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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 requests for a finding of non-compliance by Sudan

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

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Sudan

I. PROCEDURAL HISTORY

1. On 11 February 2022, Trial Chamber I (the ‘Chamber’), in response to a request from the Defence,¹ issued a decision requesting assistance from 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’) 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, and 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 of non-cooperation by Sudan (the 'Third Request for Finding of Non-Cooperation').¹²

10. On 16 January 2023, 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 which engages [REDACTED] the Rome Statute ('the Statute') although the statutory provision was not cited by Sudan.

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.

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 as to why they consider that the Biographical Documents [REDACTED] within 21 days of notification of said decision (the 'Decision on the Biographical Documents').¹⁷ Following notification of the Arabic translation of this decision to the Sudanese authorities on 25 January 2023, Sudan was requested to provide the documents by 15 February 2023.¹⁸

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').¹⁹

14. On 1 February 2023, upon request from the Chamber,²⁰ the Defence filed a modified request for legal assistance in respect of the Additional Documents (the 'Modified Request').²¹

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.²²

16. On 6 February 2023, the Chamber issued a decision requesting Sudan to provide the documents requested in the Modified Request within 21 days, or [REDACTED], to provide specific reasons for that decision within the same deadline (the 'Decision of 6 February 2023').²³ Following notification of the Arabic translation of this decision to the Sudanese authorities on 9 February 2023, Sudan was requested to provide the documents by 2 March 2023.²⁴

¹⁶ Transcript of hearing, 17 January 2023, 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 Email from the Registry, 27 January 2023, at 18:17

¹⁹ Decision relating to the documents requested on 8 November 2022, ICC-02/05-01/20-857-Conf.

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

²¹ Exécution de la Décision ICC-02/05-01/20-857-CONF, ICC-02/05-01/20-862-Conf, with two confidential *ex parte* annexes.

²² 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.

²³ Decision on the Defence's modified request for legal assistance dated 30 January 2023, ICC-02/05-01/20-864-Conf.

²⁴ Email from the Registry, 9 February 2023, at 14:15.

17. On 16 February 2023, the Chamber dismissed the Defence's request for leave to appeal the Decision on the Biographical Documents and the Decision on the Additional Documents.²⁵

18. On the same day, the Registry informed the Chamber that it had not received any response from Sudan on the implementation of the Decision on the Biographical Documents.²⁶

19. On 3 March 2023, the Registry informed the Chamber that it had not received any response from Sudan on the implementation of the Decision of 6 February 2023.²⁷

20. On 14 March 2023, the Defence requested the postponement *sine die* of the presentation of its case,²⁸ citing Sudan's continuous and worsening lack of cooperation as one of the reasons for its request.²⁹

II. ANALYSIS

21. The Chamber recalls that Sudan is under an obligation to cooperate with the Court pursuant to United Nations Security Council Resolution 1593 ('Resolution 1593'),³⁰ and as such Sudan is bound by Part 9 of the Statute and the relevant rules governing State Party cooperation³¹.

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

²⁵ Decision on the Defence's request for leave to appeal two decisions requesting cooperation from the Government of Sudan, ICC-02/05-01/20-875-Conf.

²⁶ Registry's Tenth Report on the status of cooperation with the Republic of Sudan, ICC-02/05-01/20-873-Conf.

²⁷ Registry's report on the implementation of Trial Chamber I's Decision ICC-02/05-01/20-864-Conf of 6 February 2023, ICC-02/05-01/20-889-Conf (hereinafter: 'Registry's report of 3 March 2023').

²⁸ Requête aux fins de report de la phase de présentation de la Défense, ICC-02/05-01/20-902-Conf-Exp (hereinafter: 'Request for postponement of the Defence's case'). Confidential redacted and public redacted version were notified on the same date, ICC-02/05-01/20-902-Conf-Red and ICC-02/05-01/20-902-Red respectively.

²⁹ Request for postponement of the Defence's case, ICC-02/05-01/20-902-Conf-Red, paras 5-11.

³⁰ 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 (hereinafter: 'Judgment in the Jordan Referral re Al-Bashir Appeal').

³¹ 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.

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.

23. The Chamber recalls the Appeals Chamber's finding that 'a Chamber has discretion to make or not to make a finding of non-compliance'.³²

24. The Chamber observes that the deadlines of 15 February and 2 March 2023 have passed, and none of the documents requested by the Chamber have been provided by the Sudanese authorities. The Chamber further observes that the Sudanese authorities have provided no further communication on their invocation of [REDACTED].

25. Despite the Court's best efforts to obtain cooperation from Sudan by setting reasonable deadlines and providing open channels of communication with the Court, Sudan has failed to comply with the Chamber's requests for cooperation. The Chamber therefore concludes that the only remaining judicial course of action is to make a finding of non-compliance pursuant to Article 87(7) of the Statute.

