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No. ICC-02/05-01/20

Date: 31 May 2023

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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 redacted version of

Decision on the Defence's second request pursuant to Article 87(5)(b)

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

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Other

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Sudan

I. PROCEDURAL HISTORY

1. On 11 February 2022, Trial Chamber I (the ‘Chamber’) issued a decision requesting the assistance of the Republic of Sudan (the ‘Sudanese authorities’ or ‘Sudan’) in providing documents necessary for the preparation of Mr Abd-Al-Rahman’s defence (the ‘Decision of 11 February 2022’).¹
2. On 22 April 2022, the Defence filed a first request asking the Chamber to make a finding of systematic non-cooperation by Sudan with respect to the requests for judicial assistance and visa applications (the ‘First Defence Request’).²
3. On 9 and 13 May 2022, respectively, the Registry³ and Prosecution⁴ filed observations on the First Defence Request.
4. On 24 May 2022, the Chamber partially rejected the First Defence Request, but invited the Sudanese authorities to submit observations on any issue(s) that may have impeded or prevented the execution of the Decision of 11 February 2022 (the ‘First Decision pursuant to Article 87(5)(b)’).⁵
5. On 30 June 2022, the Registry transmitted the observations of the Sudanese authorities (‘Sudan’s Observations’).⁶ In their observations, the Sudanese authorities apologised for the delay in providing the requested documents and elaborated on the conditions that prevented them from providing said documents.⁷

¹ Decision on the Defence request for cooperation pursuant to Article 57(3)(b) of the Statute, ICC-02/05-01/20-590-Conf-Exp. A public redacted version was notified on the same day, ICC-02/05-01/20-590-Red.

² Requête en vertu de l’Article 87-5-b du Statut, ICC-02/05-01/20-678-Conf (notified on 25 April 2022). A public redacted version was notified on the same day, ICC-02/05-01/20-678-Red.

³ Registry Observations on the “Requête en vertu de l’Article 87-5-b du Statut” dated 22 April 2022, ICC-02/05-01/20-678-Conf, and Sixth Report on the current status of cooperation with the Republic of Sudan, ICC-02/05-01/20-687-Conf-Exp. A confidential redacted version was notified on the same day, ICC-02/05-01/20-687-Conf-Red. *See also* Email from the Chamber, 25 April 2022, at 11:56.

⁴ Prosecution’s Observations on the “Confidential Redacted Version of ‘Registry Observations on the ‘Requête en vertu de l’Article 87-5-b du Statut’ dated 22 April 2022, ICC-02/05-01/20-678-Conf, and Sixth Report on the current status of cooperation with the Republic of Sudan,’ 9 May 2022”, ICC-02/05-01/20-687-Conf-Red, ICC-02/05-01/20-689-Conf.

⁵ Decision on the Defence’s request pursuant to Article 87(5)(b), ICC-02/05-01/20-695-Conf-Exp. A confidential redacted version was notified on the same day, ICC-02/05-01/20-695-Conf-Red.

⁶ Registry’s Transmission of Observations submitted by the Republic of Sudan pursuant to Trial Chamber I’s Decision of 24 May 2022, and Seventh Report on cooperation with the Republic of Sudan, ICC-02/05-01/20-707-Conf-Exp+707-Conf-Exp-AnxI and 707-Conf-Exp-AnxII. A confidential redacted version was notified on the same day, ICC-02/05-01/20-707-Conf-Red.

⁷ Sudan’s Observations, ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

6. On 11 October 2022, the Defence filed a second request seeking a finding of non-cooperation (the ‘Second Defence Request’).⁸

7. On 24 October 2022, upon instruction from the Chamber,⁹ the Registry filed observations (the ‘Registry’s Observations’)¹⁰ and the Prosecution filed a response (the ‘Prosecution’s Response’)¹¹ to the Second Defence Request.

II. SUBMISSIONS

8. The Defence requests a finding of non-cooperation by the Sudanese authorities under Article 87(5)(b) of the Rome Statute (the ‘Statute’) in light of the observations of the Sudanese authorities.¹² The Defence further argues that Sudan’s Observations do not provide any valid justification for the lack of response to its requests for legal assistance.¹³

9. The Defence further avers that the absence of any response to its requests for legal assistance by the Sudanese authorities directly affects the accused’s ability to prepare his defence, in violation of Article 67(1)(b) of the Statute, which compromise the fairness of the proceedings.¹⁴

10. Finally, the Defence contends that the procedure under Regulation 109(3) of the Regulation of the Court has been exhausted in relation to its first three applications for legal assistance,¹⁵ and that the conditions are now met to make a general finding of non-cooperation.¹⁶

⁸ Nouvelle Requête en vertu de l’ Article 87-5-b du Statut à la lumière des Observations ICC-02/05-01/20-707-Conf-Exp-Anx1, ICC-02/05-01/20-768-Conf-Exp+768-Conf-Exp-Anx1 (notified on 12 October 2022). A confidential redacted version was notified on the same day, ICC-02/05-01/20-768-Conf-Red.

⁹ Email from the Chamber, 12 October 2022, at 10:32.

¹⁰ Registry Observations on the “Nouvelle Requête en vertu de l’ Article 87-5-b du Statut à la lumière des Observations ICC-02/05-01/20-707-Conf-Exp-Anx1” dated 11 October 2022, ICC-02/05-01/20-768-Conf-Exp, and Eighth Report on the current status of cooperation with the Republic of Sudan, ICC-02/05-01/20-775-Conf.

