



Original: English

No. ICC-02/05-01/20

Date: 9 March 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

Decision on the Defence request pursuant to article 87(5)(b) of the Statute

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr Julian Nicholls

Counsel for Mr Abd-Al-Rahman
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**
Ms Paolina Massida

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Court’),¹ having regard to articles 34, 57(3)(b), 87, and 96 of the Rome Statute (the ‘Statute’), and rules 13, 20(1)(b), and 116 of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 109 of the Regulations of the Court (the ‘Regulations’) issues this Decision on the Defence request pursuant to article 87(5)(b) of the Statute.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.²
2. On 9 November 2020³ and 9 December 2020,⁴ the Defence addressed two urgent requests for cooperation from Sudan through the Registry.
3. On 11 November 2020, the Defence informed the Registry by email that it intended to ask the cooperation of the Sudanese authorities in the context of its planned mission to that country.⁵ This mission has hitherto not been able to take place.
4. On 19 January 2021, the Defence filed a request pursuant to article 87(5) of the Statute, in which it asked the Chamber to find that the Sudanese authorities have not cooperated with the Court in relation to three cooperation requests by the Defence, to take all useful measures pursuant to article 57(3)(b) of the Statute in relation to these cooperation requests, and to inform the Security Council of Sudan’s alleged non-cooperation (the ‘Request’).⁶

¹ [Decision on the designation of a Single Judge](#), 9 June 2020 (notified on 10 June 2020), ICC-02/05-01/07-80.

² See, for example, [Decision on the Defence request and observations on reparations pursuant to article 75\(1\) of the Rome Statute](#), 18 August 2020, ICC-02/05-01/20-117, paras 1-4.

³ ICC-02/05-01/20-263-Conf-Exp-AnxA.

⁴ ICC-02/05-01/20-263-Conf-Exp-AnxB.

⁵ ICC-02/05-01/20-263-Conf-Exp-AnxC.

⁶ Requête en vertu de l’Article 87-5-b du Statut de la Cour, 19 January 2021, ICC-02/05-01/20-263-Conf-Exp (a public redacted version was filed on the same day as [ICC-02/05-01/20-263-Red2](#), both versions were notified on 20 January 2021).

5. On 1 February 2021, pursuant to the Chamber's instructions,⁷ the Registry submitted its observations in relation to the Request (the 'Registry Observations').⁸

II. ANALYSIS

6. The Request is framed as an application to refer Sudan to the Security Council pursuant to article 87(5)(b) of the Statute. The Defence leaves it to the Chamber to decide whether or not an order pursuant to article 57(3)(b) of the Statute constitutes a necessary preliminary step in this regard.⁹ However, the Defence argues that, since its three cooperation requests were transmitted to the Sudanese authorities by the Registry pursuant to rule 13(1) of the Rules, the non-execution of these requests constitutes a sufficient basis for noting the non-cooperation of the Sudanese authorities and for activating the procedure of article 87(7) of the Statute.¹⁰ The Defence further suggests that an order under article 57(3)(b) of the Statute might be issued 'in parallel' in order to put pressure on the Sudanese authorities.¹¹

7. The Single Judge notes that, despite suggesting the possible issuance of an order pursuant to article 57(3)(b), the Request makes no attempt to provide the information required pursuant to rule 116 of the Rules. Under these circumstances, the Single Judge is not in a position to consider issuing such an order. If the Defence wants the Chamber to issue an order requesting cooperation from Sudan, it must submit a fully motivated formal request compliant with the cumulative requirements set out in rule 116 of the Rules.¹² In particular, in order to seek cooperation under article 57(3)(b) and Part 9 of the Statute, any request to that effect must meet the triple requirements of specificity, relevance and necessity.¹³

⁷ Email from Pre-Trial Chamber II to the Registry dated 20 January 2021 at 12.10.

⁸ Registry's Observations on the 'Requête en vertu de l'Article 87-5-b du Statut de la Cour' (ICC-02/05-01/20-263-Conf-Exp), 1 February 2021, ICC-02/05-01/20-274-Conf-Exp.

⁹ Request, para. 13.

¹⁰ Request, para. 13.

¹¹ Request, para. 13.

¹² Pre-Trial Chamber I, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the "Defence Application pursuant to Article 57\(3\)\(b\) of the Statute to Seek the Cooperation of the Democratic Republic of Congo \(DRC\)"](#), 25 April 2008, ICC-01/04-01/07-444, p. 5.

