

**Original: English****No. ICC-02/05-01/20****Date: 31 May 2023****Date of original: 29 November 2022****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 request for leave to appeal the Decision on the
Defence's second request pursuant to Article 87(5)(b)**

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

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1. On 11 February 2022, Trial Chamber I (the ‘Chamber’) issued a decision requesting the assistance of the Republic of Sudan (the ‘Sudanese authorities’ or ‘Sudan’) in providing documents necessary for the preparation of Mr Abd-Al-Rahman’s defence (the ‘Decision of 11 February 2022’).¹
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 Defence request on non-cooperation’).²
3. On 24 May 2022, the Chamber partially rejected the First Defence request on non-cooperation, but invited the Sudanese authorities to submit observations on any issue(s) that may have impeded or prevented the execution of the Decision of 11 February 2022 (the ‘First Decision pursuant to Article 87(5)(b)’).³
4. On 30 June 2022, the Registry transmitted the observations of the Sudanese authorities (‘Sudan’s Observations’).⁴ In their observations, the Sudanese authorities [REDACTED].⁵
5. On 11 October 2022, the Defence filed a second request seeking a finding of non-cooperation (the ‘Second Defence request on non-cooperation’).⁶
6. On 4 November 2022, the Chamber issued a decision requiring that the Sudanese authorities provide the documents sought by the Defence no later than 13 January 2023,

¹ 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.

² 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.

³ 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.

⁴ 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.

⁵ Sudan’s Observations, ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

⁶ 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.

and deferring its decision on the Second Defence request on non-cooperation until after that date (the ‘Impugned Decision’).⁷

7. On 8 November 2022, the Chamber issued an addendum to the Impugned Decision, requiring that the Sudanese authorities provide the documents sought in the Defence’s Fourth Request for legal assistance of 20 January 2022 no later than 13 January 2023.⁸ The Chamber also instructed the Sudanese authorities to file observations on the aforesaid documents by 1 December 2022, should they so require.⁹

8. On 11 November 2022, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).¹⁰

9. On 18 November 2022, the Prosecution responded by requesting the Chamber to reject the Request (the ‘Response’).¹¹

10. The Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,¹² and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Rome Statute (the ‘Statute’) in relation to its Request.

11. The Defence requests leave to appeal the Impugned Decision on the following Issue:

Par sa Décision dont Appel renvoyant le constat de non-coopération du Soudan à une date ultérieure au 13 janvier 2023, la Chambre a-t-elle fait ce qu’elle devait afin d’assurer que le procès soit conduit de façon équitable et avec diligence,

⁷ Decision on the Defence’s second request pursuant to Article 87(5)(b), ICC-02/05-01/20-806-Conf.

⁸ Addendum to the ‘Decision on the Defence’s second request pursuant to Article 87(5)(b)’, ICC-02/05-01/20-809-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, para. 6.

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 Prosecution’s response to “Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-806-Conf”, 14 November 2022, ICC-02/05-01/20-811-Conf, ICC-02/05-01/20-813-Conf.

¹² Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. *See also* oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

*dans le plein respect du droit de l'accusé de disposer du temps nécessaire à la préparation de sa défense, en vertu des Articles 64-2 et 67-1-b du Statut?*¹³

12. The Defence submits that the issue fully meets the criteria of Article 82(1)(d) of the Statute.¹⁴

13. The Defence further avers that, the absence of a response to its requests for legal assistance of November 2020, December 2020 and January 2022, severely hinders its preparation of Mr Abd-Al-Rahman's defence. Moreover, even if the Sudanese authorities were to cooperate, the Defence would still need considerable time to prepare its case. It argues that the absence of a response from the Sudanese authorities has prevented and/or rendered futile the formulation of new requests for legal assistance. The Issue is therefore likely to affect the fairness and expeditiousness of the trial.¹⁵

14. The Defence contends that the immediate resolution of the Issue by the Appeals Chamber is essential for the continuation of the proceedings, considering the Prosecution's intention to conclude the presentation of its evidence by early February 2023. It submits that the determination of the Issue by the Appeals Chamber will be an important element in the Chamber's determination of the time it will allow the Defence for the preparation of its case.¹⁶

