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

**Date: 31 May 2023**

**Date of original: 20 January 2023**

**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 in relation to the documents requested from Sudan on 11 February  
2022**

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

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**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Competent authorities of the Republic of  
Sudan

## I. PROCEDURAL HISTORY

1. On 11 February 2022, Trial Chamber I (the ‘Chamber’), on request of the Defence,<sup>1</sup> 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’).<sup>2</sup>

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 Request for Finding of Non-Cooperation’).<sup>3</sup>

3. On 9 and 13 May 2022, respectively, the Registry<sup>4</sup> and Prosecution<sup>5</sup> filed observations on the First Request for Finding of Non-Cooperation.

4. On 24 May 2022, the Chamber partially rejected the First Request for Finding of Non-Cooperation, 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 ‘Decision of 24 May 2022’).<sup>6</sup>

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<sup>1</sup> Requête relative à la non-coopération du Soudan, 18 January 2022, ICC-02/05-01/20-557-Conf-Exp. A public redacted version was notified on the same date, ICC-02/05-01/20-557-Red.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

5. On 30 June 2022, the Registry transmitted the observations of the Sudanese authorities ('Sudan's Observations of 30 June 2022').<sup>7</sup> In their observations, the Sudanese authorities [REDACTED].<sup>8</sup>
6. On 11 October 2022, the Defence filed a second request seeking a finding of non-cooperation (the 'Second Request for Finding of Non-Cooperation').<sup>9</sup>
7. On 24 October 2022, the Registry filed observations<sup>10</sup> and the Prosecution filed a response<sup>11</sup> to the Second Request for Finding of Non-Cooperation.
8. On 4 November 2022, the Chamber deferred its decision on the Second Request for Finding of Non-Cooperation, and required the Sudanese authorities to provide the documents requested by the Defence as soon as possible, and no later than 13 January 2023 ('Decision of 4 November 2022').<sup>12</sup>
9. On 8 November 2022, the Chamber issued an addendum to its Decision of 4 November 2022,<sup>13</sup> requiring the Sudanese authorities to provide the Defence with additional documents by the same deadline (the 'Addendum').
10. On 11 November 2022, the Defence requested leave to appeal the Decision of 4 November 2022.<sup>14</sup> On 29 November 2022, the Chamber rejected the Defence's request for leave to appeal.<sup>15</sup>

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<sup>7</sup> 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.

<sup>8</sup> Sudan's Observations of 30 June 2022, ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> Decision on the Defence's second request pursuant to Article 87(5)(b), ICC-02/05-01/20-806-Conf.

<sup>13</sup> Addendum to the 'Decision on the Defence's second request pursuant to Article 87(5)(b)', ICC-02/05-01/20-809-Conf.

<sup>14</sup> Demande d'autorisation d'interjeter appel de la décision ICC-02/05-01/20-806-CONF, ICC-02/05-01/20-811-Conf (notified on 14 November 2022).

<sup>15</sup> Decision on the Defence's request for leave to appeal the Decision on the Defence's second request pursuant to Article 87(5)(b), ICC-02/05-01/20-820-Conf.

11. On 16 January 2023, the Defence filed a third request asking the Chamber to make a finding on non-cooperation by Sudan (the ‘Third Request for Finding of Non-Cooperation’).<sup>16</sup>

12. On the same day, the Registry transmitted a communication from the Sudanese authorities pursuant to the Decision of 4 November 2022 and the Addendum (‘Sudan’s Communication of 12 January 2023’).<sup>17</sup> The communication was received by the Registry on 12 January 2023. In their communication, the Sudanese authorities state that [REDACTED].<sup>18</sup>

13. On 17 January 2023, the Prosecution, Registry and Defence made oral submissions following Sudan’s Response.<sup>19</sup>

## II. ANALYSIS

14. The present decision is limited to the documents requested in the Decision of 11 February 2022. The Chamber will shortly issue a separate decision in respect of the documents requested in the Addendum.

15. The Chamber recalls that Sudan is under an obligation to cooperate with the Court pursuant to United Nations Security Council Resolution 1593.<sup>20</sup> Consequently, Part 9 of the Statute and the relevant rules governing State Party cooperation are applicable to it.<sup>21</sup>

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<sup>16</sup> Troisième Requête aux fins de constat de la non-coopération du Soudan, ICC-02/05-01/20-849-Conf.

