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No. ICC-02/05-01/20

Date: 31 May 2023

Date of original: 24 May 2022

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 request pursuant to Article 87(5)(b)

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

The Office of the Prosecutor

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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States Representatives

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REGISTRY

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Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Competent authorities of the Republic of
Sudan

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 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 ‘Defence’s Request’).²
3. On 9 May 2022, upon instruction by the Chamber,³ the Registry filed its observations on the Defence’s Request (the ‘Registry’s Observations’).⁴
4. On 13 May 2022, the Prosecution responded to the Registry’s Observations,⁵ pursuant to the Chamber’s instructions (the ‘Prosecution’s Observations’).⁶
5. In its Request, the Defence submits that the Sudanese authorities have not put the Decision of 11 February 2022 into effect, on the basis of the lack of response from the Sudanese authorities and that the expiry date of 15 days for the Sudanese authorities to respond under Regulations 108(2) and 109(1) of the Regulations of the Court (the ‘Regulations’) has not been met.⁷
6. The Defence further argues that [REDACTED] to issue visas for members of the Defence team constitutes another breach by Sudan of [REDACTED] Agreement on

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 Email from the Chamber, 25 April 2022, at 11:56.

⁴ 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.

⁵ 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.

⁶ Transcript of hearing, 10 May 2022, ICC-02/05-01/20-T-039-CONF-ENG, p. 2, lines 17-21.

⁷ Defence Request, ICC-02/05-01/20-678-Conf, paras 11 and 13.

Cooperation between the International Criminal Court and the Republic of Sudan (the ‘Cooperation Agreement’).⁸

7. The Defence avers that these two infringements directly affect the accused’s ability to prepare his defence, conduct investigations in a timely manner, and examine and call witnesses to appear on his behalf; all of which compromise his right to a fair trial.⁹

8. In relation to the cooperation request, the Chamber notes that there has been some cooperation by the Sudanese authorities. First, the Chamber notes that the Sudanese authorities have approved visas for the Defence [REDACTED] [REDACTED],¹⁰ which was even before the issuance of the Decision of 11 February 2022. The Chamber also notes that on [REDACTED].¹¹ The Chamber further notes that members of the Prosecution¹² and the Registry¹³ have been able to travel to Sudan in the past few months. The Chamber also notes that, since the start of the trial on 5 April 2022, a number of witnesses [REDACTED] have been able to come to the Court to testify. This would not have been possible but for the continued logistical support and cooperation from the Sudanese authorities.

9. Nevertheless, the Chamber notes that the cooperation request contained in the Decision of 11 February 2022 currently remains unfulfilled in relation to the provision of documents. However, although the documents requested are straightforward and of an administrative nature, the Chamber understands that the execution of a decision on

⁸ Defence Request, ICC-02/05-01/20-678-Conf, para. 14, *referring to* Annex A to the Observations de la Défense en relation avec la sécurité des témoins, des victimes et des autres personnes à risque du fait des activités de la Cour, y compris son personnel, au Soudan, 8 October 2021, ICC-02/05-01/20-481-Conf-AnxA.

⁹ Defence Request, ICC-02/05-01/20-678-Conf, para. 15.

¹⁰ Registry’s Fourth Report on the current status of cooperation with the Republic of Sudan, 7 March 2022, ICC-02/05-01/20-619-Conf-Exp, para. 18. A confidential redacted version was notified on the same day, ICC-02/05-01/20-619-Conf-Red (hereinafter: ‘Registry’s fourth report on cooperation’).

¹¹ Registry’s fourth report on cooperation, ICC-02/05-01/20-619-Conf-Red, para. 19.

¹² Transcript of hearing, 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 21, lines 19-22.

¹³ Transcript of hearing, 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 5, lines 18-21; Transcript of hearing, 23 March 2022, ICC-02/05-01/20-T-025-CONF-ENG, p. 12, lines 15-22; p. 14, lines 1-6.

a cooperation request is a complicated and ongoing process, [REDACTED].¹⁴

10. In that regard, the Chamber further notes, as did the Defence,¹⁵ that before making a finding under Article 87 of the Rome Statute (the ‘Statute’), it shall hear from the Sudanese authorities pursuant to Regulation 109(3) of the Regulations.

11. Having noted Sudan’s cooperation in respect of issuing visas for the Defence, facilitating missions to Sudan for the Prosecution and the Registry [REDACTED] the Chamber invites the competent Sudanese authorities to submit observations on any issue(s) that may have impeded or prevented the execution of the Decision of 11 February 2022.

12. The Chamber also invites the Sudanese authorities to engage in consultations with the Court, should they require any clarification on the purpose or scope of the Decision of 11 February 2022.

