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

Date: 14 January 2021

PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

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

Public

**Prosecution’s response to “Version Publique Expurgée de la Requête en vertu des
Articles 4-2 et 68-1 du Statut”, 14 December 2020, ICC-02/05-01/20-231-Red**

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

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I. INTRODUCTION

1. The Chamber should reject the Defence's *Requête en vertu des Articles 4-2 et 68-1 du Statut* ("Request").¹ This Request should be rejected because it is not only based on an incorrect interpretation of articles 4(2) and 68(1) the Rome Statute but also makes incorrect factual assertions and fails to show the concrete impact of these assertions and, thus, the forensic purpose of the relief requested.

II. SUBMISSIONS

2. On 14 December 2020, the Defence requested that all activities of the Court in the territory of the Republic of Sudan ("Sudan") should be suspended as a consequence of an alleged violation of articles 4(2) and 68(1) of the Rome Statute that would, according to the Defence, endanger witnesses, victims and other personnel in the country's territory.

3. The Defence argues that the Prosecution has put witnesses, victims and others at risk by engaging in evidence -seeking activities in the territory of Sudan since 2005 and including in 2007, allegedly without that Sudan's consent. These assertions are flawed in three ways.

4. Firstly, the Request mischaracterises Sudan's obligations as being those of a non-party State under article 4(2) of the Statute, insofar as it assumes that Sudan must be treated for this purpose as "any other State", and therefore the Court may only function on its territory once a "special agreement" is concluded. Yet, to the contrary, because the situation in Darfur was referred to the Court by the United Nations Security Council pursuant to its Resolution 1593 ("Resolution 1593")²—and Sudan is obliged to cooperate with the Court—no special agreement was or is necessary.³

¹ [ICC-02/05-01/20-231-Red](#).

² United Nations Security Council, [Resolution 1593](#) (2005), U.N. Doc. S/RES/1593 (2005). *See* para. 2 (deciding that "the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor). Pursuant to article 25 of the UN Charter, Sudan as a UN Member State must accept and carry out the obligations imposed on it by a Security Council resolution adopted under Chapter VII of the UN Charter.

³ [ICC-02/05-01/09-309](#), paras. 35-40 and 44. [ICC-02/05-01/09-139-Corr](#), para. 36. *See also* Triffterer, Ambos, *The Rome Statute of the International Criminal Court : A commentary*. 3rd ed. Hart/Nomos, pp. 107/108 : "When the Security Council refers a situation to the Court, the binding Council resolution adopted under Chapter VII of the UN Charter replaces the agreement of the territorial State to the exercise of jurisdiction. The Court's competence

Sudan's existing obligations under the Charter of the United Nations and Resolution 1593 suffice to ensure that, for the purpose of State cooperation, it must be treated like a "State Party" and not "any other State".⁴ It is well established that the Statute's articles cannot be read in isolation,⁵ but must instead be read in context so that—relevantly—article 4(2) remains compatible with, among others, article 13(b).

5. Secondly, the Request ignores Part 9 of the Statute which comprehensively sets out the Court's competence in seeking the cooperation of States.⁶ Article 87(1) provides that the Court may request the cooperation of a State Party, which is under an obligation to comply.⁷ For a non-party State, article 87(5) provides that the Court may request the State's assistance "on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis".

6. Thirdly, the Defence mistakes the circumstances of the missions about which it complains. It overlooks that the missions were carried out with the cooperation of the

is then founded on the binding Security Council decision, not on State consent. In the same way, the Security Council decisions referring situations to the ICC contained an obligation of the territorial State concerned to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor. Since cooperation includes allowing for the exercise of functions and powers of the Court on one's own territory, the binding Security Council decisions in these cases legally also replaced the consent requirement with regard to cooperation"; Rastan, p. 442 ("In the case of a Security Council referral, the Chapter VII resolution directing a state to co-operate with the ICC would form the relevant 'appropriate basis' for the Court to issue its requests—that is, the conclusion of an ad hoc agreement or arrangement with the non-party state would not be a prerequisite").

