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No. ICC-02/05-01/20

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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 two requests to vary the time limit for disclosing incriminating evidence

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

The Office of the Prosecutor

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Legal Representatives of Victims

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Counsel Support Section

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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 of the Rome Statute (the ‘Statute’), rule 121 of the Rules of Procedure and Evidence (the ‘Rules’) and regulation 35 of the Regulations of the Court (the ‘Regulations’), issues this Decision on two requests to vary the time limit for disclosing incriminating 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 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge.³ At the hearing, the confirmation of charges hearing was scheduled to commence on Monday, 7 December 2020.⁴
3. On 17 August 2020, Judge Aitala, acting as the Single Judge on behalf of the Chamber,⁵ issued the ‘Order on disclosure and related matters’ in which the Single Judge, *inter alia*, ordered that any applications for ‘non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence shall be submitted to the Chamber no later than 11 September 2020’ (the ‘First Order on Disclosure’).⁶
4. On 9 September 2020, the Prosecutor submitted the ‘Prosecution’s urgent request for an extension of time’,⁷ requesting that the Chamber vacate the 11 September 2020 deadline.
5. On 16 September 2020, the Prosecutor submitted a request to postpone the confirmation hearing to 1 June 2021 and to adjust the deadline for the submission of

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

² See, for example, [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, paras 1-9.

³ Transcript of hearing, [ICC-02/05-01/20-T-001-ENG](#) (the ‘Initial Appearance’).

⁴ [Initial Appearance](#), p. 22, line 23 to p. 23, line 3.

⁵ [Decision on the designation of a Single Judge](#), 9 June 2020, ICC-02/05-01/07-80.

⁶ [Order on disclosure and related matters](#), 17 August 2020, ICC-02/05-01/20-116, para. 12(iii).

⁷ ICC-02/05-01/20-149-Conf-Exp (as instructed by the Chamber, a confidential redacted version, ICC-02/05-01/20-149-Conf-Red, and a public redacted version, [ICC-02/05-01/20-149-Red2](#), were notified on 10 September 2020).

any applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence to 1 March 2021 (the 'First Postponement Request').⁸

6. On 2 October 2020, the Chamber issued the 'Second Order on disclosure and related matters' in which it indicated that it 'would only entertain the possibility of postponing the hearing once the OTP has demonstrated that it is seriously committed to discharging its disclosure obligations as early as possible, in a transparent, efficient and expeditious manner' (the 'Second Order on Disclosure').⁹

7. On 2 November 2020, the Chamber issued the 'Decision on the Prosecutor's Request for Postponement of the Confirmation Hearing and related deadlines' in which it, *inter alia*, set the confirmation hearing to commence on 22 February 2021 and ordered the Prosecutor to disclose by 7 December 2020 the totality of the witness statements intended to be relied upon at the confirmation hearing (the 'First Postponement Decision').¹⁰

8. On 3 December 2020, the Prosecutor submitted a request to postpone the confirmation hearing to 31 May 2021, and to postpone related deadlines, including, *inter alia*, the 7 December 2020 deadline to disclose the totality of witness statements intended to be relied upon at the confirmation hearing (the 'Second Postponement Request').¹¹

9. On 4 December 2020, the Chamber sent an email to the parties indicating that the Second Postponement Request would only be considered in relation to the date of the confirmation hearing, and that all other deadlines would remain applicable, including the 7 December 2020 deadline to submit the totality of witness statements to be relied upon at the confirmation hearing, with redactions where necessary. The Chamber further instructed that the Prosecutor may apply in writing to extend time limits under

⁸ [Corrected Version of "Prosecution's request to postpone the confirmation hearing"](#), ICC-02/05-01/20-157-Conf-Exp-Corr (a confidential redacted version, ICC-02/05-01/20-157-Conf-Red-Corr, and a public redacted version, ICC-02/05-01/20-157-Corr-Red, were notified on the same date).

⁹ [ICC-02/05-01/20-169](#), para. 35.

¹⁰ [ICC-02/05-01/20-196](#).

