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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 “Prosecution’s response to ‘Submission under rule 79(1)(a) of the Rules of Procedure and Evidence’”, 3 July 2023, ICC-02/05-01/20-986-Conf

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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. Given the failure of the Defence to file a notice of alibi that complies with rule 79(1)(a) of the Rules of Procedure of Evidence by the deadline set by the Chamber, the Prosecution respectfully requests the Chamber to (i) order the Defence, should it identify any evidence upon which it intends to rely to establish an alibi, to immediately provide full and proper notice of the alibi to the Prosecution, and (ii) to set a new deadline for the filing of any such notice.

2. Contrary to the Defence's submission, the failure to provide a proper alibi notice cannot be attributed to a lack of cooperation from the Government of Sudan ("GoS"), nor the current situation in Sudan. Furthermore, the Defence's "Submission under rule 79(1)(a) of the Rules of Procedure and Evidence" ("Submission")¹ contains multiple inaccuracies.

II. CLASSIFICATION

3. Pursuant to regulation 23bis(2) of the Regulations of the Court, this document is filed as confidential since it responds to a document with the same classification.

III. SUBMISSIONS

The Prosecution is unable to adequately prepare and to respond to the potential alibi

4. On 17 April 2023, the Chamber postponed the deadline for notification by the Defence of any defences or alibi from 22 May 2023 to 22 June 2023.² In doing so, the Chamber found that the Defence's "claim that [the documents which have been requested from the Sudanese authorities] are essential for giving notice of an alibi defence, is not one which the Chamber finds persuasive at this stage of the proceedings."³

¹ Submission under rule 79(1)(a) of the Rules of Procedure and Evidence, [ICC-02/05-01/20-978-Conf](#).

² Decision on the Defence's Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf-Red](#), para. 44(A) ("Postponement Decision"); Second Directions on the conduct of proceedings, [ICC-02/05-01/20-836](#), para. 20(a).

³ [Postponement Decision](#), para. 33 (fn. omitted).

5. On 22 June 2023, the Defence filed the Submission. The Submission does not constitute a proper notice of alibi since, as the Defence concedes,⁴ it does not fulfil the requirements of rule 79(1)(a) of the Rules.

6. The purpose of an alibi notice is to put the Prosecution on notice “sufficiently in advance to enable [it] to prepare adequately and to respond.”⁵ A notice of alibi 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”.⁶

7. Due to the lack of specific and concrete information in the Submission, the Prosecution is unable to adequately prepare and to respond to the potential alibi.

8. The Submission is deficient in several respects. First, it does not name any witness nor identify any other specific evidence in the Defence’s possession upon which it intends to rely to establish the potential alibi. The Prosecution accepts that the Defence is unable to provide further information regarding the documents requested but not received from the GoS.⁷ However, the Defence has not demonstrated that any such records, if they exist, would support an alibi for any of the charged counts. [REDACTED].⁸

9. Second, the particulars of the potential alibi in the Submission are imprecise and unclear. Further specificity and clarity are required in relation to, in particular:

- a. the date, [REDACTED];⁹
- b. the date, [REDACTED];¹⁰ and
- c. [REDACTED]¹¹ [REDACTED].

⁴ [Submission](#), paras. 1, 3, 11.

⁵ Rule 79(2) of the Rules.

⁶ Rule 79(1) of the Rules.

⁷ See [Submission](#), paras. 18(a), 20-29.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

10. The Defence does not explain why [REDACTED].¹² The Defence also does not explain how [REDACTED] is said to be relevant.

11. Should the Defence file a proper notice of alibi that complies with the requirements of rule 79(1) of the Rules, the Prosecution will require time to address the issues raised in any such notice, for example, through further investigation.¹³ This is especially so since the proceedings are already at a relatively late stage for the giving of an alibi notice.¹⁴ Regrettably, the Defence's failure to provide an adequate and timely notice of alibi has the potential to delay the proceedings.

12. The Prosecution therefore respectfully requests the Chamber to (i) order the Defence, should it identify any evidence upon which it intends to rely to establish an alibi, to immediately provide full and proper notice of the alibi to the Prosecution, and (ii) to set a new deadline for the filing of any such notice.

