



Original: English

No. ICC-02/05-01/20

Date: 31 May 2023

Date of original: 16 February 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 on the Defence's request for leave to appeal two decisions requesting
cooperation from the Government of Sudan**

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

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**Victims Participation and Reparations
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I. PROCEDURAL HISTORY

1. On 11 February 2022, Trial Chamber I (the ‘Chamber’), on request of the Defence,¹ issued a decision requesting the assistance of the Republic of Sudan (the ‘Sudanese authorities’ or ‘Sudan’) in providing documents relating to Mr Abd-Al-Rahman’s background and identity (the ‘Biographical Documents’) necessary for the preparation of his defence (the ‘Decision of 11 February 2022’).²
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’).³
3. On 24 May 2022, the Chamber partially rejected the First Request for a Finding of Non-Cooperation, but invited Sudan 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’).⁴
4. On 30 June 2022, the Registry transmitted the observations of Sudan (‘Sudan’s Observations of 30 June 2022’).⁵ In their observations, the Sudanese authorities [REDACTED].⁶
5. On 11 October 2022, the Defence filed a second request seeking a finding of non-cooperation (the ‘Second Request for Finding of Non-Cooperation’).⁷

¹ 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.

² 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.

³ 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.

⁴ 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 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.

⁶ Sudan’s Observations of 30 June 2022, ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

⁷ 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.

6. 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 Biographical Documents as soon as possible, and no later than 13 January 2023 ('Decision of 4 November 2022').⁸

7. On 8 November 2022, the Chamber issued an addendum to its Decision of 4 November 2022,⁹ requiring the Sudanese authorities to provide the Defence with additional documents by the same deadline, and inviting the Sudanese authorities to file observations on these documents by 1 December 2022 (the 'Addendum').

8. On 11 November 2022, the Defence requested leave to appeal the Decision of 4 November 2022 (the 'Request for Leave to Appeal the Decision of 4 November 2022').¹⁰ On 29 November 2022, the Chamber rejected the Defence's request for leave to appeal.¹¹

9. 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').¹²

10. 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').¹³ The communication was received by the Registry on 12 January 2023.¹⁴ In their communication, the Sudanese authorities state that [REDACTED].¹⁵

⁸ Decision on the Defence's second request pursuant to Article 87(5)(b), ICC-02/05-01/20-806-Conf.

⁹ Addendum to the 'Decision on the Defence's second request pursuant to Article 87(5)(b)', ICC-02/05-01/20-809-Conf.

¹⁰ 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).

¹¹ 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 (hereinafter: 'Decision on the Defence's request for leave to appeal the Decision of 4 November 2022').

¹² Troisième Requête aux fins de constat de la non-coopération du Soudan, ICC-02/05-01/20-849-Conf.

¹³ 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 (hereinafter: 'Registry's Transmission of Sudan's Communication of 12 January 2023').

¹⁴ Sudan's Communication of 12 January 2023, ICC-02/05-01/20-848-Conf-AnxI, p. 2.

¹⁵ Sudan's Communication of 12 January 2023, ICC-02/05-01/20-848-Conf-AnxI, p. 2.

11. On 17 January 2023, the Prosecution, Registry and Defence made oral submissions following Sudan's Communication of 12 January 2023.¹⁶

12. On 20 January 2023, the Chamber issued a decision requesting Sudan to provide specific reasons why they consider that the Biographical Documents [REDACTED] (the 'Decision on the Biographical Documents').¹⁷

13. On 27 January 2023, the Chamber issued a decision instructing the Defence to clarify and modify their request in respect of the Additional Documents (the 'Decision on the Additional Documents').¹⁸

14. On 1 February 2023, upon request from the Chamber,¹⁹ the Defence filed a modified request for legal assistance in respect of the Additional Documents.²⁰

15. On 3 February 2023, the Defence filed a request for leave to appeal the Decision on the Biographical Documents as well as the Decision on the Additional Documents (the 'Request').²¹

16. On 9 February 2023, the Prosecution responded to the Defence's Request (the 'Prosecution's Response').²²

II. SUBMISSIONS

17. The Defence requests leave to appeal the Decision on the Biographical Documents as well as the Decision on the Additional Documents (the 'Impugned Decisions') on the following issues:

First Issue:

¹⁶ Transcript of hearing, 17 January, ICC-02/05-01/20-T-107-CONF-ENG, p. 26, line 15 to p. 47, line 15.

¹⁷ Decision in relation to the documents requested from Sudan on 11 February 2022, ICC-02/05-01/20-853-Conf.

¹⁸ Decision relating to the documents requested on 8 November 2022, ICC-02/05-01/20-857-Conf.

¹⁹ Transcript of hearing, 31 January 2023, ICC-02/05-01/20-T-111-CONF-ENG, p. 88, line 25 to p. 92, line 2.

²⁰ Exécution de la Décision ICC-02/05-01/20-857-CONF, ICC-02/05-01/20-862-Conf, with two confidential *ex parte* annexes.