¹¹ [Prosecution's second request to postpone the confirmation hearing and related deadlines](#), ICC-02/05-01/20-218-Conf. A public redacted version was filed on 4 December 2020 (ICC-02/05-01/20-218-Red).

the conditions set forth in regulation 35 of the Regulations (the ‘4 December 2020 Email Instructions’).¹²

10. On 4 December 2020, the Prosecutor submitted an urgent request for the Chamber to extend the time limit for the disclosure of the totality of the witnesses’ statements to be relied upon at the confirmation hearing from 7 December 2020 to 30 April 2021 (the ‘4 December 2020 Request’).¹³

11. On 7 December 2020, the Defence submitted its response to the 4 December 2020 Request, seeking that it be dismissed *in limine*.¹⁴

12. On 10 December 2020, the Prosecutor submitted a request for the variation of disclosure related time limits in accordance with the 4 December 2020 Email Instructions (the ‘10 December 2020 Request’).¹⁵

13. On 11 December 2020, the Defence submitted its consolidated response to the Second Postponement Request and the 10 December 2020 Request.¹⁶

14. On 18 December 2020, the Chamber issued the ‘Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits’, postponing the start of the confirmation hearing until Monday, 24 May 2021, and setting a number of new deadlines, including the deadline for disclosing all incriminating and exonerating evidence by 29 March 2021 at the latest (the ‘Second Postponement Decision’ and the ‘Time Limit’, respectively).¹⁷

¹² Email sent by the Chamber to the parties on 4 December 2020 at 13:29.

¹³ [Prosecution’s urgent request for variation of disclosure related time limit](#), ICC-02/05-01/20-221.

¹⁴ [Réponse à la Requête ICC-02/05-01/20-221](#), ICC-02/05-01/20-222. A courtesy copy was sent by the Defence to the Chamber on 4 December 2020 at 18:27.

¹⁵ [Prosecution’s request for variation of disclosure related time limits](#), ICC-02/05-01/20-228.

¹⁶ [Réponse aux Requêtes ICC-02/05-01/20-218-Red et ICC-02/05-01/20-228](#), ICC-02/05-01/20-229.

¹⁷ [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.

15. On 13 April 2021, the Prosecutor filed a request for variation of time limits and to authorise the disclosure of newly collected materials in relation to two witnesses (the ‘First Request’).¹⁸

16. On 20 April 2021, the Defence responded to the First Request (the ‘First Response’).¹⁹

17. On 22 April 2021, the Prosecutor submitted a second request for variation of time limits to disclose newly collected materials (the ‘Second Request’).²⁰

18. On 3 May 2021, the Defence responded to the Second Request (the ‘Second Response’).²¹

II. SUBMISSIONS

A. The First Request

19. In the First Request, the Prosecutor asks the Chamber to authorise the addition of materials relating to witnesses P-0643 and P-0924, which were collected after the disclosure deadline of 29 March 2021. The Prosecutor asserts that due to security, logistical and personal reasons, it was not possible to interview the two witnesses before the disclosure deadline. It is further claimed that it was not possible to file the request within the prescribed Time Limit because the Prosecutor had not completed interviewing the witnesses or assessed their statements for inclusion in the confirmation evidence list before the disclosure deadline. Further, the Prosecutor was still evaluating the security situation of one witness at the time of filing the First Request.

20. The Defence objects to the First Request on the grounds that (i) the Prosecutor violated information security policy by not marking the statements as confidential; (ii) the statements were collected in the territory of Sudan without a sufficient legal basis for doing so and without being able to offer adequate protection to the witnesses; and

¹⁸ [Prosecution’s request for variation of time limits for the newly collected materials, and third request for the authorisation of non-disclosure of witness identities](#), ICC-02/05-01/20-341-Conf-Exp. A public redacted version of the First Request was filed on 15 April 2021 (ICC-02/05-01/20-341-Red2).

¹⁹ [Réponse à la Requête ICC-02/05-01/20-341-Conf](#), ICC-02/05-01/20-355-Conf. A public redacted version of the First Response was filed on the same day (ICC-02/05-01/20-355-Red).

