

Original: **English**

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

Date: **2 July 2024****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

**Public redacted version of Reply to “Prosecution’s response to
Defence’s ‘APPLICATION FOR AN ORDER TO
PROSECUTION TO MAKE IMMEDIATE DISCLOSURE’”**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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I. INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman replies, with the leave of the Trial Chamber,¹ to the Prosecution's response² to the Defence's Application of 24 June 2024.³

2. The content and tone of the Response demonstrate that the OTP has no intention of voluntarily complying with its disclosure obligations; this is why an order from the Chamber to compel compliance is required.

II. SUBMISSIONS

(a) The Application seeks disclosure of more than simply a screening note or statement

3. The Prosecution has taken care in its choice of words at paragraph 3 of the Response, reiterated at paragraph 7, in stating that it "does not have a screening note or a witness statement from ABD-AL-HAKAM." The Defence, of course, asked for more than simply a screening note/interview or witness statement. At paragraph 1 of the Application, the Defence deliberately cast its net wide in asking for disclosure of "any document, including but not limited to any investigation note, report, memo, witness statement, or screening note, or any other material that is in [the OTP's] possession or control related to" Abd-Al-Hakam.⁴ The Prosecution limits its denial of possession to two categories of documents in the Defence's non-exhaustive list. The Chamber will find it inconceivable that there are no investigation notes, reports, memos or similar documents relating to, for example, [REDACTED],⁵ and [REDACTED]. But if the OTP failed to make such notes or reports, it should be required to provide an explanation for this glaring omission. The Defence notes the Prosecution's assertion that there is no witness statement or even a screening note from Abd-Al-Hakam, but does not accept that there are no other disclosable documents in the Prosecution's possession.

¹ Email from Chamber's Legal Officer, 25 June 2024, 12:14

² ICC-02/05-01/20-1154-Conf ("Response")

³ ICC-02/05-01/20-1149-Conf ("Application")

⁴ Emphasis added

⁵ [REDACTED]

(b) The fact Abd-Al-Hakam may have made incriminating comments in the past is of no relevance to this request for disclosure

4. A significant part of the Response is taken up by the Prosecution highlighting examples of Abd-Al-Hakam reportedly implicating *Ali Kushayb* in the period up to October 2008.⁶ This is, of course, not relevant to the issue of whether more recent material created or collected by the Prosecution in its possession, and particularly material regarding [REDACTED], is disclosable. The purported attribution of the implication of *Ali Kushayb* in crimes to Abd-Al-Hakam when interviewed by Sudanese personnel well over 15 years ago is not a relevant consideration to be taken into account in the context of a request for disclosure of material which is “material to the preparation of the defence” under Rule 77 of the Rules of Procedure and Evidence. It will be recalled that an item is material to the preparation of the defence if it would undermine the prosecution case, or support a line of argument of the defence, or significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case.⁷ The information that [REDACTED] is new to the Defence and potentially changes the analysis. The Defence cannot exclude the possibility that Abd-Al-Hakam changed his narrative in the 13 years between 2008 and [REDACTED]. The Prosecution fails to appreciate that any Defence team would be remiss in not following this new information up. The fact [REDACTED] was itself “material to the preparation of the Defence” and should have been disclosed at the time in order to give the Defence the opportunity of interviewing him while he was still alive.

(c) Whether the Defence sought to interview Abd-Al-Hakam between [REDACTED] is of no relevance to this request for disclosure

5. The Prosecution again chooses to focus on irrelevant considerations rather than deal with the substance of the Application, this time by returning to tired (and tiresome) criticisms of what the Defence may or may not have done during its mission to Khartoum in [REDACTED]. However, for the sake of the record, in the period of

⁶ Response, paras 7-10

⁷ *Prosecutor v. Bemba*, Decision on the "Defence Motion on Prosecution contact with its witnesses", [ICC-01/05-01/08-3070](#), para. 23

[REDACTED], the Defence (i) was not aware that Abd-al-Hakam [REDACTED], and (ii) had no basis to believe that there would be any profit in interviewing Abd-Al-Hakam, for the reasons set out in paragraphs 7-9 of the Response. It was only when the Defence became aware, in May 2024, of the media reports of September 2021 that Abd-Al-Hakam had met but had refused to cooperate with the OTP that the Defence developed an interest in the potential materiality of what Abd-Al-Hakam may have had to say. By this time, however, Abd-Al-Hakam was reportedly dead. The Defence had simply not come across either of the reports cited at paragraph 11 of the Response, which the Prosecution failed to disclose despite their materiality to the preparation of the Defence, in breach of its obligations under Rule 77. It hardly needs to be stated that, unfortunately, the Abd-Al-Rahman Defence team does not have the vast financial and human resources enjoyed by the Prosecution. What matters here is not what the Defence did or not do, it is the Prosecution's failure to respect its disclosure obligations.

(d) The tone and deflections in the Response lead to more questions than answers

6. The uncharacteristically uncooperative, and indeed aggressive, tone of the Response will not have escaped the Chamber's attention. The unexceptional and moderate relief requested in the Application precipitated wholly unwarranted accusations of it being unfounded, speculative and, most extraordinarily, frivolous.⁸ Instead of dealing with the Application in a measured way, the Prosecution complains that [REDACTED].⁹ Instead of addressing the merits of the Application, the Prosecution hides behind a deliberately selective reading of the scope of the relief requested, and on a focus on irrelevant matters. To paraphrase Queen Gertrude in Hamlet, the Prosecution doth protest too much, methinks. The Chamber is entitled to ask itself, as does the Defence, what the Prosecution is hiding, and why.

⁸ Response, paras 1 and 14

⁹ Response, para. 4

Respectfully submitted,

Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 2 July 2024

At The Hague, The Netherlands