

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **14 July 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  
Note for the Record  
in relation to Paragraph 10 of the Decision on the Second Application  
for Postponement of the Defence Case (ICC-02/05-01/20-990-CONF)**

**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*

to:

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**Other**

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“the Defence”, “Mr Abd-Al-Rahman”) respectfully submits this Note for the Record (“Note”) to reply to certain public criticisms made of the Defence in paragraph 10 and footnote 17 of the “Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence” (ICC-02/05-01/20-990-Conf) issued by the Honourable Trial Chamber I (“Chamber”) on 7 July 2023 (“Decision”)<sup>1</sup>.
2. In its Decision, the Chamber partially granted the Defence’s application for postponement of its case by amending a number of deadlines.<sup>2</sup> The Chamber also reiterated its earlier criticisms of the Defence for “*engaging in endless discussions and arguments with the Registry, instead of taking timely and appropriate actions to secure witnesses’ testimonies and other evidence*” and for other reasons set out in footnote 17.
3. The Defence recognises that the dual conditions in an application for leave to appeal under Article 82(1)(d) are not met in this case; leave is therefore not sought. In any event, it is likely that the various current deadlines would pass during the time it would take to litigate leave to appeal and any subsequent substantive appeal, rendering the entire procedure ineffectual.
4. A point-by-point reply to the Chamber’s criticisms cannot be addressed in an appeal. Equally, however, the Defence cannot abstain from providing any reply at all in the face of this public judicial criticism, with which it respectfully takes issue, hence this Note.
5. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), the Note is classified “Confidential” as some of the information contained therein remain under the same classification. A public redacted version is also submitted.

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<sup>1</sup> ICC-02/05-01/20-990-Conf and its public redacted version [ICC-02/05-01/20-990-Red](#), par. 10.

<sup>2</sup> ICC-02/05-01/20-983-Conf and its public redacted version [ICC-02/05-01/20-983-Red](#).

## REPLY TO PARAGRAPH 10

### (i) Criticism that “*the Defence has been engaging in endless discussions and arguments with the Registry*”

6. The Defence’s submissions on: (i) the incompatibility of the legal framework of the Court’s activities in Sudan with the Rome Statute; (ii) the legal value of the 10 May 2021 Cooperation Agreement (“Cooperation Agreement”);<sup>3</sup> (iii) the criminalisation of unauthorized cooperation with the Court in Sudan; (iv) the identification of [REDACTED] as one of the Court’s main interlocutors for security [REDACTED];<sup>4</sup> and (v) their consequences on the security of victims, witnesses, staff members, members of the Defence team and other persons at risk on account of the activities of the Court in Sudan, and on the reliability of evidence collected in Sudan remain unresolved in the sense that the Appeals Chamber has not definitively ruled on these submissions. This is because all applications for leave to appeal the various rulings of Honourable Pre-Trial Chamber II (“Pre-Trial Chamber II”) and of the Chamber on these matters have been denied.

7. It has always been the Defence’s considered view that the “*discussions and arguments with the Registry*” have always been legitimate. They have always been undertaken in good faith. They will continue until such time as a final determination is delivered by the Appeals Chamber.

8. The “*discussions and arguments with the Registry*” have proven to be fruitful. They have led to the revelation or confirmation of the following important matters:

- (i) On 26 August 2008, Sudan sent a communication to the UN Secretary-General asserting that it has no legal obligation arising from its signature of the Rome Statute on 8 September 2000.<sup>5</sup> This declaration was made after the referral of the Situation in Darfur, Sudan to the Court by UNSC Resolution 1593. No State, and in particular none of the States which had voted in favour UNSC

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<sup>3</sup> [REDACTED].

<sup>4</sup> [REDACTED].

<sup>5</sup> Organisation des Nations Unies, [Collection des Traités, Chap. XVIII.10](#), “Sudan”.

Resolution 1593, objected. The Defence proposed that the Chamber could invite Sudan to withdraw that assertion;<sup>6</sup> the Chamber has not done so. This assertion remains current;

- (ii) Before 10 May 2021 at the earliest, there was no special agreement governing the activities of the Court in Sudan pursuant to Article 4(2) of the Rome Statute;
- (iii) The Cooperation Agreement between the Court and Sudan signed on 10 May 2021<sup>7</sup> is not registered with the United Nations Secretariat and has not been published by it. It has been kept confidential, in spite of the Defence's repeated requests to make it public.<sup>8</sup> Article 102(1) of the United Nations Charter provides that: *"Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it"*;
- (iv) To date, there is no law on cooperation with the Court in Sudan, as required under Articles 87(5)(a) and 88 of the Rome Statute;
- (v) Treaties, international agreements, international customary law, and resolutions of the UN Security Council are not sources of law directly applicable in Sudan under its Constitution;<sup>9</sup>
- (vi) To some extent at least, Sudan has been cooperating with the Office of the Prosecutor ("OTP") and the Registry since 2020: [REDACTED] have been disclosed in response to OTP's requests for assistance, even if a significant number of these requests remain outstanding.<sup>10</sup> Both the OTP<sup>11</sup> and the Registry<sup>12</sup> received visas for their missions on a regular basis, albeit sometimes with delay. The Defence received visas to travel to Sudan once only, in

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<sup>7</sup> [REDACTED].