²⁰ [Prosecution’s request for variation of time limits for the newly collected materials of Witnesses P-0926 and P-0935](#), ICC-02/05-01/20-359-Conf. A public redacted version was filed on the same day (ICC-02/05-01/20-359-Red).

²¹ [Réponse à la Requête ICC-02/05-01/20-359-Conf](#), ICC-02/05-01/20-376-Conf. A public redacted version was filed on the same day (ICC-02/05-01/20-376-Red).

(iii) the reasons for which the Prosecutor was unable to interview the two witnesses before the disclosure deadline were not outside of the Prosecutor's control, because the Prosecutor commenced an investigation without previously concluding an agreement pursuant to article 4(2) of the Statute.

B. The Second Request

21. In the Second Request, the Prosecutor argues that it was not possible to review and disclose the materials related to witnesses P-0926 and P-0935 prior to the time limit because the Prosecutor had not been able to interview them by that time due to logistical difficulties and resource limitations. In particular, there appears to have been a shortage of available investigators to interview the witnesses in time. In terms of justifying why the Second Request was not made before the expiry of the Time Limit, the Prosecutor argues that this was not possible because the interviews had not been completed or assessed yet.

22. In relation to the Second Request, the Defence points out that, since the Prosecutor already had the intention to interview P-0926 and P-0935 for a while, there was no reason why the Prosecutor could not have submitted a request pursuant to regulation 35 of the Regulations before the lapsing of the time limit. The Defence further argues that the Prosecutor cannot rely on its limited resources and the corresponding need to prioritise the allocation thereof as an excuse for failing to meet the disclosure deadlines set by the Chamber.

III. ANALYSIS

23. At the outset, the Single Judge recalls that the Chamber granted the Prosecutor's First and Second Postponement Requests primarily on the basis that more time was needed to put in place protective measures for witnesses. The Chamber specifically rejected the Prosecutor's ongoing investigation as a reason for postponing the confirmation hearing.²² The Chamber also stressed that postponing the confirmation hearing was an exceptional measure, given the important implications on the competing interests of the parties and the rights of the suspect.²³ One of the key concerns in this regard is the Defence's right to have adequate time and facilities to prepare for the

²² [First Postponement Decision](#), paras 17-18; [Second Postponement Decision](#), para. 28.

²³ [First Postponement Decision](#), para. 12, [Second Postponement Decision](#), para. 15.

confirmation hearing.²⁴ This is precisely why the Chamber set the Time Limit for disclosure sooner than the regular 30 period provided for in rule 121(3) of the Rules.²⁵

24. Although the Prosecutor is entitled to continue investigation throughout and beyond the entire confirmation process, this does not mean that there is a corresponding right to submit newly discovered evidence beyond the time limits set by the Chamber.²⁶ Indeed, given the need to afford the Defence enough time to process the evidence relied upon by the Prosecutor for the purpose of the confirmation hearing, the Prosecutor would need compelling reasons to persuade the Chamber to permit the late disclosure of additional incriminating evidence. No such reasons were offered in the First or Second Request.

25. First of all, the Prosecutor filed the First and Second Requests after the Time Limit had already expired. Whereas regulation 35(2) of the Regulations does provide for this possibility, it is strictly circumscribed. In particular, the Prosecutor must demonstrate that it was not possible to file a request for variation within the time limit.²⁷ This means that if the Prosecutor already knew that it was not feasible to interview the four witnesses in time for the disclosure deadline but nevertheless had the intention of relying on their statements for purposes of confirmation, a formal application under regulation 35(2) of the Regulations should have been filed before the time limit expired.²⁸ The fact that the Prosecutor informed the Chamber of its ongoing investigative efforts in the bi-weekly progress reports is insufficient in this regard.

26. Moreover, even if the First and Second Requests had been filed on time, the Chamber would still reject them. As already indicated, the Prosecutor is entitled to continue investigating, but this cannot lead to a situation where disclosure deadlines become meaningless. The fact that the Prosecutor was unable to conduct the interviews

²⁴ Article 67(1)(b) of the Statute; [First Order on Disclosure](#), para. 16; [Second Order on Disclosure](#), para. 11.

