on.¹⁶ The Defence did not do so in this case. Accordingly, the Request should be denied.

¹⁰ Fourth Periodic Report under paragraph 18 of Decision #990, [ICC-02/05-01/20-1008-Conf-Red](#) ("Fourth Periodic Report"), paras 3-22.

¹¹ [Fourth Periodic Report](#), para. 3 ("La Défense tire en conclusion les conséquences de ses progrès réalisés et anticipés sur l'échéancier actuel de la présentation de la Défense.").

¹² Status Conference, 5 September 2023, [T-125-CONF-ENG](#), 30-35:11-6.

¹³ Status Conference, 5 September 2023, [T-125-CONF-ENG](#), 35-36:15-20.

¹⁴ [Request](#), para. 7. *See also* Status Conference, 5 September 2023, [T-125-CONF-ENG](#), 35:2-5.

¹⁵ [Request](#), para. 10.

¹⁶ Status Conference, 5 September 2023, [T-125-CONF-ENG](#), 3:6-12.

8. Notwithstanding the procedural deficiencies, the Request should be dismissed on its merits. The Defence case must begin. It has been over 20 years since the alleged crimes. The Prosecution case ended in February 2023. The victims, many of whom are very elderly, have waited long enough for justice in this case. There is no justification for further delay.

9. The Prosecution recognise that the Defence have recently made progress in their investigations and will continue to support the Defence in their preparations. Owing to this progress the Defence now have statements [REDACTED].¹⁷ The Defence are therefore in a position to start their case, even though, like the Prosecution,¹⁸ the Defence may not be able to call witnesses in its preferred order of appearance.¹⁹ The Chamber are aware of the need for the Defence to continue their investigations and have allowed for rolling disclosure²⁰ and an extra week to file their pre-trial brief.²¹ The Chamber have also expressly acknowledged that the Defence may call a limited number of witnesses in the first block.²² Given this flexibility from the Chamber, there is no reason to further delay the start of the Defence case.

III. CONCLUSION

10. For the foregoing reasons, the Prosecution respectfully requests the Chamber to deny the Request.



Karim A. A. Khan KC
Prosecutor

Dated this 12th day of September 2023

At The Hague, The Netherlands

¹⁷ [REDACTED].

¹⁸ See [T-024-CONF-ENG](#), 14:8-18; [T-025-CONF-ENG](#), 37: 21-25.

¹⁹ [Request](#), para. 16.

²⁰ Status Conference, 5 September 2023, [T-125-CONF-ENG](#), 32-33:24-2; 35:16-18; 38:5-8.

²¹ Status Conference, 5 September 2023, [T-125-CONF-ENG](#), 32-33:24-2.

²² [Request](#), para. 11.