



**Original: English**

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

**Date: 31 May 2023**

**Date of original: 27 January 2023**

**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 relating to the documents requested on 8 November 2022**

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

**The Office of the Prosecutor**

Karim A.A. Khan  
Nazhat Shameem Khan  
Julian Nicholls

**Counsel for the Defence**

Cyril Laucci  
Iain Edwards

**Legal Representatives of Victims**

Natalie von Wistinghausen  
Anand Shah

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

---

**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Competent authorities of the Republic of  
Sudan

## I. PROCEDURAL HISTORY

1. On 11 February 2022, Trial Chamber I (the ‘Chamber’), on request of the Defence,<sup>1</sup> issued a decision requesting the assistance of the Republic of Sudan (the ‘Sudanese authorities’ or ‘Sudan’) in providing documents relating to Mr Abd-Al-Rahman’s background and identity (the ‘Biographical Documents’) necessary for the preparation of his defence (the ‘Decision of 11 February 2022’).<sup>2</sup>
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 Request for Finding of Non-Cooperation’).<sup>3</sup>
3. On 9 and 13 May 2022, respectively, the Registry<sup>4</sup> and Prosecution<sup>5</sup> filed observations on the First Request for Finding of Non-Cooperation.
4. On 24 May 2022, the Chamber partially rejected the First Request for a Finding of Non-Cooperation, but invited Sudan to submit observations on any issue(s) that may have impeded or prevented the execution of the Decision of 11 February 2022 (the ‘Decision of 24 May 2022’).<sup>6</sup>

---

<sup>1</sup> Requête relative à la non-coopération du Soudan, 18 January 2022, ICC-02/05-01/20-557-Conf-Exp. A public redacted version was notified on the same date, ICC-02/05-01/20-557-Red.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> Registry Observations on the “Requête en vertu de l’Article 87-5-b du Statut” dated 22 April 2022, ICC-02/05-01/20-678-Conf, and Sixth Report on the current status of cooperation with the Republic of Sudan, ICC-02/05-01/20-687-Conf-Exp. A confidential redacted version was notified on the same day, ICC-02/05-01/20-687-Conf-Red. *See also* Email from the Chamber, 25 April 2022, at 11:56.

<sup>5</sup> Prosecution’s Observations on the “Confidential Redacted Version of ‘Registry Observations on the ‘Requête en vertu de l’Article 87-5-b du Statut’ dated 22 April 2022, ICC-02/05-01/20-678-Conf, and Sixth Report on the current status of cooperation with the Republic of Sudan,’ 9 May 2022”, ICC-02/05-01/20-687-Conf-Red, ICC-02/05-01/20-689-Conf.

<sup>6</sup> 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.

5. On 30 June 2022, the Registry transmitted the observations of Sudan ('Sudan's Observations of 30 June 2022').<sup>7</sup> In their observations, the Sudanese authorities [REDACTED].<sup>8</sup>
6. On 11 October 2022, the Defence filed a second request seeking a finding of non-cooperation (the 'Second Request for Finding of Non-Cooperation').<sup>9</sup>
7. On 24 October 2022, the Registry filed observations<sup>10</sup> and the Prosecution filed their response<sup>11</sup> to the Second Request for a Finding of Non-Cooperation.
8. On 4 November 2022, the Chamber deferred its decision on the Second Request for Finding of Non-Cooperation, and required the Sudanese authorities to provide the Biographical Documents as soon as possible, and no later than 13 January 2023 ('Decision of 4 November 2022').<sup>12</sup>
9. On 8 November 2022, the Chamber issued an addendum to its Decision of 4 November 2022,<sup>13</sup> requiring the Sudanese authorities to provide the Defence with additional documents by the same deadline, and inviting the Sudanese authorities to file observations on these documents by 1 December 2022 (the 'Addendum').
10. On 11 November 2022, the Defence requested leave to appeal the Decision of 4 November 2022.<sup>14</sup> On 29 November 2022, the Chamber rejected the Defence's request for leave to appeal.<sup>15</sup>

---

<sup>7</sup> 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.

<sup>8</sup> Sudan's Observations of 30 June 2022, ICC-02/05-01/20-707-Conf-Exp-AnxI, p. 4.

<sup>9</sup> 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.

<sup>10</sup> Registry Observations on the "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" dated 11 October 2022, ICC-02/05-01/20-768-Conf-Exp, and Eighth Report on the current status of cooperation with the Republic of Sudan, ICC-02/05-01/20-775-Conf.