²⁵ [Second Order on Disclosure](#), para. 13.

²⁶ Trial Chamber II, *Prosecutor v. Katanga*, [Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP- 1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)"](#), 27 July 2009, ICC-01/04-01/07-1336, para. 28.

²⁷ Appeals Chamber, *Prosecutor v. Lubanga Dyilo*, [Decision on the request for an extension of time filed by the Legal Representatives of Victims V02](#), 8 February 2013, ICC-01/04-01/06-2975, para. 4.

²⁸ 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.

before the disclosure deadline because of logistical constraints, limited resources, or unspecified ‘personal’ reasons, does not constitute good cause under regulation 35(2) of the Regulations.²⁹

27. The only reason which might move the Chamber to allow the late submission of new incriminating evidence is if the Prosecutor can demonstrate that the newly discovered evidence brings to light important and hitherto unknown facts, which have the potential to significantly affect the charges.³⁰ However, even if this is the case, the Chamber must still weigh this against the additional burden that allowing the new evidence will place on the Defence.³¹ In addition, the Chamber must be vigilant that the Defence’s right to prepare for the confirmation hearing is not jeopardised, bearing in mind the paramount need to conduct the confirmation proceedings fairly and expeditiously.³²

28. The Single Judge observes, in this regard, that the Prosecutor indicates an intention to rely on the evidence of the four witnesses for the confirmation of charges against Mr Abd-Al-Rahman, but offers little more in terms of how significant the statements of P-0643, P-0924, P-0926 and P-0935 are when viewed in light of the other available evidence. In relation to P-0926 and P-0935, the Prosecutor asserts that their evidence ‘may be relevant to the Chamber in its decision on whether to confirm the charges’ but provides no further explanation on this point, other than giving a vague description of the content of their statements, which were not even appended to the Second Request or available in e-Court at the time of filing of the Second Request.

29. This alone would suffice to reject the First and Second Requests. Nevertheless, the Single Judge has analysed the statements of all four witnesses but does not consider

²⁹ Trial Chamber II, *Prosecutor v. Katanga*, [Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP- 1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)"](#), 27 July 2009, ICC-01/04-01/07-1336, para. 6.

³⁰ Trial Chamber II, *Prosecutor v. Katanga*, [Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP- 1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)"](#), 27 July 2009, ICC-01/04-01/07-1336, para. 30.

³¹ Trial Chamber V(b), *Prosecutor v. Kenyatta*, [Decision on Prosecution request to add P-548 and P-66 to its witness list](#), 23 October 2013, ICC-01/09-02/11-832, para. 11; Pre-Trial Chamber II, *Situation in Kenya*, [Decision on Extension of Time Limit](#), 23 December 2009, ICC-01/09-7, para. 8.

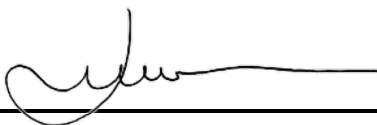
³² Pre-Trial Chamber II, *Prosecutor v. Al Bashir*, [Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87\(7\) of the Rome Statute](#), 15 October 2015, ICC-02/05-01/09-249, para. 11.

them to provide crucial new information that is relevant to one or more central issues in this case. The Single Judge did note, however, that P-0643 provided corrections concerning the identity of a source of information as well as the name of another individual that were mentioned in his previous statement.³³ To the extent that these corrections prove to be relevant, the Chamber will take them into consideration. However, the remainder of P-0643, P-0924, P-0926 and P-0935's statements cannot be relied upon by the Prosecutor because they were submitted after the Time Limit. The statements will nevertheless stay on the record and may be relied upon by the Defence if it so wishes.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the First and Second Requests.

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



Judge Rosario Salvatore Aitala
Single Judge

Dated this Thursday, 6 May 2021

At The Hague, The Netherlands

³³ DAR-OTP-0218-0638.