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TRIAL CHAMBER I

**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 “Prosecution’s response to ‘Version confidentielle expurgée de la Réponse aux observations du Bureau du Procureur, des Représentants des Victimes et du Greffe’”, 12 January 2024, ICC-02/05-01/20-1053-Conf

Source: Office of the Prosecutor

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I. INTRODUCTION

1. As instructed by Trial Chamber I (“Chamber”),¹ the Prosecution provides this response to the Defence’s “Réponse aux observations du Bureau du Procureur, des Représentants des Victimes et du Greffe” (“Joint Response”).²

2. The Prosecution maintains its position set out in the “Prosecution’s response to ‘Demande de Report de la Date de Reprise de la Présentation de la Défense’” (“Prosecution Response”).³ In particular, none of the Defence’s arguments justify the need for [REDACTED], the deployment of a member of the Defence team [REDACTED], or its failure to bring witnesses to testify in compliance with the schedule ordered by the Chamber.

3. The Prosecution also provides further submissions on the issue of notification of ICC missions to the Sudanese authorities and corrects some of the mischaracterisations contained in the Joint Response.

II. CLASSIFICATION

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed as confidential since it responds to a filing with the same classification.

III. SUBMISSIONS

The Joint Response again fails to show why [REDACTED]

5. The Defence submits that [REDACTED].⁴ The open source reports provided do not support this assertion. [REDACTED],⁵ [REDACTED].⁶ It is not clear from these sources how [REDACTED]. As noted in the Prosecution Response,⁷ the Defence has

¹ E-mail of 5 January 2024 14:05h.

² Version confidentielle expurgée de la Réponse aux observations du Bureau du Procureur, des Représentants des Victimes et du Greffe, [ICC-02/05-01/20-1052-Conf-Red](#), 10 January 2024 (“Joint Response”).

³ Prosecution’s response to “Demande de Report de la Date de Reprise de la Présentation de la Défense” (“Prosecution Response”), [ICC-02/05-01/20-1049-Conf](#), 4 January 2024.

⁴ [REDACTED].

⁵ Demande de Report de la Date de Reprise de la Présentation de la Défense (“Request”), [ICC-02/05-01/20-1048-Conf](#), fn. 2.

⁶ Registry’s observations on the “Demande de Report de la Date de Reprise de la Présentation de la Défense”, [ICC-02/05-01/20-1051-Conf](#), para. 10 and fn. 9-11.

⁷ [Prosecution Response](#), para. 8.

stated that [REDACTED].⁸

6. [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED].

7. As noted previously,¹¹ and contrary to the misdirection contained in the Joint Response,¹² despite the fact that the Prosecution is unable to deploy staff [REDACTED], it continues to meet and interview potential witnesses who travel outside of Sudan to meet the Prosecution. In the Prosecution Response, the Prosecution was plainly referring to current meetings with persons [REDACTED], not to Prosecution trial witnesses. Contrary to the Defence's submissions, these witnesses are not [REDACTED].¹³ [REDACTED]¹⁴

The Joint Response fails to explain why the Defence's [REDACTED]

8. It appears that the only supposed limitation on Defence witnesses [REDACTED] - which has prompted the Defence's latest conflict with Registry - arises from the Defence's insistence that a member of its team travel [REDACTED]. Yet it remains entirely unclear why such travel is necessary in the present circumstances.

9. [REDACTED].¹⁵ It is therefore unnecessary and unrealistic that the Defence team member is needed [REDACTED].¹⁶

10. Furthermore, the Defence has an established practice by which [REDACTED]. It is again unnecessary for a Defence team member [REDACTED] to conduct exactly the same tasks.¹⁷

11. Therefore, it appears that the main barrier to [REDACTED].

Notification of the Government of Sudan ("GoS") should not entail a violation of the

⁸ Defence request for in-court protective measures, [ICC-02/05-01/20-1020-Conf](#), para. 12.

⁹ [REDACTED].

¹⁰ [Joint Response](#), para. 12.

¹¹ [Prosecution Response](#), para. 7.

¹² [Joint Response](#), para. 14.

¹³ [Joint Response](#), para. 14; [REDACTED].

¹⁴ [Joint Response](#), para. 14.

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

confidentiality of [REDACTED]

12. Even assuming, *arguendo*, that travel by a Defence team member [REDACTED] was necessary, it is still unclear why notification to the GoS of this intended mission [REDACTED] would violate the confidentiality of [REDACTED].