⁴ See [ICC-02/05-01/09-397-Corr](#), paras. 135-142 and 149, especially para. 141 ("In the view of the Appeals Chamber, the fact that Sudan is obliged to fully cooperate with the Court, as per Resolution 1593, means that the cooperation regime for States Parties to the Rome Statute is applicable to Sudan's cooperation with the Court, and not article 87(5) of the Statute. This is because the latter regime is clearly inappropriate for a State that actually has a legally binding duty to cooperate with the Court. Therefore, exercise of jurisdiction by the Court 'in accordance with [the] Statute' means, in relation to cooperation by Sudan, cooperation on the basis of the regime established for States Parties to the Statute."); cf. [ICC-01/11-01/11-577](#), paras. 21-22 (equating Libya to a State Party for the purposes of article 87(7) and deciding to refer its non-compliance to the Security Council pursuant to article 87(7) on the basis of its duty to cooperate with the Court in accordance with resolution 1970(2011)). It may also be argued that Resolution 1593 forms the "appropriate basis" under article 87(5) of the [Statute](#) on which the Court may seek Sudan's cooperation and with which Sudan is required to comply. Whether taking this view, or the view that Sudan's obligations are equated to that of a State Party as the Appeals Chamber has held, the outcome is the same: Sudan is required to comply with the Court even in the absence of an agreement or arrangement.

⁵ Art. 31, [Vienna Convention on the Law of Treaties](#) (1969)

⁶ Article 4(2) primarily concerns the recognition of the Court's legal personality on a State's territory, and not the exercise of the Court's jurisdiction or the Court's competence to seek a State's cooperation: R. Rastan, "Testing Co-operation: The International Criminal Court and National Authorities", *Leiden Journal of International Law*, Vol. 21 (2008) ("Rastan"), fn. 46.

⁷ Article 87, [Statute](#)

Sudanese authorities,⁸ at the request of the Prosecution.⁹ The Prosecution thus carried out these missions in accordance with article 54(2)(a) and Part 9 of the Statute, which, as shown above, required Sudan to cooperate.

7. It is also important to note, that the scope of the Request must be considered to be limited only to the missions that took place in 2006 and 2007 and their consequences, since the Defence fails to identify any further activities by the Prosecution on the territory of Sudan.

8. Finally, and in any event, the Defence has failed to demonstrate, or even articulate, any forensic purpose for the Request. It has not provided any concrete example of how its preparations have been impacted, rendering its arguments purely speculative.

9. The Defence has also not demonstrated which of the Prosecution activities presented an impermissible risk to any person involved in them. As always, consistent with article 68, the Prosecution takes all feasible and appropriate measures to protect persons who may be exposed to risk as a consequence of its operations. This is illustrated, for example, by the successful identification of reported attempts by certain persons to influence victims and witnesses for the potential benefit of Mr Abd-Al-Rahman.¹⁰

⁸ [ICC-02/05-56](#), paras. 15 (“The Prosecution also conducted five missions to the Sudan, *after requesting cooperation from the Sudanese Government*. During these missions, *the Prosecution, with the agreement of the Sudanese Government, obtained information and accounts from senior officials of the Government of the Sudan* in respect of: (1) events relating to the ongoing conflict in Darfur since July 2002; and (2) national proceedings being conducted in the Sudan regarding crimes allegedly committed in Darfur”); 254-257, 258 (“From 27 January until 7 February 2007, the Prosecution carried out a mission to gather further information on these developments. In this regard, the Prosecution met with The Minister of Justice, the Under Secretary for the Ministry of Justice, the Chief Justice of West Darfur and the President of the Special Court for West Darfur. In particular, the Prosecution interviewed the three special advisers of the Judicial Investigations Committee (JIC) over five days”). (emphasis added)

⁹ [Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 \(2005\)](#), pages 9-10. [Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council pursuant to UNSCR 1593 \(2005\)](#), 14 December 2006, page 6. [Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 \(2005\)](#), 14 June 2006, page 4. [Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council pursuant to UNSCR 1593 \(2005\)](#), 13 December 2005, pages 8-9.

¹⁰ [ICC-02/05-01/20-209-Red](#), para. 14 and 16.

10. Furthermore, the Defence argument that concluding an agreement with the Sudanese authorities would automatically ameliorate any risk to victims and witnesses is not only speculative but simplistic and unsustainable. For example, even if such an agreement were concluded, it cannot be assumed that it would suffice to prevent threats from persons or groups not affiliated to the government.

III. CONCLUSION

11. For the foregoing reasons, the Request should be rejected.



James Stewart
Deputy Prosecutor

Dated this 14th day of January 2021

At The Hague, The Netherlands