¹¹ Prosecution’s response to the “Version Expurgée Confidentielle ex parte – Défense, Bureau du Procureur seulement – de la Nouvelle Requête en vertu de l’ Article 87-5-b du Statut à la lumière des Observations ICC-02/05-01/20-707-Conf- Exp-Anx1a”, 17 October 2022, ICC-02/05-01/20-768-Conf-Exp-Red, ICC-02/05-01/20-777-Conf-Exp.

¹² Second Defence Request, ICC-02/05-01/20-768-Conf-Exp, para. 10.

¹³ Second Defence Request, ICC-02/05-01/20-768-Conf-Exp, paras 11-15.

¹⁴ Second Defence Request, ICC-02/05-01/20-768-Conf-Exp, paras 18-19.

¹⁵ Second Defence Request, ICC-02/05-01/20-768-Conf-Exp, para. 20.

¹⁶ Second Defence Request, ICC-02/05-01/20-768-Conf-Exp, para. 21.

11. In its Observations, the Registry reports that, although some progress was made in the area of cooperation with the Sudanese authorities, there continues to be ‘difficulties in securing the implementation of more substantial requests such as the requests for cooperation submitted by the Defence.’¹⁷

12. Moreover, the Registry reports that the Sudanese authorities have become more restrictive in their delivery of visas since September 2022.¹⁸ Finally, the Registry reports that its request to designate a new technical focal point for the Court has remained unanswered by the Sudanese authorities.¹⁹

13. In its Response, the Prosecution primarily focuses on the spurious allegations made by the Defence which relate to their conduct.²⁰ These allegations and the Prosecution’s response thereto will be addressed by the Chamber orally in court. The Prosecution does submit that the Defence’s request should be denied.²¹

III. ANALYSIS

14. Article 87(7) of the Statute provides that:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

15. The Chamber observes that since its First Decision pursuant to Article 87(5)(b), the Defence has been able to conduct a field mission to Sudan,²² and the Sudanese authorities filed observations explaining the delay in providing the documents referred to in the Decision of 11 February 2022.²³

¹⁷ Registry’s Observations, ICC-02/05-01/20-775-Conf, para 9.

¹⁸ Registry’s Observations, ICC-02/05-01/20-775-Conf, para 10.

¹⁹ Registry’s Observations, ICC-02/05-01/20-775-Conf, paras 12-13.

²⁰ Prosecution’s Response, ICC-02/05-01/20-777-Conf-Exp, paras 10-17.

²¹ Prosecution’s Response, ICC-02/05-01/20-777-Conf-Exp, para. 20.

²² The Defence met with representatives of the Sudanese authorities on 26 June 2022, *see* ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

²³ Sudan’s Observations, ICC-02/05-01/20-707-Conf-Exp-AnxI.

16. The Chamber has also taken note of the difficulties listed by the Sudanese authorities in their observations, and their ‘sincere interest in full cooperation in the provision of required documents.’²⁴

17. The above developments notwithstanding, the Chamber observes that, regrettably none of the documents requested by the Defence have been provided by the Sudanese authorities. The provision of Mr Abd-Al-Rahman’s national number,²⁵ in itself a sign of the State’s ability to cooperate with the Court, does not compensate for its failure to provide the specific basic documents sought by the Defence.

18. The Chamber notes that as the Prosecution’s case is coming to an end, it is important for the Defence to be provided with the documents requested in the Decision of 11 February 2022.²⁶ The Chamber stresses that the principles of fairness of proceedings and the equality of arms, which form part of the rights accorded to the accused in proceedings before the Court under Article 67(1) of the Statute, mandate that the Defence be provided with documents it considers necessary for the preparation of its case.

19. Consequently, the Chamber requires that the Sudanese authorities provide the following documents as soon as possible, and no later than **13 January 2023**:

- [REDACTED];

²⁴ Sudan’s Observations, ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

²⁵ Sudan’s Observations, ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

²⁶ Decision of 11 February 2022, ICC-02/05-01/20-590-Conf-Exp, para. 9.

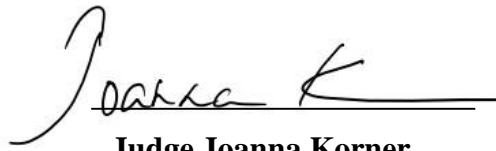
- [REDACTED].²⁷

20. The Chamber therefore defers its decision on the Defence's Second Request until after that date.

21. More generally, the Chamber calls upon the Sudanese authorities to enable all parties and the Registry to conduct missions in Sudan by facilitating the issuance of visas.

FOR THE FOREGOING REASONS, THE CHAMBER

- (i) **REQUIRES** that the Sudanese authorities provide the documents requested at paragraph 19 of the present decision as soon as possible, and no later than **13 January 2023**;
- (ii) **CALLS UPON** the Sudanese authorities to enable all parties and the Registry to conduct missions in Sudan by facilitating the issuance of visas;
- (iii) **DEFERS** the decision on the Defence's Second Request until after 13 January 2023.

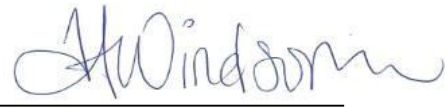


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 4 November 2022

At The Hague, The Netherlands

²⁷ See also Decision of 11 February 2022, ICC-02/05-01/20-590-Conf-Exp, para. 9.