13. The 10 May 2021 Cooperation Agreement between the Court and the Sudan (“Cooperation Agreement”)¹⁸ simply requires the Registry to inform the GoS that a mission will take place and that a person affiliated with the Court will enter Sudan’s territory. On the basis of the information available to the Prosecution, there is no reason why any such notification would need to refer to [REDACTED].

14. The Prosecution notes that a notification makes the GoS aware of the intended movement of ICC personnel [REDACTED] and aims to ensure that the Defence team member will enjoy the privileges, immunities and facilities foreseen in the Cooperation Agreement.¹⁹

There are no legal or practical justifications for the Defence’s request to suspend or terminate the Cooperation Agreement

15. The Defence asserts that the Chamber’s finding of non-cooperation by Sudan²⁰ relieves the Court of any obligations under the Cooperation Agreement, including the requirement to notify Sudan of a mission on its territory.

16. Given the Registry’s expected submissions on this issue, the Prosecution limits itself to the following brief points:

- a. as noted by the CLRV,²¹ the Registry has clearly indicated that “the Court is obliged to inform any State of any official ICC mission occurring on

¹⁸ 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 (“Cooperation Agreement”), [ICC-02/05-01/20-481-Conf-AnxA](#).

¹⁹ [REDACTED].

²⁰ Decision on Defence’s requests for a finding of non-compliance by Sudan, [ICC-02/05-01/20-913-Conf](#).

²¹ CLRV Observations on Defence “Demande de Report de la Date de Reprise de la Présentation de la Défense”, [ICC-02/05-01/20-1050-Conf](#), para. 8.

their territory.”²² On this basis, a notification would still be required even if the Cooperation Agreement was invalidated;

- b. notwithstanding Sudan’s failure to provide certain documents to the Court, parts of the Cooperation Agreement continue to be observed, including in particular the recent provision of visas for a Prosecution mission to Port Sudan; and
- c. the Cooperation Agreement provides for the privileges and immunities of the members of the Court, including the Defence, when operating in Sudan.

The Defence could and should have been ready to call witnesses on schedule this month
[REDACTED]

17. The Defence asserts that it is not responsible for any delay in the proceedings.²³ The Prosecution has repeatedly corrected this misrepresentation.²⁴ In this context, the Prosecution notes in particular, the Chamber’s previous observation that the Defence “has been ‘engaging in endless discussions and arguments with the Registry’, instead of taking timely and appropriate actions to secure witnesses’ testimonies and other evidence”.²⁵ This is demonstrated by, for example, the Defence’s failure to arrange the interview of D-1, despite apparently being in contact with him prior to the onset of the present hostilities.²⁶ As set out above, it is not clear why the Defence’s latest argument with the Registry should prevent [REDACTED].

18. The Defence’s allegation that through its offers to assist the Defence, the Prosecution intends to “continue to use its offers of services to the Defence for the

²² [REDACTED].

²³ [Joint Response](#), para. 18.

²⁴ Prosecution’s response to “Note for the Record in relation to Paragraph 10 of the Decision on the Second Application for Postponement of the Defence Case”, [ICC-02/05-01/20-997-Conf](#), para. 8; Prosecution’s response to “Requête aux fins de report de la phase de présentation de la Défense”, 14 March 2023, ICC-02/05-01/20-902-Conf-Red, [ICC-02/05-01/20-906-Conf, paras. 17-23](#); [REDACTED].

²⁵ Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, [ICC-02/05-01/20-990-Conf](#), para. 10 (footnote omitted). See also Decision on the Defence’s Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf-Red](#), para. 41; [REDACTED].

²⁶ [REDACTED]. See also [T-139 CT](#), 88:7-21.

purposes of gathering information for its own investigations”²⁷, is false. The Prosecution has always made such offers of assistance in good faith²⁸ and has to date made strenuous efforts to assist the Defence in the preparation of its case. The Prosecution does not need to “assist the Defence” to conduct its ongoing investigations. Assisting the Defence does not assist the Prosecution in its ongoing investigations, it only assists in the continuation of this case.

IV. CONCLUSION

19. For the foregoing reasons, the Prosecution maintains its position that the request for postponement should be rejected.



Nazhat Shameem Khan
Deputy Prosecutor

Dated this 8th day of July 2026

At The Hague, The Netherlands

²⁷ [Joint Response](#), para. 15.

²⁸ [REDACTED].