<sup>11</sup> Prosecution's response to the "Version Expurgée Confidentielle ex parte – Défense, Bureau du Procureur seulement – de la 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-Anx1a", 17 October 2022, ICC-02/05-01/20-768-Conf-Exp-Red, ICC-02/05-01/20-777-Conf-Exp.

<sup>12</sup> Decision on the Defence's second request pursuant to Article 87(5)(b), ICC-02/05-01/20-806-Conf.

<sup>13</sup> Addendum to the 'Decision on the Defence's second request pursuant to Article 87(5)(b)', ICC-02/05-01/20-809-Conf.

<sup>14</sup> 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).

<sup>15</sup> Decision on the Defence's request for leave to appeal the Decision on the Defence's second request pursuant to Article 87(5)(b), ICC-02/05-01/20-820-Conf.

11. On 16 January 2023, the Defence filed a third request asking the Chamber to make a finding on non-cooperation by Sudan (the ‘Third Request for Finding of Non-Cooperation’).<sup>16</sup>

12. On the same day, the Registry transmitted a communication from the Sudanese authorities pursuant to the Decision of 4 November 2022 and the Addendum (‘Sudan’s Communication of 12 January 2023’).<sup>17</sup> The communication was received by the Registry on 12 January 2023.<sup>18</sup> In their communication, the Sudanese authorities state that [REDACTED].<sup>19</sup>

13. On 17 January 2023, the Prosecution, Registry and Defence made oral submissions following Sudan’s Communication of 12 January 2023.<sup>20</sup>

14. On 20 January 2023, the Chamber issued a decision requesting Sudan to provide specific reasons why they consider that the Biographical Documents [REDACTED] (the ‘Decision on the Biographical Documents’).<sup>21</sup>

## II. ANALYSIS

15. The present decision is limited to the documents requested in the Addendum of 8 November 2022. As noted above, the Chamber has issued a separate decision in respect of the Biographical Documents requested in the Decision of 11 February 2022.<sup>22</sup>

16. The Chamber refers to the legal framework applicable to Sudan’s cooperation with the Court as previously set out in the Decision on the Biographical Documents.<sup>23</sup>

17. [REDACTED] of the Rome Statute (the ‘Statute’) provides that:

[REDACTED]

---

<sup>16</sup> Troisième Requête aux fins de constat de la non-coopération du Soudan, ICC-02/05-01/20-849-Conf.

<sup>17</sup> Registry’s Transmission of a Communication Submitted by the Embassy of the Republic of Sudan pursuant to Trial Chamber I’s Decisions of 4 and 8 November 2022 respectively, and Ninth Report on the status of cooperation with the Republic of Sudan, ICC-02/05-01/20-848-Conf, with Confidential Annexes I-III (hereinafter: ‘Registry’s Transmission of Sudan’s Communication of 12 January 2023’).

<sup>18</sup> Sudan’s Communication of 12 January 2023, ICC-02/05-01/20-848-Conf-AnxI, p. 2.

<sup>19</sup> Sudan’s Communication of 12 January 2023, ICC-02/05-01/20-848-Conf-AnxI, p. 2.

<sup>20</sup> Transcript of hearing, 17 January, ICC-02/05-01/20-T-107-CONF-ENG, p. 26, line 15 to p. 47, line 15.

<sup>21</sup> Decision in relation to the documents requested from Sudan on 11 February 2022, ICC-02/05-01/20-853-Conf.

<sup>22</sup> Decision on the Biographical Documents, ICC-02/05-01/20-853-Conf.

<sup>23</sup> Decision on the Biographical Documents, ICC-02/05-01/20-853-Conf, paras 15-18.

18. In the Addendum, the Chamber required Sudan to provide the Defence with the following documents (the ‘Additional Documents’):

- a) [REDACTED];
- b) [REDACTED];
- c) [REDACTED];
- d) [REDACTED]; and
- e) [REDACTED].<sup>24</sup>

19. The Defence argues that [REDACTED] of the Statute is not applicable and should be dismissed *in limine*, because pursuant to [REDACTED].<sup>25</sup> The Chamber recalls that, in respect of the Additional Documents, the Defence sent the Sudanese authorities a request for the provision of said documents on 20 January 2022.<sup>26</sup>

20. The Prosecution contends that [REDACTED] of the Statute does apply in the present case. It argues that now that Sudan has [REDACTED] must be followed.<sup>27</sup>

21. The Chamber notes that Article 93 of the Statute applies to requests of the Court and not to requests of the Defence.<sup>28</sup> The Chamber recalls that it requested the provision of the Additional Documents from Sudan in its Addendum of 8 November 2022. Accordingly, Sudan’s obligation to promptly inform the Court of its denial of the request to provide the Additional Documents under Article 93(6) of the Statute, only

---

<sup>24</sup> Annex 1 to the 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, 11 October 2022, ICC-02/05-01/20-768-Conf-Exp-Anx, pp. 2-3.

