

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-02/05-01/2**

Date: **22 June 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

**Public redacted version of
SUBMISSION UNDER RULE 79(1)(A)
OF THE RULES OF PROCEDURE AND EVIDENCE
(ICC-02/05-01/20-978-CONF, 22 June 2023)**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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INTRODUCTION

1. The present submission is not a notice of alibi complying with Rule 79(1)(a) of the Rules of Procedure and Evidence (“RPE”). For the reasons set out below, the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“the Defence”, “Mr Abd-Al-Rahman”) is not in a position to submit a proper notice of alibi that fulfils the requirements of Rule 79(1)(a) of the RPE. Instead, the Defence makes the present submission in order to comply with the instruction received from the Honourable Trial Chamber I (“the Chamber”) [REDACTED]¹ [REDACTED]².

2. The Defence hereby notifies the Chamber, the Office of the Prosecutor (“Prosecution”) and the Common Legal Representative for Victims (“CLR”) that the Defence has identified and intends to raise an alibi for the alleged crimes committed in [REDACTED]. The available particulars of that intended alibi are specified below.

3. The Defence is not, despite its best efforts since 2020, in a position to provide a full notice complying with Rule 79(1)(a) requirements. The reasons for that impediment were provided to the Chamber at the *ex parte* status conference of 24 May 2023. The Defence relied on a detailed chronology of its efforts since the initial appearance of Mr Abd-Al-Rahman,³ which was supported by a series of 233 documents, including filings, emails, letters, and *notes verbales*, 81 of which were annexed to the chronology⁴. That unprecedented, transparent exposure of the Defence’s ongoing efforts to the Chamber was acknowledged. [REDACTED]⁵ [REDACTED]⁶ The Chamber is thus fully apprised of the Defence’s past and continuing efforts to prepare for its case. The Instruction was issued on the basis of that information.

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

CLASSIFICATION

4. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), the Defence files this submission as confidential, as it refers to Decisions and Requests with the same classification. Moreover, the Defence requests that the details of the alibi remain confidential until the Defence has completed its on-going investigation efforts. A public redacted version will be also filed on the same day of the present filing.

TIMING OF THE SUBMISSION

5. On 4 March 2022, in its Pre-Trial Brief, the Defence stated that it would give notice of a particular defence, in accordance with Rule 79(1)(a) of the Rules, once in possession of the information required for that purpose. On that occasion, the Defence emphasised that the notice of a particular defence was dependent on cooperation from the Sudanese authorities, specifically on the provision of the records and documents sought in its requests for judicial assistance.⁷

6. On 6 December 2022, as the Chamber raised the question of a formal notice of alibi by the Defence, the Defence recalled that the provision of details of a potential alibi was subject to outstanding requests for cooperation.⁸

7. On 15 December 2022, the Chamber issued its Second Directions on the Conduct of Proceedings (“Second Directions”),⁹ setting out a series of staggered deadlines concerning the opening of the Defence’s case. The deadline for the notification of any defences or alibi, filing of a trial brief and disclosure of evidence was set for 22 May 2023.¹⁰

8. On 28 February 2023, the Prosecution notified the Chamber that it had concluded its presentation of evidence.¹¹

⁷ [ICC-02/05-01/20-616-tENG](#), para. 20.

⁸ ICC-02/05-01/20-T-105-CONF-ENG, [Open session], p.63 1.17-25. *See also* ICC-02/05-01/20-T-009-CONF-ENG CT, p.72; ICC-02/05-01/20-T-013-ENG CT2 WT, p. 50 ; ICC-02/05-01/20-T-021-CONF-EXP-ENG CT, p. 8.

⁹ [ICC-02/05-01/20-836](#).

¹⁰ *Ibid*, para. 20.

¹¹ [ICC-02/05-01/20-887](#).

9. On 4 April 2023, the Defence reiterated that notification of the potential alibi defence remained subject to outstanding requests for cooperation.¹²

10. On 17 April 2023, the Chamber amended the deadlines set out in the Second Directions concerning the Defence case “*in order to allow further time for preparation*”.¹³ The deadline for the notification of any defences or alibi was postponed to 22 June 2023.¹⁴

11. On 24 May 2023, the Chamber informed the Defence that the deadline for the notification of any defences or alibi of 22 June 2023 remains, subject to the caveat already mentioned in paragraph 1 above.¹⁵ The present submission is the best the Defence is able to provide in compliance with the latter Instruction.

APPLICABLE LAW

12. Pursuant to Rule 79(1)(a) of the Rules, the Defence “*shall notify the Prosecutor of its intent to: (a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi*”.

13. Rule 79(2) further states notification “*shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond.*”

14. Such defences of alibi have been raised several times at different stages of proceedings in the Court.¹⁶ Pre-Trial Chamber I considered that “*rule 79 of the Rules*

¹² ICC-02/05-01/20-T-115-CONF-ENG, p. 32.

¹³ ICC-02/05-01/20-916-Conf-Exp and its public redacted version [ICC-02/05-01/20-916-Red](#).