²¹ Demande d'autorisation d'interjeter appel des décisions ICC-02/05-01/20-853-CONF et ICC-02/05-01/20-857-CONF, ICC-02/05-01/20-863-Conf.

²² Prosecution's response to "Demande d'autorisation d'interjeter appel des décisions ICC-02/05-01/20-853-CONF et ICC-02/05-01/20-857-CONF", 3 February 2023, ICC-02/05-01/20-863-Conf, ICC-02/05-01/20-869-Conf.

*Par ses Décisions dont Appel renvoyant sine die le constat de non-coopération du Soudan, la Chambre a-t-elle fait ce qu'elle devait afin d'assurer que le procès soit conduit de façon équitable et avec diligence, dans le plein respect du droit de l'accusé de disposer du temps nécessaire à la préparation de sa défense, en vertu des Articles 64-2 et 67-1-b du Statut ?*²³

Second Issue:

[REDACTED] *était-il applicable à la Note Verbale ?*²⁴

Third Issue:

*La 4ème Demande d'Assistance Judiciaire revêtait-elle le caractère d'une demande de coopération de la Cour avant son endossement par l'Addendum ?*²⁵

18. The Defence submits that the Decision on the Bibliographical Documents is silent on what the Chamber intends to do in the event that it does not receive satisfactory justification before the set deadline and no longer requires the Sudanese authorities to provide the requested documents.²⁶ The Defence further avers that the Decision on the Additional Documents did not set a deadline for Sudan to comply with the Defence's modified request for legal assistance.²⁷

19. The Defence further contends that the Chamber erred in finding that [REDACTED].²⁸ According to the Defence, the Chamber erred, first, because Article 93(6) and 97 of the Rome Statute (the 'Statute') require [REDACTED] to be raised 'without delay', which cannot be compatible with an objection raised after the time limit for the observations of the State concerned under Regulation 109 of the Regulations of the Court (the 'Regulations'). Secondly, the Defence notes that the

²³ Request, ICC-02/05-01/20-863-Conf, para. 9. The Chamber has unofficially translated the issue as follows: In its decisions postponing *sine die* the finding of non-cooperation by Sudan, has the Chamber ensured that the trial is conducted fairly and expeditiously, with full respect for the right of the accused to have adequate time to prepare his defence, pursuant to Articles 64(2) and 67(1)(b) of the Statute?

²⁴ Request, ICC-02/05-01/20-863-Conf, para. 10. The Chamber has unofficially translated the issue as follows: Was [REDACTED] applicable to the *note verbale*?

²⁵ Request, ICC-02/05-01/20-863-Conf, para. 11. The Chamber has unofficially translated the issue as follows: Did the 4th request for legal assistance have the character of a request for cooperation from the Court before its endorsement by the Addendum?

²⁶ Request, ICC-02/05-01/20-863-Conf, paras 5, 9.

²⁷ Request, ICC-02/05-01/20-863-Conf, para. 6.

²⁸ Request, ICC-02/05-01/20-863-Conf, para. 10.

Chamber set the dates of 30 June and 1 December 2022 for the submission of Sudan's observations under Regulation 109 of the Regulations. It therefore submits that the [REDACTED] raised on 12 January 2023 was time-barred pursuant to the Chamber's aforesaid deadlines. The Defence argues that the Chamber erred in law and abdicated the authority of its own decisions by concluding otherwise.²⁹

20. The Defence also argues that the *note verbale* was [REDACTED].³⁰ It therefore submits that the *note verbale* was sent to the Court [REDACTED], which is an additional reason why [REDACTED] was not engaged. The Defence states that the Chamber thus erred in fact and in law by initiating the procedure under [REDACTED] on the basis of the *note verbale* alone, when that article was not applicable.³¹

21. In relation to the Third Issue, the Defence submits that the Chamber erred in law by finding that the Defence's request for legal assistance of 20 January 2022 did not constitute a request for cooperation from the Court pursuant to Article 93 of the Statute. The Defence argues that the Chamber erred in finding that it was merely a request by the Defence which Sudan was not obliged to comply with, and that it only became a request for cooperation from the Court under Article 93 of the Statute as of the Addendum.³² According to the Defence, [REDACTED], the Defence's request for legal assistance of 20 January 2022 constituted a request for cooperation from the Court.³³

22. Finally, the Defence generally submits that the issues fulfil the criteria of Article 82(1)(d) of the Statute.³⁴

23. In its response, the Prosecution submits that the three issues fail to meet the cumulative criteria under Article 82(1)(d) of the Statute.³⁵ The Prosecution further argues that the First Issue does not arise from the Decision on the Biographical Documents or the Decision on the Additional Documents, and is based on the mischaracterisation of these decisions.³⁶

²⁹ Request, ICC-02/05-01/20-863-Conf, para. 10.

³⁰ Request, ICC-02/05-01/20-863-Conf, para. 10.