13. Finally, the Prosecution notes that, in certain circumstances, the Chamber, when assessing an alibi, may draw a negative inference from the failure to provide adequate and timely notice of the existence of the alibi.¹⁵

The Defence has not made reasonable efforts to advance its investigation in lieu of cooperation from the GoS

14. In the Submission, the Defence, again, blames its lack of progress on a lack of cooperation from the GoS.¹⁶ The Prosecution recalls the Chamber's finding that the Defence "failed to explore diligently and in a timely manner" other avenues, apart from cooperation by the GoS, for the preparation of its case,¹⁷ and that "many of the

¹² [REDACTED].

¹³ Rule 79(2) provides: "The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence."

¹⁴ In several cases before the Court, the Defence has been required to file any alibi notice prior to the commencement of trial. See e.g. *Lubanga* Decision on disclosure by the Defence, [ICC-01/04-01/06-1235-Corr-Anx1](#), para. 41(b); *Bemba et al.* Decision on the conduct of the proceedings, [ICC-01/05-01/13-1209](#), para. 8; *Ongwen* Decision on 'Prosecution's request to order the Defence to comply with rule 79', [ICC-02/04-01/15-460](#), paras. 8-9.

¹⁵ See e.g. *Ngirabatware* AJ, [MICT-12-29-A](#), paras. 193-196; *Ndahimana* AJ, [ICTR-01-68-A](#), paras. 106-115; *Kanyarukiga* AJ, [ICTR-02-78-A](#), paras. 92-102; *Munyakazi* AJ, [ICTR-97-36A-A](#), paras. 13-19; *Kalimanzira* AJ, [ICTR-05-88-A](#), paras. 54-58.

¹⁶ [Submission](#), para. 19.

¹⁷ [Postponement Decision](#), para. 39.

delays in the preparation of, and investigations relating to, the Defence's case are attributable to the Defence".¹⁸ Notably, the Defence requested assistance with a mission to a third country only in February 2023,¹⁹ and recruited a resource person only at a late stage, 14 months after the charges against Mr Abd-Al-Rahman were confirmed.²⁰

15. In addition, the Defence now points to the conflict in Sudan as a "*force majeure* preventing any substantial further progress in the Defence's investigations."²¹ The Defence submits that it has not been able to [REDACTED].²² By contrast, despite the difficulties, the Prosecution has been able to [REDACTED].²³ [REDACTED],²⁴ [REDACTED].²⁵

16. These examples demonstrate that, by continued and determined efforts, evidence can be obtained from persons inside Sudan, notwithstanding the lack of cooperation from the GoS and the current fighting in Sudan. As held by the Chamber, "continuation of trial proceedings at this Court cannot be contingent upon a State's cooperation being forthcoming".²⁶

The Submission contains multiple inaccuracies

17. The Prosecution addresses the following inaccuracies in the Submission.

18. At paragraph 18(b), the Defence states that [REDACTED].²⁷ [REDACTED].²⁸ [REDACTED].²⁹

19. At paragraph 19, the Defence refers to a "total lack of cooperation of Sudan with the Defence of Mr Abd-Al-Rahman, as distinct from the purported cooperation

¹⁸ [Postponement Decision](#), para. 40.

¹⁹ [Postponement Decision](#), para. 39.

²⁰ [Postponement Decision](#), para. 37.

²¹ [Submission](#), para. 19.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [Postponement Decision](#), para. 32.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

apparently enjoyed by the OTP and/or the Registry”.³⁰ [REDACTED].³¹ [REDACTED].³² [REDACTED]. In relation to requests for assistance, while the Prosecution did receive some limited responses,³³ 36 requests for assistance to Sudan remain outstanding. [REDACTED].³⁴ [REDACTED],³⁵ the Prosecution made use of the limited window of cooperation to conduct missions to Sudan.

20. At paragraph 21, the Defence states: “On 9 March 2021, Pre-Trial Chamber II denied intervening [in the Defence’s request for documents from the GoS]”.³⁶ This submission does not accurately reflect the record. In the decision cited by the Defence, Pre-Trial Chamber II declined to make a finding of non-cooperation against Sudan under article 87(5)(b) of the Statute on the basis that the Defence’s requests to Sudan were not binding.³⁷ Pre-Trial Chamber II informed the Defence that, to obtain an order requesting cooperation from Sudan under article 57(3)(b), the Defence must submit a fully motivated request compliant with the requirements of rule 116, and that it would consider such a request as a matter of priority.³⁸ The Defence subsequently chose, for no valid reason (i.e. for reasons of principle), not to file such a request.³⁹

21. At paragraph 28, the Defence states that it does not know if the Prosecution has requested from the GoS the [REDACTED] sought by the Defence.⁴⁰ Yet the Defence has never asked the Prosecution to request these [REDACTED] from the GoS nor discussed this possibility with the Prosecution. [REDACTED],⁴¹ [REDACTED],⁴² [REDACTED].⁴³ The Prosecution maintains its longstanding offer to assist the Defence

³⁰ [Submission](#), para. 19.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [Submission](#), para. 21.