¹³ Trial Chamber VII, *Prosecutor v. Bemba Gombo et al.*, [Decision on Second Mangenda Request for Cooperation](#), 05 April 2016, ICC-01/05-01/13-1768, para. 8; Trial Chamber VII, *Prosecutor v. Bemba Gombo et al.*, Decision on 'Defence Request for Disclosure and Judicial Assistance' 21 August 2015, ICC-01/05-01/13-1166-Conf, para. 14; Trial Chamber IV, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Public redacted Decision on the second](#)

8. The Defence may file its request *ex parte*, without prejudice to the Chamber's discretion to seek the views of the Prosecutor.¹⁴ The Chamber will consider the Defence's request as a matter of priority. However, as the Chamber has noted in the past, the start of the confirmation hearing cannot be made conditional upon the completion of investigations, especially when such completion is dependent upon unpredictable political developments.¹⁵ Indeed, it is well-known that in matters of international cooperation in criminal investigations, both at the bilateral level and in the international criminal justice sphere, the time required by national authorities to implement the requested cooperation is inherently unpredictable. The most recent Report of the Court on Cooperation, for instance, indicates that the *average* time needed by States to execute formal requests for cooperation is 40 days, regardless of complexity and further notes that of all the Defence teams' requests transmitted by the Registry in the reporting period, only less than a quarter received a positive response.¹⁶ Given this reality, the Chamber cannot allow the Defence's right to request the Court's support in connection with its investigative steps to unduly infringe upon the expeditiousness of the proceedings and the fundamental rights of the suspect, all the more so given the circumstance that he is in custody. Given the specific function of the pre-trial stage and the mentioned time constraints, the room

[defence's application pursuant to Article 57\(3\)\(b\) and 64\(6\)\(a\) of the Statutes](#), 21 December 2011, ICC-02/05-03/09-268-Red, para. 13; Trial Chamber IV, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Decision on "Defence Application pursuant to Articles 57\(3\)\(b\) & 64\(6\)\(a\) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union"](#), 1 July 2011, ICC-02/05-03/09-170, para. 13-14; Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Decision on the "Defence Application pursuant to article 57\(3\)\(b\) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan"](#), 17 November 2010, ICC-02/05-03/09-102, para. 2; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the "Defence Application pursuant to Article 57\(3\)\(b\) of the Statute to Seek the Cooperation of the Democratic Republic of Congo \(DRC\)"](#), 25 April 2008, ICC-01/04-01/07-444.

¹⁴ Rule 116(2) of the Rules.

¹⁵ [Second Order on disclosure and related matters](#), 2 October 2020, ICC-02/05-01/20-169, para. 19; [Decision on the Prosecutor's Request for Postponement of the Confirmation Hearing and related deadlines](#), 2 November 2020, ICC-02/05-01/20-196, paras 17-18; [Decision on the Prosecutor's Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), 18 December 2020, ICC-02/05-01/20-238, para. 28. More generally, see, generally, Trial Chamber IV, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Decision on the defence request for a temporary stay of proceedings](#), 26 October 2012, ICC-02/05-03/09-410, in which the Trial Chamber remarked, at paragraph 100, that "the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a State's choice to cooperate or not cooperate with the Court."

¹⁶ The International Criminal Court, "[Report of the Court on Cooperation](#)" for the Nineteenth Session of the ASP, 28 October 2020, ASP-ICC/19/25, p.4.

for Defence investigation at this phase of the proceedings is in practise limited. Conclusively, the submission and the granting of a request under article 57(3)(b) cannot *per se* change the timeline of the confirmation proceedings, which must not be unduly protracted beyond what is strictly necessary. By the same token, the start of the confirmation hearing cannot be made contingent on the outcome of any requests for cooperation the Chamber may have ordered on behalf of the Defence.

9. Turning to the actual object of the Request, the Single Judge notes that the Defence bases the Request on article 87(5)(b) of the Statute, but nevertheless asks the Chamber to ‘refer’ Sudan to the Security Council. The Single Judge observes that article 87(5)(b) of the Statute discusses non-cooperation on behalf of States that have no obligation to cooperate under the Statute or pursuant to a Security Council referral, but that have agreed, on an ad hoc basis, to cooperate with the Court.¹⁷ If such a State fails to honour its commitment, the Court has the option to ‘inform’ the Assembly of States Parties or the Security Council respectively, depending on the basis upon which the Court is exercising its jurisdiction.

10. Since Sudan is under an obligation to cooperate with the Court pursuant to Security Council Resolution 1593,¹⁸ Part 9 of the Statute and the relevant rules governing State Party cooperation are applicable to it.¹⁹ Accordingly, any finding of non-cooperation would have to be made on the basis of article 87(7) of the Statute

¹⁷ See, for example, Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council](#), 28 August 2013, ICC-01/11-01/11-420, paras 12-13.