¹⁴ *Ibid*, para. 43, 44.

¹⁵ ICC-02/05-01/20-T-118-CONF-EXP-ENG ET 24-05-2023, p. 55, l. 15-20.

¹⁶ *See*, for notice of alibi at the Pre-Trial phase: The Prosecutor v. Charles Blé Goudé, Notice of Alibi, 9 September 2014, [ICC-02/11-02/11-146](#); The Prosecutor v. Dominic Ongwen, Second Public Redacted Version of “Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence”, filed on 10 August 2016, [ICC-02/04-01/15-519-Red2](#). *See*, for notice of alibi at the Trial phase: The Prosecutor v. Alfred Rombhot Yekatom & Patrice-Edouard Ngaïssona, Public Redacted Version of the “Defence Notification Pursuant to Rule 79 of the Rules of Procedure and Evidence”, 05 February 2021, [ICC-01/14-01/18-818-Red](#).

makes it clear that the Defence may raise any alibi or any other defence, under article 31 (1) of the Statute, either at the confirmation hearing or at the trial.”¹⁷

INTENDED NOTICE OF ALIBI

15. Had it been able to do so, the Defence would have filed a notice of alibi pursuant to Rule 79(1)(a) of the RPE to put the Chamber, the Prosecution and the CLRV on notice of the following. [REDACTED]¹⁸

16. [REDACTED]¹⁹ [REDACTED].²⁰ [REDACTED].²¹ Mr Abd-Al-Rahman’s [REDACTED], demonstrates that it could not have been possible for him to be present in [REDACTED]²² [REDACTED]²³, as charged. If averred, the information about [REDACTED] at the time of the events in [REDACTED] amounts to an alibi casting reasonable doubt on the available evidence of the presence of Mr Abd-Al-Rahman in these two places.

17. The exact date of [REDACTED] could not be more specifically determined, nor corroborated. The reasons why the Defence has not yet been able to comply with the last requirement of Rule 79(1)(a), i.e. to provide *“the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi”* and collect evidence of this information are provided below.

18. The Defence has identified the following evidence that may support Mr Abd-Al-Rahman’s alibi, subject of course to the information contained therein:

- (a) [REDACTED]: this was requested for the first time in the Defence’s first Request for Judicial Assistance to the Sudanese authorities (*“First Request for Judicial Assistance”*), dated 9 November 2020.²⁴ For the reasons which are

¹⁷ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, [ICC-01/04-01/06-102](#), para. 53.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ ICC-02/05-01/20-263-Conf-Exp-AnxA.

summarized below, it could not be obtained, in spite of all efforts deployed by the Defence. [REDACTED];

(b) the evidence [REDACTED]²⁵ [REDACTED]²⁶ [REDACTED];²⁷ and

(c) the potential evidence [REDACTED];

(d) the potential evidence [REDACTED].

SUMMARY OF THE REASONS FOR NON-COMPLIANCE WITH RULE 79(1)(A) REQUIREMENT REGARDING DISCLOSURE OF EVIDENCE OF THE INTENDED ALIBI

19. The Defence here summarizes the reasons why, despite all postponements of the date of submission of the notice of alibi, it is not able to comply with Rule 79(1)(a) of the RPE with respect to disclosure of evidence. It addresses first [REDACTED], then witnesses' evidence. In both cases, the most fundamental reason is the total lack of cooperation of Sudan with the Defence of Mr Abd-Al-Rahman, as distinct from the purported cooperation apparently enjoyed by the OTP and/or the Registry. Since 15 April 2023, the armed conflict that rampages Sudan is adding a new circumstance of *force majeure* preventing any substantial further progress in the Defence's investigations. Full details have been provided to the Chamber at the *ex parte* status conference of 24 June 2023, with an update by way of separate filing today.²⁸

(i) [REDACTED]

20. On 9 November 2020, the Defence addressed the First Request for Judicial Assistance to Sudan (the 'First Request for Cooperation'), requesting the provision of, *inter alia*, [REDACTED].²⁹

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ ICC-02/05-01/20-977-Conf.

²⁹ ICC-02/05-01/20-263-Conf-Exp-AnxA.

21. In the absence of a response to that request, the Defence escalated the matter to Pre-Trial Chamber II on 19 January 2021.³⁰ On 9 March 2021, Pre-Trial Chamber II denied intervening.³¹

22. On 18 January 2022, the Defence requested the Chamber's intervention on this matter.³² On 11 February 2022, the Chamber ordered the Sudanese authorities to respond to the First Request for Judicial Assistance or consult without delay with the Court in case they identify any problems.³³

23. In the absence of response, the Defence requested the Chamber to issue a finding of non-cooperation against Sudan on 25 April 2022.³⁴ On 24 May 2022, the Chamber instructed the Sudanese authorities to provide reasons for their absence of response within 30 days and deferred its finding of non-cooperation of Sudan until reception of Sudan's observations.³⁵ Sudan responded to that instruction by a *note verbale* on 27 June 2022,³⁶ but the Chamber did not issue a decision after that.