13. The Chamber stresses that the interests of a fair trial and the rights of the accused under Article 67 of the Statute mandate that the documents requested in the Decision of 11 February 2022 be provided to the Defence as soon as possible.

14. Considering the above, the Chamber finds that it would be premature to make a determination on the Defence’s request in respect of the execution of the Decision of 11 February 2022. The Chamber will issue a decision on this matter after receipt of Sudan’s observations.

15. As concerns the issuance of visas to the Defence, the Defence contends that after submitting three visa applications and passports to the Registry on 16 and 25 March 2022, it only received notification that the visas had been approved on 22 April 2022. This, according to the Defence, was ‘too late for the purposes of the Defence’s mission in May 2022’.¹⁶

¹⁴ Registry’s Observations, ICC-02/05-01/20-687-Conf-Exp, para. 14. *See also* Transcript of hearing, 23 March 2022, ICC-02/05-01/20-T-025-CONF-ENG, p.14 lines 15-21 and p.16 lines 10-17.

¹⁵ Defence Request, ICC-02/05-01/20-678-Conf, para. 12.

¹⁶ Defence Request, ICC-02/05-01/20-678-Conf, paras 3-6.

16. The Prosecution avers that the Defence provided the Registry with the complete package of all three passports of the Defence team 50 days after being informed that the Sudanese authorities had granted the visa request and that [REDACTED].¹⁷ The Prosecution argues that ‘had the Defence provided their passports to the Registry, without delay, after the Sudanese authorities granted the request for visas, they would have received their visas much sooner’.¹⁸

17. The Chamber notes that the mission was planned for mid-May 2022,¹⁹ or three weeks after the issuance of the visas. The Chamber is of the opinion that three weeks provides more than sufficient time to prepare for a mission, [REDACTED],²⁰ and is unpersuaded by the oral clarification, provided by the Defence, that the issuing of the visas on 22 April 2022 would have forced it to organise the mission at the ‘last minute’.²¹

18. The Chamber accepts the Prosecution’s argument that the delay in obtaining visas is partly due to the Defence’s own inaction from the time it was informed that the Sudanese authorities had granted the request for the issuance of visas of three members of the Defence on 3 February 2022.²² The Chamber further notes that since the filing of the Defence’s Request, the Defence [REDACTED].²³

19. In light of the above, the Chamber finds that the Sudanese authorities have complied with their obligation under [REDACTED] the Cooperation Agreement in relation to the granting of visas to the Defence team.

¹⁷ Prosecution’s Observations, ICC-02/05-01/20-689-Conf, paras 8-9.

¹⁸ Prosecution’s observations, ICC-02/05-01/20-689-Conf, para. 9.

¹⁹ Prosecution’s observations, ICC-02/05-01/20-689-Conf, para. 9.

²⁰ Registry’s Report pursuant to Trial Chamber I’s instruction dated 20 January 2022, 31 January 2022, ICC-02/05-01/20-569-Conf-Exp, para. 25. A confidential redacted version was notified on the same day, ICC-02/05-01/20-569-Conf-Red.

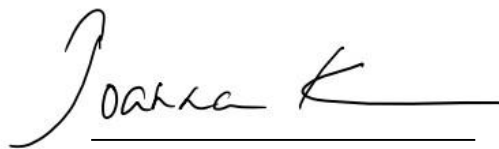

²¹ Transcript of hearing, 10 May 2022, ICC-02/05-01/20-T-039-CONF-ENG, p. 71, line 12 to p. 72, line 12.

²² Registry’s Observations, ICC-02/05-01/20-687-Conf-Exp, para. 22.

²³ Email from the Registry, 18 May 2022, at 11:33. *See also* Transcript of hearing, 10 May 2022, ICC-02/05-01/20-T-039-CONF-ENG, p. 72, lines 4-8.

FOR THE FOREGOING REASONS, THE CHAMBER

- (i) **INVITES** the competent authorities of the Republic of Sudan to submit, within one month from the day they are notified of the present decision, their observations on any issue(s) that may have impeded or prevented the execution of the Decision of 11 February 2022;
- (ii) **INVITES** the competent authorities of the Republic of Sudan to consult with the Court, should they require any clarification on the purpose or scope of the Decision of 11 February 2022;
- (iii) **ORDERS** the Registrar to transmit this decision to the competent authorities of the Republic of Sudan; and
- (iv) **REJECTS** the Defence's request to make a finding that the Sudanese authorities are in breach of their obligation to cooperate under [REDACTED] the Cooperation Agreement as concerns the issuance of visas to the Defence team.

**Judge Joanna Korner****Presiding Judge****Judge Reine Alapini-Gansou****Judge Althea Violet Alexis-Windsor**

Dated this 24 May 2022

At The Hague, The Netherlands