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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 “3ème Requête aux fins d’exclusion de moyens de preuve” (ICC-02/05-01/20-389)

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Pre-Trial Chamber II (“Chamber”) should reject the Defence’s “3ème Requête aux fins d’exclusion de moyens de preuve” (“Third Request”).¹ It is unnecessary and speculative, lacks specificity, and seeks, once again, to re-litigate matters already decided by the Chamber.² On its merits, the Request is based on a misinterpretation of the law.

II. SUBMISSIONS

2. On 17 May 2021, the Defence filed the Third Request seeking the exclusion of items 1701-1718 of the List of Evidence (“LoE”) submitted by the Prosecution³. The Request is based on the alleged impossibility to assess the “credibility” of those exhibits before the confirmation hearing, given that the Defence was not granted access to unspecified documents that it alleges are in possession of the Office of the Prosecutor and that relate to the investigation conducted following unfounded corruption allegations made by Mr David Nyekorach Matsanga⁴.

The Third Request is unnecessary, repetitive and lacks specificity

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 of the Rome Statute, 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.”⁵

¹ [ICC-02/05-01/20-389](#).

² [ICC-02/05-01/20-384](#), [ICC-02/05-01/20-216](#).

³ ICC-02/05-01/20-346-Conf-Anx B.

⁴ Third request, paras. 10-13.

⁵ [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”).

4. Furthermore, the Third Request lacks the necessary specificity. The Defence impugns 18 items of evidence based on the fact that the Prosecution has not disclosed documents related to Mr Matsanga's allegations that could allegedly impact their credibility. However, at no point in its Third Request does the Defence demonstrate which documents it should have been granted access to, nor that they contain disclosable information.⁶ The Defence concedes that it cannot emit an opinion on the credibility of these allegations⁷ and, therefore, on their influence over the evidence whose exclusion it now seeks.

5. As well as lacking specificity, the Third Request is speculative and provides no concrete grounds for the required exclusion of evidence. The items whose admissibility is questioned are all transcripts of video recordings of interviews conducted with Sudanese authorities. The Defence, however, does not indicate which parts of the exhibits could potentially be tainted.⁸ Despite previously analysing the recordings themselves⁹, the Defence does not challenge the content of the transcripts to reasonably demonstrate how Mr Matsanga's allegations could impact the current proceedings.

6. The Third Request also amounts to a repeat of previous submissions made by the Defence.¹⁰ The Chamber has already concluded that (i) the Defence did not provide any cogent argument to show that the documents it requests could contain any information relevant to the defence of the suspect and its allegations are, thus, entirely speculative and unsubstantiated¹¹, and (ii) the Chamber has no power to compel the Independent Oversight Mechanism ("IOM") to divulge information on its investigations.¹² None of these conclusions are altered by the new submission, that

⁶ The Defence itself recognises that these allegations were investigated and dismissed by the proper authorities (ICC-02/05-01/20-208-Conf, para. 3). Furthermore, the Chamber has already determined that "(...) it is the Prosecutor's responsibility to determine whether such information, if it exists, is of exculpatory nature and therefore subject to disclosure" (ICC-02/05-01/20-216, para. 10).

⁷ ICC-02/05-01/20-389, para. 11(b). ICC-02/05-01/20-208-Red, para. 1. ICC-02/05-01/20-217, para. 5.

⁸ ICC-02/05-01/20-216, para. 7.

⁹ ICC-02/05-01/20-208-Conf, para. 3.

¹⁰ ICC-02/05-01/20-208-Red, ICC-02/05-01/20-217.

¹¹ ICC-02/05-01/20-216, para. 7.

¹² ICC-02/05-01/20-216, para. 10.

simply seeks to re-litigate the matter despite the Defence being expressly and repeatedly warned against submitting duplicative filings.¹³ For all these reasons, the Third Request should be dismissed.

The Third Request is based on a misinterpretation of the law

7. In addition, the arguments in the Third Request misinterpret the Defence's right under article 67(2) of the Statute.

8. The Defence's right under article 67(2) entitles it to receive any "evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."¹⁴ However, it does not entitle the Defence to demand the Prosecution to employ time and resources to search for documents whose relevance to the Defence is not even minimally proven.¹⁵ In this aspect, the mere insinuation that allegations of corruption - already dismissed by the IOM¹⁶ and the Court¹⁷ - could influence the evidence collected, is not sufficient to justify the Defence's request to exclude this evidence, as established by the case-law of the Court¹⁸.

¹³ [ICC-02/05-01/20-186](#), para. 8. [ICC-02/05-01/20-372](#), para. 16. [ICC-02/05-01/20-391](#), para. 24.

¹⁴ [ICC-01/04-02/06-1330](#), para. 22. ICC-02/11-01/11-351-Conf, para. 14.

¹⁵ [ICC-02/05-01/20-216](#), para. 7. [ICC-01/04-01-06-1311-Anx2](#), para. 94: "[...] if the prosecution has in its possession potentially exculpatory evidence which in accordance with Article 67(2) of the Statute may have a real, as opposed to minimal, impact on the trial in favour of the accused, he has an absolute entitlement to receive it, albeit in an appropriate form [...]." (*emphasis added*).

¹⁶ <https://eagle.co.ug/2016/08/08/icc-accuses-former-kony-advisor-matsanga-money-laundering.html>. See also <https://www.theeastafrican.co.ke/tea/news/east-africa/ugandan-activist-matsanga-used-forged-papers-to-fix-icc-president--1353602>. Last accessed on 26 November 2020.

¹⁷ ICC-01/09-01/11-1859-Conf-Exp, [ICC-01/09-127-Red](#), [ICC-01/09-111](#), [ICC-01/09-96-Red](#).

¹⁸ ICC-01/04-01/06-796-Conf-tEN, para. 97.

III. CONCLUSION

9. For the foregoing reasons, the Chamber should reject the Third Request.



Fatou Bensouda
Prosecutor

Dated this 20th day of May 2021

At The Hague, The Netherlands