15. In its response, the Prosecution submits that the Defence does not identify an appealable issue, but instead disagrees with the Chamber's proper exercise of discretion in postponing a finding of non-cooperation until after 13 January 2023.¹⁷

16. The Prosecution further avers that the Defence failed to show that the purported issue would significantly affect the fair and expeditious conduct of the proceedings or

¹³ Request, ICC-02/05-01/20-811-Conf, para. 14. The Chamber has unofficially translated the issue as follows: By its deferring its decision on the finding of non-cooperation by Sudan until after 13 January 2023, has the Chamber ensured that the trial is conducted fairly and expeditiously, with full respect for the right of the accused to have adequate time to prepare his defence, pursuant to Articles 64(2) and 67(1)(b) of the Statute?

¹⁴ Request, ICC-02/05-01/20-811-Conf, paras 8, 15.

¹⁵ Request, ICC-02/05-01/20-811-Conf, para. 16.

¹⁶ Request, ICC-02/05-01/20-811-Conf, para. 17.

¹⁷ Response, ICC-02/05-01/20-813-Conf, paras 2, 14-17.

the outcome of the trial.¹⁸ Moreover, a resolution by the Appeals Chamber would not materially advance the proceedings.¹⁹

17. Finally, the Prosecution argues that the deadline set out by Chamber has not yet expired and the Sudanese authorities may still comply with the Defence's requests.²⁰ The Chamber may also resort to other measures to avert or address any potential prejudice that may arise.²¹

18. The Chamber refers to the Appeals Chamber's finding that 'a Chamber has discretion to make or not to make a finding of non-compliance.'²²

19. The Chamber further recalls that the Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.²³ The Defence's Request however, makes no attempt to demonstrate that any such error of law, fact or procedure was made in the Chamber's decision to postpone a finding of non-cooperation until after 13 January 2023. Consequently, the Issue is not an appealable issue.

20. In addition, the Chamber finds that the Request does not meet the remaining criteria of Article 82(1)(d) of the Statute.

21. First, the Chamber accepts the Prosecution's argument that the Issue does not significantly impact the fair and expeditious conduct of the proceedings or the outcome

¹⁸ Response, ICC-02/05-01/20-813-Conf, paras 3, 18-21.

¹⁹ Response, ICC-02/05-01/20-813-Conf, paras 3, 22.

²⁰ Response, ICC-02/05-01/20-813-Conf, paras 3, 19.

²¹ Response, ICC-02/05-01/20-813-Conf, paras 3, 21.

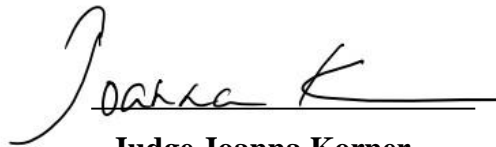
²² Appeals Chamber, *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 41 (the 'Kenyatta Judgment on a finding of non-compliance'). See also 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), para. 183.

²³ *Kenyatta Judgment on a finding of non-compliance*, ICC-01/09-02/11-1032 (OA5), para. 22. See also Appeals Chamber, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 80; Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest, 3 March 2015, ICC-02/05-03/09-632-Red (OA5), para. 30; Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 17 June 2015, ICC-02/04-01/15-251 (OA3), para. 35.

of the trial,²⁴ considering the reasonable deadline of 13 January 2023 which the Chamber imposed on the Sudanese authorities to respond to the requests for legal assistance.

22. Second, the Chamber finds that the resolution of the Issue by the Appeals Chamber will not materially advance the proceedings. Even if the Appeals Chamber were to find that the Chamber had erred in the exercise of its discretion, the present Chamber - and not the Appeals Chamber - would remain competent to decide on the appropriate course of action in relation to non-cooperation by Sudan.²⁵ Moreover, as argued by the Prosecution, 'it is highly unlikely that an appeal, if granted, would be resolved by [13 January 2023].'²⁶

23. Considering the above, the Chamber dismisses the request for leave to appeal on all grounds.




Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 29 November 2022

At The Hague, The Netherlands

²⁴ Response, ICC-02/05-01/20-813-Conf, paras 3, 18-21.

²⁵ *Kenyatta* Judgment on a finding of non-compliance, ICC-01/09-02/11-1032 (OA5), para. 77.

²⁶ Response, ICC-02/05-01/20-813-Conf, para. 22.