



Original: English

No. ICC-02/05-01/20

Date: 25 January 2021

PRE-TRIAL CHAMBER II

Before:

**Judge Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala**

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

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

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for Mr Abd-Al-Rahman
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

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

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), having regard to article 82(1)(d) of the Rome Statute (the ‘Statute’), rule 155 of the Rules of Procedure and Evidence (the ‘Rules’) and regulation 65 of the Regulations of the Court (the ‘Regulations’), issues this 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.

I. PROCEDURAL HISTORY

1. The Chamber recalls the general procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.¹
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.² At the hearing, the confirmation of charges hearing was scheduled to commence on Monday, 7 December 2020.³
3. On 17 August 2020, Judge Aitala, acting as the Single Judge on behalf of the Chamber,⁴ issued the ‘Order on disclosure and related matters’ (‘First Order on Disclosure’) 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 2020.⁵
4. On 9 September 2020, the Prosecutor submitted the ‘Prosecution’s urgent request for an extension of time’,⁶ requesting that the Chamber vacate the 11 September 2020 deadline.

¹ See, for example, [Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), 18 December 2020, ICC-02/05-01/20-238.

[Decision on the Defence request and observations on reparations pursuant to article 75\(1\) of the Rome Statute](#), 18 August 2020, ICC-02/05-01/20-117, paras 1-4.

² Transcript of hearing of Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#) (‘Initial Appearance’).

³ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 22, line 23 to page 23, line 3.

⁴ [Decision on the designation of a Single Judge](#), 9 June 2020, ICC-02/05-01/07-80.

⁵ [Order on disclosure and related matters](#), 17 August 2020, ICC-02/05-01/20-116 (‘First Order on Disclosure’), para. 12(iii).

⁶ 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).

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 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').⁷

6. On 2 October 2020, the Chamber issued the 'Second Order on disclosure and related matters' (the 'Second Order on Disclosure')⁸ 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'.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 Decision on Postponement').¹⁰

8. On 3 December 2020, the Prosecutor submitted a request to postpone the confirmation 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

⁷ Corrected Version of "Prosecution's request to postpone the confirmation hearing", 16 September 2020, 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) ('Postponement Request').

⁸ [ICC-02/05-01/20-169](#).

⁹ [Second Order on Disclosure](#), 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 of the Second Postponement Request was filed on 4 December 2020 (ICC-02/05-01/20-218-Red).

further instructed that the Prosecutor may apply in writing to extend time limits under 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 (the ‘Decision’).¹⁷

15. On 27 December 2020, the Defence filed a request for leave to appeal the Decision (the ‘Request’).¹⁸

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 [Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), 18 December 2020, ICC-02/05-01/20-238.

¹⁸ [Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-238](#), 27 December 2020, ICC-02/05-01/20-245.

16. On 11 January 2021, the Prosecutor filed a response to the Request, asking for it to be rejected (the ‘Response’).¹⁹

II. SUBMISSIONS

17. In its Request, the Defence has formulated two issues it wishes to bring before the Appeals Chamber:

- a. Whether the Chamber had the authority to modify its earlier decisions “that had become *res judicata*” and whether the Chamber misused this authority by granting the Second Postponement Request even after it had concluded that the Prosecutor had violated the Chamber’s instructions (the ‘First Issue’).²⁰
- b. Whether the Chamber erred by postponing the date of the confirmation hearing on the sole ground that this was necessary for the protection of witnesses, even after having concluded that the Prosecutor had disregarded its instructions in this regard and that the Prosecutor was unable to protect its witnesses (the ‘Second Issue’).²¹

18. In its Response, the Prosecutor argues that the Chamber ought to dismiss the Request because neither issue raised for certification is appealable within the meaning of article 82(1)(d) of the Rome Statute. According to the Prosecutor, the proposed issues either misread the Decision and/or are premised on a mere disagreement with it and therefore do not constitute appealable issues.

III. ANALYSIS

A. First Issue

19. The First Issue does not arise from the Decision. As the Defence acknowledges, rule 121(7) of the Rules grants the Chamber the power to postpone the date of the confirmation hearing. A previous decision setting a date for the confirmation hearing therefore cannot be considered a final decision that would preclude the Chamber from changing that date at a later stage. Moreover, as the Prosecutor correctly points out, the

¹⁹ [Prosecution’s Response to “Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-238”](#), 11 January 2021, ICC-02/05-01/20-253.

²⁰ Request, para. 20.

²¹ Request, para. 30.

4 December 2020 Instructions by email did not contain any final decision regarding the deadlines related to the confirmation hearing. The Instructions merely stated that the filing by the Prosecutor of the Second Postponement Request did not mean that all other deadlines were automatically suspended until the Chamber had ruled on the former. Accordingly, far from being a final decision on disclosure and other deadlines, the 4 December 2020 Instructions merely offered the Prosecutor an opportunity to submit requests for variation of time limits, to which the Defence was entitled to respond.

20. Furthermore, the Chamber did not need to rule on the 4 December 2020 Request and the 10 December 2020 Request insofar as deadlines were concerned, because it was decided to partially grant the Second Postponement Request and set new deadlines. The new deadlines superseded the old ones to which the 4 December 2020 Request and 10 December 2020 Request applied, thereby rendering both moot. It is true that the Decision concluded that the Prosecutor violated the Chamber's instructions, but this finding was limited to the Prosecutor's failure to disclose witness statements with redactions where necessary. The Defence seems to argue that the Second Postponement Request should have been rejected because of the abovementioned violation. However, the Defence has failed to advance arguments related to the exercise of the Chamber's discretion²² and has merely expressed its disagreement with the Decision, which, as the Appeals Chamber has consistently held, does not constitute a sufficient basis for granting leave to appeal.²³

B. Second Issue

21. The Second Issue is also based on a mere disagreement with the Decision. The Defence argues that the Chamber should have refused to postpone the confirmation hearing on the sole ground that the Office of the Prosecutor needed more time to make arrangements for the protection of some of its witnesses. However, the Request does not identify any cognisable legal or factual error of the Chamber in this regard.

²² Appeals Chamber, *Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor's appeal against Trial Chamber V\(B\)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute"](#), 19 August 2015, [ICC-01/09-02/11-1032](#), para. 25.

²³ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/14-168, para. 9.


22. It is worth pointing out that, contrary to what the Defence suggests, the Chamber's finding that the Prosecutor had violated its instruction to disclose all witness statements, with redactions where necessary, by 7 December 2020, was unrelated to the Prosecutor's diligence or capability in terms of witness protection. Whereas the Defence argues that the Chamber erred in law by not drawing any consequences from the absence of a special agreement between the Court and Sudan in terms of protection of witnesses, the Request does not articulate this alleged error. The issue is therefore not appealable.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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



Judge Antoine Kesia-Mbe Mindua


Judge Tomoko Akane


Judge Rosario Salvatore Aitala

Dated this Monday, 25 January 2021

At The Hague, The Netherlands