<sup>17</sup> Registry’s Transmission of a Communication Submitted by the Embassy of the Republic of Sudan pursuant to Trial Chamber I’s Decisions of 4 and 8 November 2022 respectively, and Ninth Report on the status of cooperation with the Republic of Sudan, ICC-02/05-01/20-848-Conf, with Confidential Annexes I-III.

<sup>18</sup> Sudan’s Communication of 12 January 2023, ICC-02/05-01/20-848-Conf-AnxI, p. 2.

<sup>19</sup> Transcript of hearing, 17 January, ICC-02/05-01/20-T-107-CONF-ENG, p. 26, line 15 to p. 47, line 15.

<sup>20</sup> United Nations, Security Council, Resolution 1593, 31 March 2005, S/RES/1593 (2005); Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, paras 87-88; Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397 (OA2), paras 140-142 (‘Judgment in the Jordan Referral re Al-Bashir Appeal’).

<sup>21</sup> Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397 (OA2), para. 141; Decision on the Defence request pursuant to article 87(5)(b) of the Statute, 9 March 2021, ICC-02/05-01/20-295, para. 10.

16. Although the Sudanese authorities do not refer to a specific provision of the Agreement on Cooperation between the International Criminal Court and the Republic of Sudan (the ‘Cooperation Agreement’), the Chamber recalls that [REDACTED]:

‘[REDACTED].’

17. [REDACTED] of the Rome Statute (the ‘Statute’) in turn provides that:

‘[REDACTED].’

18. In cases where the disclosure of the information or documents of a [REDACTED].

19. In its Decision of 11 February 2022 the Chamber requested the following documents from the Sudanese authorities (the ‘Requested Documents’):

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED].<sup>22</sup>

20. With regard to these documents, the Chamber invited the Sudanese authorities to submit their observations pursuant to Regulation 109(3) of the Regulations of the Court.<sup>23</sup> Furthermore, the Chamber offered the Sudanese authorities the opportunity to engage in consultations with the Court, should they require any clarification on the purpose or scope of the Decision of 11 February 2022.<sup>24</sup>

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<sup>22</sup> Decision of 11 February 2022, ICC-02/05-01/20-590-Conf-Exp, para. 9.

<sup>23</sup> Decision of 24 May 2022, ICC-02/05-01/20-695-Conf-Red, para. 10 and Operative part, page 7.

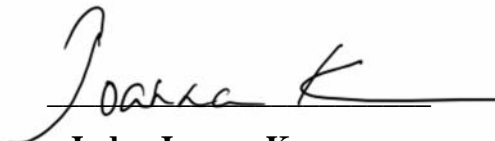
<sup>24</sup> Decision of 24 May 2022, ICC-02/05-01/20-695-Conf-Red, para. 12 and Operative part, page 7.

21. In their observations, the Sudanese authorities [REDACTED].<sup>25</sup> Sudan also provided [REDACTED],<sup>26</sup> which, although in itself a sign of Sudan's ability to cooperate, was not part of the documents requested by the Chamber.<sup>27</sup>

22. Although [REDACTED], the Court has so far not received any of the documents in question.

23. The Chamber reiterates that the 'documents requested are straightforward and of an administrative nature',<sup>28</sup> and that Sudan [REDACTED]. The basis of Sudan's recent assertion [REDACTED] is therefore not readily apparent. Also taking into account the fact that all reasonable steps have been taken to resolve the matter through cooperative means, the Chamber requests the Sudanese authorities to provide specific reasons why they consider that the Requested Documents [REDACTED]. These reasons may be provided on an *ex parte* basis, available only to the Chamber.

24. For the foregoing reasons, the Chamber requests the Sudanese authorities to provide specific reasons as to why they consider that the documents requested in the Decision of 11 February 2022 [REDACTED], within 21 days of notification of the present decision.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 20 January 2023

At The Hague, The Netherlands

<sup>25</sup> Sudan's Observations of 30 June 2022, ICC-02/05-01/20-707-Conf-Exp-AnXI, p. 4.

<sup>26</sup> Sudan's Observations of 30 June 2022, ICC-02/05-01/20-707-Conf-Exp-AnXI, p. 4.

<sup>27</sup> Decision of 4 November 2022, ICC-02/05-01/20-806-Conf, para. 17.

<sup>28</sup> Decision of 24 May 2022, ICC-02/05-01/20-695-Conf-Red, para. 9.