26. Having found that Sudan has failed to comply with the Chamber's requests for cooperation, the Chamber must then examine whether circumstances are such that a referral of the matter to the United Nations Security Council (the 'UN Security Council') within the meaning of Article 87(7) of the Statute is warranted. In this regard, the Appeals Chamber has stated that the

'factual prerequisite' under the first clause of article 87(7) consists of two cumulative conditions, namely, (i) that the State concerned failed to comply with a request to cooperate; and, (ii) that this non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute. It is only when the Chamber has established that *both* conditions are met that it may proceed to consider whether to refer

³² 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 (hereinafter: '*Kenyatta* Judgment on a finding of non-compliance'). See also Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397 (OA2), para. 183.

the State to the Assembly of States Parties or the UN Security Council or both, following a finding of non-compliance.³³

27. The Chamber acknowledges that Sudan's failure to comply with its requests for cooperation has negatively impacted the Defence's ability to prepare Mr Abd-Al-Rahman's defence in accordance with its chosen line of investigation. However, the Chamber cannot conclude that Sudan's non-compliance has prevented the Court from exercising its functions and powers under the Statute. In particular, the Chamber notes that there still exists lines of communications with the Sudanese authorities as the Registry reports it is in regular contact with Sudanese representatives [REDACTED].³⁴ Moreover, the Chamber notes that the Sudanese authorities have recently issued visas for Registry staff, although not, as requested, for the Defence team.³⁵ Consequently, the Chamber finds that the factual prerequisite of Article 87(7) of the Statute has not been established, and that it cannot exercise its discretion to refer Sudan to the UN Security Council, following a finding of non-compliance.³⁶

28. The Chamber further recalls in this regard that

‘the decision to refer a State is not an “automatic consequence” of failure to avail cooperation to the Court, but rather a “determination [that] falls within the discretion of the Chamber seized of the article 87(7) application” and a response “that may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand”’.³⁷

29. Considering the complex and transitional political situation in Sudan and the fact that the object and purpose of Article 87(7) of the Statute is to foster cooperation, the Chamber is not persuaded that a referral of the present matter to the UN Security Council would lead to the provision of the requested documents by Sudan. As such, the

³³ Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397 (OA2), para. 184.

³⁴ Registry's report of 3 March 2023, ICC-02/05-01/20-889-Conf, paras 9-14.

³⁵ Registry's Observations on the “Requête aux fins de report de la phase de présentation de la Défense” submitted by the Defence, 20 March 2023, ICC-02/05-01/20-907-Conf-Exp, para. 21.

³⁶ Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397 (OA2), para. 185.

³⁷ Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397 (OA2), para. 183, *referring to Kenyatta* Judgment on a finding of non-compliance, ICC-01/09-02/11-1032 (OA5), paras 51, 53.

Chamber cannot conclude that a referral to the UN Security Council is the most effective way of obtaining cooperation in the concrete circumstances at hand.

30. The Chamber nonetheless recalls that the decision to not refer an instance of non-compliance to the UN Security Council ‘does not necessarily imply acceptance of non-cooperation, but may be based on the Chamber’s conclusion that such a referral may not be an effective means to address the lack of cooperation in the specific context of the case.’³⁸

³⁸ *Kenyatta* Judgment on a finding of non-compliance, ICC-01/09-02/11-1032 (OA5), para. 52.

III. CONCLUSION

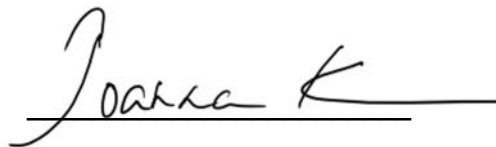
31. The Chamber finds that Sudan has failed to comply with its requests for cooperation pursuant to Article 87(7) of the Statute. However, the Chamber recalls that Sudan is compelled to cooperate with the Court, and to comply with the Decision on the Biographical Documents and the Decision of 6 February 2023. To this end, the Chamber hereby convenes a status conference on **19 April 2023** and requests representatives of Sudan to appear in person or via video-link to provide submissions on the Decision on the Biographical Documents and the Decision of 6 February 2023.

32. For the above reasons, the Chamber:

FINDS that Sudan has failed to comply with its repeated requests for cooperation, pursuant to Article 87(7) of the Statute;

CONVENES a status conference on 19 April 2023, and

REQUESTS representatives of Sudan to appear in person or via video-link at the status conference to provide submissions on the Decision on the Biographical Documents and the Decision of 6 February 2023.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 31 March 2023

At The Hague, The Netherlands