³⁷ Decision on the Defence request pursuant to article 87(5)(b) of the Statute, [ICC-02/05-01/20-295](#), paras. 11-12.

³⁸ Decision on the Defence request pursuant to article 87(5)(b) of the Statute, [ICC-02/05-01/20-295](#), paras. 6-8.

³⁹ Decision on Defence requests and procedural challenges, [ICC-02/05-01/20-402](#), para. 46. *See also* Observations relatives à l’audience de confirmation des charges, [ICC-02/05-01/20-363-Red](#), para. 10.

⁴⁰ [Submission](#), para. 28.

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

to the extent possible and, in the continuing spirit of cooperation, invites the Defence to raise any such matters with it directly.

22. At paragraph 28, the Defence states that “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, thus systematically opposing the provision of any support to the Defence’s efforts to secure, *inter alia*, that documentation.”⁴⁴ This is a gross misstatement, which is not supported by the examples cited by the Defence.⁴⁵ The Prosecution has never impeded the Defence’s efforts to obtain cooperation from Sudan. To the contrary, [REDACTED],⁴⁶ and, applying the Statute and the Rules, has supported reasonable measures to obtain cooperation from Sudan through cooperative means.⁴⁷

23. At paragraph 30, the Defence states: “[REDACTED] in the absence of visas delivered by Sudanese authorities.”⁴⁸ [REDACTED].⁴⁹ Based on the information available to the Prosecution, the Defence’s submission is inaccurate and overly simplistic since the Defence: [REDACTED];⁵⁰ [REDACTED];⁵¹ and [REDACTED].⁵² In relation to the mission [REDACTED],⁵³ the Prosecution does not possess all of the relevant information regarding this mission, including [REDACTED],⁵⁴ to respond to this submission.

24. At paragraph 32, the Submission states: [REDACTED].⁵⁵ [REDACTED].

⁴⁴ [Submission](#), para. 28 (fn. omitted).

⁴⁵ [Submission](#), para. 28, fn. 44, citing to [REDACTED]; Prosecution’s response to “Requête aux fins de report de la phase de présentation de la Défense”, 14 March 2023, ICC-02/05-01/20-902-Conf-Red, [ICC-02/05-01/20-906-Conf](#) (the Prosecution submitted that the Defence’s request for a postponement *sine die* of the presentation of its case was not justified in the circumstances).

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [Submission](#), para. 30.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

The Submission relies on the transcript of the ex parte 24 May 2023 Status Conference

25. The Defence submits that the Submission complies with an instruction given by the Presiding Judge [REDACTED] (“Instruction”), which the Defence submits added a caveat to the Chamber’s order that the Defence serve notice of any defences or alibi by 22 June 2023.⁵⁶ The Defence also quotes [REDACTED] during the 24 May 2023 Status Conference [REDACTED],⁵⁷ [REDACTED].⁵⁸

26. As the Prosecution was not present during the 24 May 2023 Status Conference, and does not have access to the transcript, it was not aware of the Instruction prior to receiving the Submission and cannot assess the context in which the Instruction was given [REDACTED]. The Prosecution may also be lacking pertinent information regarding [REDACTED]. To be fully informed, the Prosecution respectfully requests the Chamber to grant the Prosecution access to a confidential redacted version of the transcript of the 24 May 2023 Status Conference.

IV. RELIEF REQUESTED

27. The Prosecution respectfully requests the Chamber to:

- a. Order the Defence, should it identify any evidence upon which it intends to rely to establish an alibi, to immediately provide full and proper notice of the alibi to the Prosecution;
- b. Set a new deadline for the filing of any alibi notice; and

⁵⁶ [Submission](#), paras. 1, 11. *See also* [Postponement Decision](#), paras. 44(A), 45.

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

- c. Grant the Prosecution access to a confidential redacted version of the transcript of the 24 May 2023 Status Conference.



Karim A. A. Khan KC
Prosecutor

Dated this 5th day of July 2023

At The Hague, The Netherlands