



Original: **English**

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

Date: **24 April 2024**

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 ‘Mise à jour de la liste des témoins de la Défense et demande d’extension de délai pour le dépôt de sa liste définitive’”, 19 April 2024, ICC-02/05-01/20-1116-Conf

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Ms Nazhat Shameem Khan
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. INTRODUCTION

1. The Prosecution opposes the Defence request (“Request”)¹ for a one month extension to file the final list of witnesses (“LoW”) and final list of evidence (“LoE”). The Request advances no new reasons to merit an additional month extension and no valid justifications have been provided by the Defence.

2. The Defence also presumptively includes two new witnesses, D-0038 and D-0039, on the LoW (Annex 1).² Despite repeated instructions by the Chamber on 5 March 2024 and 21 March 2024, the Defence did not seek leave to add these witnesses, pursuant to regulation 35(1) of the Regulations of the Court (“Regulations”).³

II. CLASSIFICATION

3. Pursuant to regulation 23bis(2) of the Regulations, this filing is classified as confidential since it responds to a request with the same classification.

III. PROCEDURAL HISTORY

4. The Second Directions on the Conduct of Proceedings set the deadline for the Defence to file the LoW on 23 June 2023.⁴ This date was later postponed to 18 September 2023.⁵

5. On 5 March 2024 and 15 March 2024, the Chamber instructed the Defence to file the LoW, with any regulation 35 request, no later than 15 April 2024.⁶

6. On 15 April 2024, the Defence filed a Request for a one month extension to file the final LoW and final LoE.

¹ “Mise à jour de la liste des témoins de la Défense et demande d’extension de délai pour le dépôt de sa liste définitive”, [ICC-02/05-01/20-1111-Conf](#) (“Request”).

² [Request Annex 1](#), p. 11-13.

³ Trial Chamber email dated 5 March 2024 at 09:30, “ Subject: Abd-Al-Rahman trial schedule March-June 2024” and [T-147](#), p. 20, lines 1-2 (Presiding Judge): “And don’t forget that you need to file a Regulation 35 request for any of your new witnesses that you find”.

⁴ Second Directions on the Conduct of Proceedings, [ICC-02/05-01/20-836](#), para. 21.

⁵ Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, [ICC-02/05-01/20-990-Conf](#), para. 15.

⁶ Trial Chamber email dated 5 March 2024 at 09:30, “ Subject: Abd-Al-Rahman trial schedule March-June 2024”. See also [T-147](#), p. 19, lines 20-22.

IV. SUBMISSIONS

7. The Request is premised on three purported justifications:⁷

- a. The outbreak of the armed conflict in Sudan on 15 April 2023;
- b. The delay [REDACTED]
- c. The security situation in Sudan impacting Defence deployment and Defence witnesses' travel.

8. The continued characterisation of the armed conflict in Sudan, which has been going on for over one year, as a "*force majeure*" preventing the Defence from making investigative progress,⁸ is not a new nor valid reason justifying an extension. There has been no material change regarding the armed conflict in Sudan since the deadline set by Chamber, nor does the Request explain how this has impacted the Defence in such a way that would merit an extension.

9. Regarding [REDACTED], the Request provides no justification as to why the Defence could not adhere to the Chamber's 15 April 2024 deadline and seek leave under regulation 35 to add new witnesses later, should the Defence mission ever deploy.

10. As previously held by the Chamber and [REDACTED],⁹ To date, the Defence [REDACTED].¹⁰

11. The Prosecution notes with concern that the Request ties any future deadline for the final LoW as contingent on the [REDACTED].¹¹

12. At the 21 March 2024 status conference, the Defence suggested that the final LoW will be contingent on the successful deployment of the Defence mission:¹²

20 PRESIDING JUDGE KORNER: [10:13:11] All right. Then, just two other matters.

⁷ [Request](#), para 4.

⁸ [Request](#), para. 4.

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [Request](#), para. 3.

¹² [T-147](#), p. 19-20, lines 21-2.

21 Well, firstly on witnesses. You're due to file a final list of witnesses on 15 April. I'm
 22 assuming it may be the final but not the final, final, final, final.
 23 MR LAUCCI: [10:13:34](Interpretation) That will be the final, notwithstanding the
 24 results of our resource person's [REDACTED] That's the best I can do in
 25 terms of any commitment.

13. In the Fourth Periodic Report¹³ the Defence reiterated this position (emphasis added):

[REDACTED]

14. Based on the Defence's Fifth Periodic Report filed today, it now appears that the [REDACTED].¹⁴ [REDACTED],¹⁵ [REDACTED].¹⁶

15. The Fifth Periodic Report notes¹⁷ [REDACTED].¹⁸

16. Should the [REDACTED] – the stage will be set for the Defence to request yet another extension to file the final LoW and LoE.

