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

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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

Public

Prosecution’s Response to Defence’s “*Version publique expurgée de la 2ème Requête aux fins d’exclusion de moyens de preuve*” (ICC-02/05-01/20-349-Red)

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I. INTRODUCTION

1. The Pre-Trial Chamber II (“Chamber”) should reject the Defence’s “*Version publique expurgée de la 2ème Requête aux fins d’exclusion de moyens de preuve*” (“Second Request”).¹ The Second Request is unnecessary and speculative, lacks specificity, and seeks to re-litigate matters currently under the Chamber’s consideration.² On its merits, the Request is based on a misinterpretation of the law and the facts.

II. SUBMISSIONS

2. On 16 April 2021, the Defence filed the Second Request seeking the exclusion of all evidence the Prosecution obtained in the territory of the Republic of Sudan (“Sudan”), as well as all evidence collected from witnesses that reside in that country. The request is based on the alleged illegality of any fact-finding activity related to the territory of Sudan, given the lack of an agreement with the Government of Sudan concerning privileges and immunities of the Court. As a consequence, the Defence alleges that the relevant evidence collected is tainted and that its admission into evidence would violate the equality of the proceedings.³

The Second Request is unnecessary, lacks specificity and is repetitive

3. The Chamber does not need to issue preliminary rulings on evidentiary challenges of this kind. As recalled in *Ntaganda*, there is no obligation “to undertake a comprehensive assessment of ‘relevance’ or ‘admissibility’ of each piece of evidence” for the purpose of article 61, and the Chamber may simply “decide on the relevance and probative value to be given to each piece of evidence, if any, in its determination under article 61(7)(a) and (b) of the Statute.”⁴

4. Furthermore, the Second Request lacks the necessary specificity and is speculative. The Defence impugns all evidence collected in Sudan or from witnesses

¹ [ICC-02/05-01/20-349-Red.](#)

² [ICC-02/05-01/20-231-Red.](#), [ICC-02/05-01/20-261-Red.](#), [ICC-02/05-01/20-269.](#), [ICC-02/05-01/20-272-Red.](#), [ICC-02/05-01/20-302.](#)

³ [Second Request](#), page 18.

⁴ [ICC-01/04-02/06-308](#), paras. 25-28. See also [ICC-01/04-01/10-465-Red.](#), paras. 43-44 (“an in-depth assessment as to the admissibility of the evidence submitted for the purposes of the confirmation hearing is rendered essentially meaningless in view of the fact that the Prosecution may, for the purposes of the confirmation of charges, rely on documentary or summary evidence [...] This approach is further justified by the limited object and purpose of the confirmation hearing”).

who reside in its territory, without properly identifying the specific pieces of evidence it seeks to challenge.⁵ As well as lacking specificity, the Second Request provides no concrete grounds for the required exclusion of evidence.

5. The Second Request also amounts to a repeat of previous submissions made by the Defence.⁶ The Chamber has already indicated it will decide on these matters when deemed appropriate⁷ and has expressly warned the Defence against submitting duplicative filings.⁸

6. Given the repetitive nature of the arguments and in light of judicial economy, the Prosecution refers to the positions articulated in its previous responses⁹ on the issues raised in the Second Request.¹⁰

The Second Request is based on a misinterpretation of the law and the facts

7. In addition, the Defence's arguments (i) misinterpret the role of the Agreement on the Privileges and Immunities of the International Criminal Court ("APIC"); and (ii) mischaracterise the activities of the Office of the Prosecutor in Sudan.

8. Firstly, Sudan's cooperation with the Court is based on Resolution 1593 of the United Nations Security Council issued in accordance with Chapter VII of the United

⁵ [ICC-01/04-02/06-308](#), para. 26: "That said, the Single Judge accepts that individual challenges to the evidence can be advanced by the Defence in exercise of its right under article 61(6)(b) of the Statute. In so doing, the Defence *must define its challenge specifically and relate it to a particular piece of evidence*. [...]". (emphasis added)

⁶ [ICC-02/05-01/20-231-Red](#), [ICC-02/05-01/20-261-Red](#), [ICC-02/05-01/20-269](#), [ICC-02/05-01/20-272-Red](#), [ICC-02/05-01/20-302](#).

⁷ [ICC-02/05-01/20-338](#), para. 35.

⁸ [ICC-02/05-01/20-186](#), para. 8.

⁹ In particular, the arguments related to (i) the mischaracterisation of Sudan's obligations as those of a non-party State to the Statute ([ICC-02/05-01/20-256](#), paras. 4-5); (ii) the Defence's mistake regarding the circumstances of the Prosecution's missions to Sudan ([ICC-02/05-01/20-256](#), para. 6); (iii) the Prosecution's due diligence regarding the taking of evidence procedure and protection of witnesses ([ICC-02/05-01/20-256](#), paras. 9-10); (iv) the lack of consequences of the United Nations – African Union Hybrid Operation in Darfur (UNAMID) withdrawal to the Defence ([ICC-02/05-01/20-280](#), para. 4; [ICC-02/05-01/20-347](#), paras. 62-63); (v) the characterisation of the Memorandum of Understanding ("MoU") concluded with Sudan as an operational tool to regulate Sudan's cooperation with the OTP (ICC-02/05-01/20-353-Conf, para. 11. ICC-02/05-01/20-294-Conf, para. 4); (vi) the fact that the MoU was concluded pursuant to the Statute provisions (ICC-02/05-01/20-353-Conf, para. 25. ICC-02/05-01/20-294-Conf, para. 4) and respecting all confidentiality policies in place (ICC-02/05-01/20-353-Conf, para. 10. ICC-02/05-01/20-294-Conf, paras. 5-6); (viii) the lack of impact the conclusion of a MoU has on the Defence (ICC-02/05-01/20-294-Conf, paras. 5-8; ICC-02/05-01/20-353-Conf, paras. 24-27) and, as such, it does not serve to limit or control the circumstances in which the Court may receive evidence for the purpose of confirmation proceedings or trial.

¹⁰ [Second Request](#), paras. 4, 10, 27-37 and 40.

Nations Charter and no separate agreement with the Court is required for this purpose.¹¹ Irrespective of the APIC, article 48 of the Statute establishes the immunities and privileges of staff members and persons dealing with the Court. This applies to Sudan, which, as previously set out,¹² assumes the obligations of a State Party to the Statute in relation to the Darfur situation.

9. Secondly, contrary to the Defence's submissions¹³, the Prosecution has collected evidence in the territory of Sudan in accordance with the Statute. In relation to the witnesses that reside in Sudan, all necessary precautions were taken regarding their safety, as well as the integrity of their interviews, in accordance with, *inter alia*, article 68 of the Statute.

III. CONCLUSION

10. For the foregoing reasons, the Chamber should reject the Second Request.



Fatou Bensouda
Prosecutor

Dated this 28th day of April 2021

At The Hague, The Netherlands

¹¹ [ICC-02/05-01/20-256](#), para. 4. See also [ICC-02/05-01/09-309](#), paras. 35-40, 44. [ICC-02/05-01/09-139-Corr](#), para. 36.

¹² [ICC-02/05-01/20-256](#), paras. 4-6.

¹³ [Second request](#), paras. 30-42.