³¹ Request, ICC-02/05-01/20-863-Conf, para. 10.

³² Request, ICC-02/05-01/20-863-Conf, para. 11.

³³ Request, ICC-02/05-01/20-863-Conf, para. 11.

³⁴ Request, ICC-02/05-01/20-863-Conf, paras 12-13.

³⁵ Prosecution's Response, ICC-02/05-01/20-869-Conf, paras 1, 11.

³⁶ Prosecution's Response, ICC-02/05-01/20-869-Conf, paras 2, 7-10.

24. Finally, the Prosecution contends that, even though the Second and Third issues do arise from the aforementioned decisions, the Defence fails to show that any of the purported issues would significantly affect the fair and expeditious conduct of the proceedings.³⁷ Moreover, in the view of the Prosecution, a resolution by the Appeals Chamber, at this stage, would not materially advance the proceedings.³⁸

III. ANALYSIS

25. The Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,³⁹ and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Statute in relation to its Request.

26. With regard to the First Issue, the Chamber notes, as did the Defence,⁴⁰ that it is identical to the issue formulated in the Request for Leave to Appeal the Decision of 4 November 2022.⁴¹ The Chamber refers again to the Appeals Chamber's findings in respect of a trial chamber's discretion to make a finding of non-compliance,⁴² and the circumstances in which the Appeals Chamber will intervene in a trial chamber's exercise of its discretion.⁴³

27. As with the Request for Leave to Appeal the Decision of 4 November 2022, the Defence makes no attempt to demonstrate that the Chamber made an error of law, fact

³⁷ Prosecution's Response, ICC-02/05-01/20-869-Conf, paras 3, 11-17.

³⁸ Prosecution's Response, ICC-02/05-01/20-869-Conf, paras 3, 18-19.

³⁹ Decision on the Defence's requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims' participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. *See also* oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

⁴⁰ Request, ICC-02/05-01/20-863-Conf, para. 9.

⁴¹ Request for Leave to Appeal the Decision of 4 November 2022, ICC-02/05-01/20-811-Conf, para. 14.

⁴² Appeals Chamber, *The 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 (OA5), para. 41 (the '*Kenyatta* Judgment on a finding of non-compliance'). *See also* 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), para. 183.

⁴³ *Kenyatta* Judgment on a finding of non-compliance, ICC-01/09-02/11-1032 (OA5), para. 22. *See also* Appeals Chamber, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 80; Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest, 3 March 2015, ICC-02/05-03/09-632-Red (OA5), para. 30; Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 17 June 2015, ICC-02/04-01/15-251 (OA3), para. 35.

or procedure by exercising its discretion in issuing the Impugned Decisions. As with the Request for Leave to Appeal the Decision of 4 November 2022, the Chamber can only conclude that First Issue is not an appealable issue.

28. With respect to the Second and Third Issues, the Chamber accepts that these are appealable issues. However, the Chamber finds that the Defence has failed to demonstrate that the Impugned Decisions significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial. In this regard, the Chamber accepts the Prosecution's argument that the Chamber has set out reasonable deadlines for the Sudanese authorities to respond to the Impugned Decision, which is well within the Chamber's trial management powers, and that '[t]he Defence's disagreement with the Chamber's exercise of these powers does not automatically make the trial unfair.'⁴⁴

29. Moreover, the Chamber also accepts the Prosecution's argument that '[t]he alternative sought by the Defence – determining that the Chamber erred in not immediately finding Sudan as non-cooperative – would neither contribute to the reception of the documents the Defence requests nor expedite proceedings in light of the deadlines set out by the Chamber.'⁴⁵

30. Although the Chamber does not need to consider the remaining criteria under Article 82(1)(d) of the Statute, given the cumulative nature of that provision,⁴⁶ the Chamber nonetheless finds that the Defence has also failed to demonstrate that the resolution of the three issues by the Appeals Chamber would materially advance the proceedings. In this regard, the Chamber accepts the Prosecution's argument that 'the short and reasonable deadlines set out by the Chamber will rapidly approach, rendering it highly unlikely that an appeal, if leave is granted, would be resolved by those dates.'⁴⁷

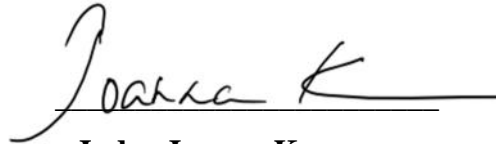
⁴⁴ Prosecution's Response, ICC-02/05-01/20-869-Conf, para. 13.

⁴⁵ Prosecution's Response, ICC-02/05-01/20-869-Conf, para. 14.

⁴⁶ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, para. 21.

⁴⁷ Prosecution's Response, ICC-02/05-01/20-869-Conf, para. 19.

31. Considering the above, the Chamber dismisses the Defence's request for leave to appeal the Decision on the Biographical Documents and the Decision on the Additional Documents.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 16 February 2023

At The Hague, The Netherlands