24. On 12 October 2022, the Defence applied for the second time for a finding of non-cooperation against Sudan.³⁷ On 4 November 2022, the Chamber gave what was presented as a last chance to Sudan authorities to respond to the First Request for Judicial Assistance by 13 January 2023.³⁸ On 12 January 2023, Sudan submitted that it was not able to respond to the First Request for Judicial Assistance because [REDACTED].³⁹

25. On 16 January 2023, the Defence filed a third request for a finding of non-cooperation against Sudan.⁴⁰ The Chamber did not accept Sudan's justification for not responding to the First Request for Judicial Assistance and requested its authorities to

³⁰ ICC-02/05-01/20-263-Conf-Exp and its public redacted version [ICC-02/05-01/20-263-Red](#).

³¹ [ICC-02/05-01/20-295](#).

³² ICC-02/05-01/20-557-Conf-Exp and its public redacted version [ICC-02/05-01/20-557-Red](#).

³³ ICC-02/05-01/20-590-Conf-Exp and its public redacted version [ICC-02/05-01/20-590-Red](#).

³⁴ ICC-02/05-01/20-678-Conf and its public redacted version [ICC-02/05-01/20-678-Red](#).

³⁵ ICC-02/05-01/20-695-Conf-Exp and its public redacted version [ICC-02/05-01/20-695-Red](#).

³⁶ ICC-02/05-01/20-707-Conf-Exp-AnxI.

³⁷ ICC-02/05-01/20-768-Conf-Exp and its Confidential redacted version ICC-02/05-01/20-768-Conf-Red.

³⁸ ICC-02/05-01/20-806-Conf and its public redacted version [ICC-02/05-01/20-806-Red](#).

³⁹ ICC-02/05-01/20-848-Conf-AnxI.

⁴⁰ ICC-02/05-01/20-849-Conf.

substantiate it within 21 days.⁴¹ In the absence of response, the Chamber issued a finding of non-cooperation against Sudan on 31 March 2023.⁴²

26. Since that date, the First Request for Judicial Assistance has remained unanswered. The ongoing armed conflict in Sudan precludes any expectation of receiving a response in a foreseeable future.

27. Since 2020, the Defence has tried to secure access to these documents through alternative ways. [REDACTED] But the impossibility to secure a Defence presence in Sudan has prevented any progress on that side either.

28. The Prosecution has offered its assistance in the Defence's investigations. This assistance has been repeatedly welcomed. The Prosecution is aware of the Defence's difficulties in securing cooperation from Sudan. It is also aware of the exact nature of the document sought by the Defence in its First Request for Judicial Assistance since, at least, 4 November 2022.⁴³ But the Defence is not aware whether the Prosecution has in fact asked for [REDACTED] by way of a request for judicial assistance, nor of the result of any such request. It must further be noted that when they were given an opportunity to do so, the Prosecution has taken every opportunity to oppose all Defence's requests aimed at obtaining cooperation from Sudan, or seeking leave to appeal decisions dismissing these,⁴⁴ thus systematically opposing the provision of any support to the Defence's efforts to secure, *inter alia*, that documentation.

29. As a result, the Defence has not been able to secure access to this crucial documentation at the date of this submission, despite all its efforts since 2020.

(ii) Impossibility to contact witnesses of the alibi and secure their evidence

⁴¹ ICC-02/05-01/20-853-Conf.

⁴² ICC-02/05-01/20-913-Conf and its public redacted version [ICC-02/05-01/20-913-Red](#).

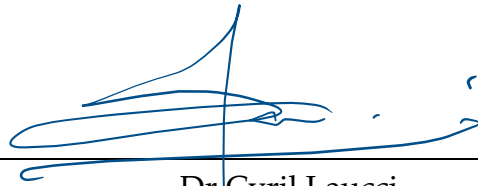
⁴³ ICC-02/05-01/20-806-Conf and its public redacted version [ICC-02/05-01/20-806-Red](#), par. 19.

⁴⁴ ICC-02/05-01/20-777-Conf-Exp-Corr; [ICC-02/05-01/20-T-107-CONF-EXP-ENG ET](#) 17-01-2023; ICC-02/05-01/20-869-Conf ; ICC-02/05-01/20-906-Conf.

30. Since 2020, the Defence has made [REDACTED].⁴⁵ [REDACTED].⁴⁶ [REDACTED] in the absence of visas delivered by Sudanese authorities. [REDACTED].⁴⁷ [REDACTED].⁴⁸ [REDACTED].⁴⁹
31. During the same period of time, [REDACTED].⁵⁰ [REDACTED].
32. [REDACTED].⁵¹ [REDACTED]. [REDACTED].⁵² [REDACTED].

CONCLUSION

33. Despite all its efforts since 2020, the Defence is not in a position to comply with the requirements of Rule 79(1)(a) of the RPE for its notice of alibi.



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 22 June 2023,
At The Hague, The Netherlands

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].