<sup>25</sup> Transcript of hearing, 17 January, ICC-02/05-01/20-T-107-CONF-ENG, p. 38, lines 2-12.

<sup>26</sup> Annex 1 to the 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, 11 October 2022, ICC-02/05-01/20-768-Conf-Exp-Anx, pp. 2-4.

<sup>27</sup> Transcript of hearing, 17 January, ICC-02/05-01/20-T-107-CONF-ENG, p. 27 line 5 to p. 28 line 12.

<sup>28</sup> Article 93(1) of the Statute states that: ‘States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions’ (emphasis added).

arose after notification of the Addendum,<sup>29</sup> and not upon receiving the Defence's request of 20 January 2022.

22. Furthermore, even though a State must promptly inform the Court if a request for cooperation is denied under Article 93(6) of the Statute, [REDACTED].

23. The Chamber notes that, although the Sudanese authorities did not avail themselves of the opportunity to file observations on the Additional Documents on 1 December 2022,<sup>30</sup> they did respond to the Chamber's request for the provision of these documents within the given deadline of 13 January 2023, and indicated [REDACTED].

24. The Defence further avers that the Sudanese authorities have 'waived [REDACTED], and they did so specifically in the observations of 26 [sic] June [REDACTED].'<sup>31</sup> The Chamber notes in this regard that Sudan's Observations of 30 June 2022 were in response to the Chamber's request for the provision of the Biographical Documents, and not to the request for the Additional Documents, which was only notified in November 2022.

25. Consequently, the Chamber rejects the Defence's arguments that [REDACTED].

26. Following Sudan's Communication of 12 January 2023 [REDACTED], the Chamber must thus engage in the process set out in [REDACTED] of the Statute in respect of the Additional Documents.

27. The Chamber aims at taking all reasonable steps to resolve the present matter by cooperative means. In this regard, the Chamber considers that Sudan must be enabled to comply with the Chamber's request to provide the Additional Documents, [REDACTED].

28. Although the Chamber ruled in its Addendum of 8 November 2022 that the requested documents were generally relevant to the case,<sup>32</sup> in light of Sudan's objection, it is of the view that further consideration must be given by the Defence to the breadth

---

<sup>29</sup> The Registry transmitted hard copies of the Addendum and of its translation into Arabic to the Sudanese authorities on 11 November 2022, *see* Registry's Transmission of Sudan's Communication of 12 January 2023, ICC-02/05-01/20-848-Conf, para. 5.

<sup>30</sup> Addendum, ICC-02/05-01/20-809-Conf, para. 6.

<sup>31</sup> Transcript of hearing, 17 January, ICC-02/05-01/20-T-107-CONF-ENG, p. 47, lines 13-15.

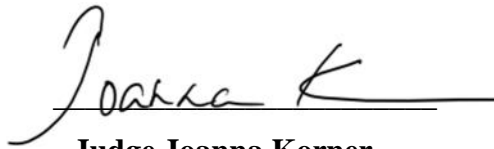
<sup>32</sup> Addendum, ICC-02/05-01/20-809-Conf, para. 4.

of the request. Accordingly, the Defence must specify which documents they require by restricting the number of reports and limiting their request to documents that mention the accused or the charged crimes (paragraph 18 (b) and (c) above). The Defence therefore is instructed to modify its request pursuant to [REDACTED] of the Statute in respect of the Additional Documents.

29. Pursuant to [REDACTED] of the Statute, the Defence is to indicate the relevance of the information sought in paragraph 18 above, as well as whether the information sought could be obtained from a source other than the Sudanese authorities.

30. Lastly, pursuant to [REDACTED] of the Statute, the Defence is to make submissions on whether there are foreseeable conditions or agreements that could be reached in order for the Sudanese authorities to make the sought information available.

31. For the foregoing reasons, the Chamber instructs the Defence to clarify and modify their request in respect of the Additional Documents as stated in paragraphs 28 to 30 above, within 14 days of notification of the present decision.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 27 January 2023

At The Hague, The Netherlands