17. The proposed [REDACTED] - for a multitude of reasons. [REDACTED], it does not merit delaying the deadline for the final LoW and LoE. The Defence can seek leave to add new witnesses and/or exhibits, [REDACTED] and it can demonstrate just cause for the failure to include the witnesses by the deadline.

18. [REDACTED].¹⁹ However, the Defence continues to ignore this admonition. In the interests of the expeditious conduct of the proceedings, the progress of this trial cannot hinge on a [REDACTED].²⁰

19. The security situation in Sudan, which the Defence argues has impacted the [REDACTED] and the travel of witnesses,²¹ is also not a valid justification for an extension. While the security situation has necessitated a shift in investigative

¹³ [REDACTED].

¹⁴ Cinquième Rapport Périodique soumis en vertu de la Décision ICC-02/05-01/20-1057-Conf, [ICC-02/05-01/20-1112-CONF](#), paras 6-7 (“Fifth Periodic Report”).

¹⁵ [Fourth Periodic Report, Annex 2](#).

¹⁶ [Fifth Periodic Report](#), para. 6.

¹⁷ [Fifth Periodic Report Annex 1](#), [REDACTED]

¹⁸ [Fifth Periodic Report](#), para. 7.

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [T-129](#) p. 18, lines 7-14; [REDACTED]; [REDACTED]; [Request](#), para. 8.

strategies, it has not prevented ongoing OTP investigations, nor should it prevent ongoing Defence investigations.

20. In terms of the ability of witnesses in Sudan to travel, numerous Prosecution²², CLRV and Defence witnesses [REDACTED] for the purpose of giving interviews and providing testimony to the Court. The CLRV successfully brought two witnesses to [REDACTED].²³ [REDACTED].²⁴ Recently the Prosecution demonstrated [REDACTED].²⁵ The Request does not provide any new or specific information in support of this reason.

21. The three reasons argued by Defence are not new. The Defence elected to file the Request on the day of the deadline. The Prosecution notes that the Defence conclude their Request by recycling the same excuses for its slow progress, none of which are new or justify an extension.²⁶

22. To date, the Chamber has been extraordinarily accommodating, granting the Defence additional time to prepare²⁷ despite its finding that “many of the delays in the preparation of, and investigations relating to, the Defence’s case are attributable to the Defence”.²⁸ In the present circumstances, no further time extensions are merited.

No regulation 35 application has been filed for D-38 or D-39 though they appear on the list of Defence witnesses

23. The updated list of Defence witnesses annexed to the Request (Annex 1) includes two new witnesses, D-38 and D-39 whose summaries have also been added to the Defence LoE (Annex 2).²⁹ Contrary to instructions³⁰ given by the Chamber to

²² [REDACTED].

²³ [REDACTED].

²⁴ D-8, D-11, and D-32. [REDACTED].

²⁵ DAR-OTP-00009137. *See also* [REDACTED].

²⁶ [Request](#), para. 8.

²⁷ Decision on the Defence’s Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf](#), para. 44, [REDACTED].

²⁸ [Postponement Decision](#), para. 40.

²⁹ [Request Annex 2](#), no. 240-241.

³⁰ [REDACTED].

the Defence, no regulation 35 application has been made for their inclusion on the Defence LoW or LoE.

24. Neither the Request nor the Fifth Periodic Report supplement the need for a formal regulation 35 request for inclusion of these witnesses. The Defence interviewed D-38 and D-39 by telephone on 6 and 12 March 2024, respectively, and summaries of those interviews were transmitted to the Prosecution almost three weeks later, on 5 April 2024.³¹

25. The Defence witness calling order in the Fifth Periodic Report includes D-38 and D-39.³² Presumptively they are now listed as being scheduled to testify [REDACTED] May 2024.³³

V. RELIEF REQUESTED

26. The Prosecution respectfully requests the Chamber to reject the Request and the addition of D-38 and D-39 to the LoW and LoE.



Karim A. A. Khan KC
Prosecutor

Dated this 24th day of April 2024

At The Hague, The Netherlands

³¹ D-38 Summary of expected evidence, DAR-D31-00000304 and D-39 Summary of expected evidence, DAR-D31-00000305.

³² [Fifth Periodic Report](#), para. 5.

³³ [Fifth Periodic Report](#), para. 6, *see also* [Request](#), para. 7.