¹⁸ United Nations, Security Council, Resolution 1593, 31 March 2005, [S/RES/1593 \(2005\)](#); Appeals Chamber, *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, paras 140-142; Pre-Trial Chamber II, *Prosecutor v. Abdel Raheem Muhammad Hussein*, [Decision on the Prosecutor’s Request for a finding of non-compliance against the republic of the Sudan](#), 26 June 2015, ICC-02/05-01/12-33, para. 12.

¹⁹ Pre-Trial Chamber II, *Prosecutor v. Abdel Raheem Muhammad Hussein*, [Decision on the Prosecutor’s Request for a finding of non-compliance against the republic of the Sudan](#), 26 June 2015, ICC-02/05-01/12-33, para. 13; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of the Sudan](#), 9 March 2015, ICC-02/05-01/09-227, para. 15; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court](#), 9 April 2014, ICC-02/05-01/09-195, para 29; Pre-Trial Chamber I, *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, [Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan](#), 25 May 2010, ICC-02/05-01/07-57, p. 6.

and *could* result in a formal referral to the Security Council.²⁰ The Single Judge notes, in this regard, that even if the Chamber concludes that a State has failed in its obligation to cooperate with the Court, said State will not automatically be referred to the Assembly of States Parties or the Security Council.²¹ This is true even when the non-cooperation relates to requests made on behalf of the Defence pursuant to article 57(3)(b) of the Statute. Indeed, the Chamber is under no obligation to adopt a particular course of action in case of lack of compliance by a State with a particular request for cooperation, even when such request was made to preserve the rights of the suspect.²²

11. In any case, the Single Judge notes that the Defence addressed its three requests for cooperation to the Sudanese authorities directly, without seeking an order from the Chamber pursuant to article 57(3)(b) of the Statute. Although there is nothing to prevent the Defence from addressing cooperation requests directly to States or other entities, the Single Judge recalls that only the Court has the power to issue binding requests for cooperation under part 9 of the Statute.²³ As article 34 of the Statute makes clear, the Defence is not an organ of the Court. Contrary to what

²⁰ See, for example, Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan](#), 9 March 2015, ICC-02/05-01/09-227, para. 18; Pre-Trial Chamber II, *Prosecutor v. Abdel Raheem Muhammad Hussein*, [Decision on the Prosecutor's Request for a finding of non-compliance against the republic of the Sudan](#), 26 June 2015, ICC-02/05-01/12-33, para. 16; Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi*, [Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council](#), 10 December 2014, ICC-01/11-01/11-577, paras 20-22.

²¹ Appeals Chamber, *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, paras 49-55; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Al-Bashir*, [Decision under article 87\(7\) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir](#), 11 December 2017, ICC-02/05-01/09-309, para. 24; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan 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, para. 135; Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the "Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision" filed by the Defence of Saif Al Islam Gaddafi](#), 10 June 2014 (notified on 11 June 2014), ICC-01/11-01/11-556, paras 23-24.

²² Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the "Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision" filed by the Defence of Saif Al Islam Gaddafi](#), 10 June 2014 (notified on 11 June 2014), ICC-01/11-01/11-556, paras 23 and 26.

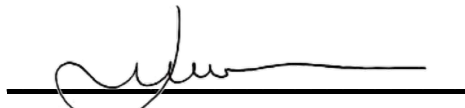
²³ Trial Chamber V(b), *Prosecutor v. Uhuru Muigai Kenyatta*, [Second decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute](#), 19 September 2016, ICC-01/09-02/11-1037, paras 5-7.

the Defence suggests, the fact that the Registry assisted the Defence by transmitting its cooperation requests to the Sudanese authorities does not transform them into requests by the Court.²⁴

12. Since the Defence did not have the authority under the Statute to make formal requests for cooperation to States, Sudan was not under an obligation to comply or even respond. The Single Judge notes, in this regard, that article 87(7) of the Statute aims solely at addressing situations where a State has already failed to comply with a request to cooperate with the Court.²⁵ As Sudan was never seized of a formal cooperation request, it cannot be said that there was a failure to cooperate on its part. Accordingly, the Single Judge finds there is no basis either to make a finding of non-cooperation or to refer Sudan to the Security Council.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY
REJECTS the Request.**

Done in both English and French, the English version being authoritative.



Judge Rosario Salvatore Aitala
Single Judge

Dated this Tuesday, 9 March 2021

At The Hague, Netherlands

²⁴ The Registry's involvement is limited to transmitting requests by the Defence and does not imply any form of endorsement of the content of such requests. *See* Registry Observations, para. 9.

²⁵ Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision Regarding Omar Al-Bashir's Visit to the Republic of Chad](#), 25 March 2014, ICC-02/05-01/09-194, para. 12.