<sup>8</sup> E.g. ICC-02/05-01/20-532-Conf and its public redacted version [ICC-02/05-01/20-532-Red](#), par. 11(iv).

<sup>9</sup> DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1<sup>st</sup> July 1998, art. 49(d), 64, 65, 73(1)(d), 90(4), 98(1)(f).

<sup>10</sup> DAR-OTP-02/05-01/20-986-Conf, and its public redacted version [ICC-02/05-01/20-986-Red](#), par. 19.

<sup>11</sup> DAR-OTP-02/05-01/20-986-Conf, and its public redacted version [ICC-02/05-01/20-986-Red](#), par. 19.

<sup>12</sup> E.g. [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED] ; ICC-02/05-01/20-978-Conf and its public redacted version [ICC-02/05-01/20-978-Red](#), par. 31.

[REDACTED], and the Defence's requests for documents, even those that are not sensitive, have been denied on the unexplained and inexplicable basis that the requests [REDACTED];<sup>13</sup>

- (vii) Under [REDACTED] the Cooperation Agreement, [REDACTED] is one of the Court's main interlocutors for all security issues in Sudan [REDACTED].<sup>14</sup> There is evidence on the record of the regular use of illegal arrests, forced disappearances, torture and extra-judicial killings by [REDACTED];<sup>15</sup>
- (viii) Sudan has submitted to the Court that pre-existing criminalisation of cooperation with the Court had been abolished by its Miscellaneous Amendments Act of July 2020.<sup>16</sup> The Miscellaneous Amendments Act, however, makes no mention of the abolition of any offence of cooperation with the Court. The crimes of treason, espionage and related offences remain in force and unamended under Articles 50 to 57 of the Sudan Criminal Act<sup>17</sup>.

9. The above matters are not in dispute. What remains in dispute is what can be inferred from these matters.

10. Notwithstanding the foregoing, the Defence's "*discussions and arguments with the Registry*" have had no significant impact on the Defence's progress in its investigation and preparation of its case. No mission has been cancelled exclusively as a result of these discussions and arguments. Since 2020, no fewer than eleven missions to Sudan have been requested by the Defence.

11. The Chamber will recall that the first Defence mission was requested [REDACTED] before the confirmation of charges hearing. It did not take place because [REDACTED]. The second Defence mission was requested for [REDACTED] prior to the confirmation of charges hearing. When no visas were issued, the mission was postponed to the "closest date possible". Whilst the third requested mission

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<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED].

<sup>17</sup> DAR-OTP-0021-0296: Sudan Criminal Act 1991, Articles 50 to 57.

[REDACTED] was cancelled in part due to reasonable security concerns arising out of an absence of a privileges and immunity agreement with Sudan, it is also right to say that the Defence still had not been issued with entry visas. The fourth requested mission [REDACTED] also could not take place, at least in part, because no visas had been issued. The fifth requested mission, for [REDACTED], was cancelled because the Registry had determined that no missions to Sudan should go ahead until further notice. The sixth mission [REDACTED] could not take place because, despite being assured that visas would be issued, the team members' passports were returned by the Sudanese Embassy *without* visas. Finally, the Defence was able to travel to Sudan in [REDACTED]. Its mission was limited to Khartoum. The Defence could not get access to the documents it had requested. No other mission took place because, quite simply, Sudan did not deliver entry visas to the Defence in time to carry out the planned missions.<sup>18</sup> The Defence never asked the Registry to withdraw any visa application that it had submitted. In sum, the Defence's "*discussions and arguments with the Registry*" had in reality no impact on the progress of its investigations.

**(ii) Criticism that the Defence "*allocated significant time and resource to litigate before the Chamber issues adjudicated by the Pre-Trial Chamber*"**

12. The Pre-Trial Chamber, in its Decision on Defence requests and procedural challenges of 21 May 2021, dismissed a number of Defence submissions in the following terms: "*there is no imperative for the [Pre-Trial] Chamber to rule on all challenges to the admissibility of evidence, which can always be raised again by either party before the Trial Chamber and may be assessed anew.*"<sup>19</sup> That was the extent of the Pre-Trial Chamber's adjudication of the matters referred to by the Trial Chamber. Consequently, the Defence simply – and reasonably – walked through the door that the Pre-Trial Chamber had left wide open, being of the considered view that it was in the best interests of its client to pursue these challenges before the Trial Chamber.

<sup>18</sup> ICC-02/05-01/20-978-Conf and its public redacted version [ICC-02/05-01/20-978-Red](#), par. 30.

<sup>19</sup> [ICC-02/05-01/20-402](#), par. 37.

Indeed, in light of the Pre-Trial Chamber's *obiter* comments, the Defence could have been criticised for not vigorously pursuing these avenues before the Trial Chamber.

13. In any event, the time and resources allocated by the Defence in this regard did not impact on other activities relating to Defence investigations. The team has always been large enough and agile enough to multi-task, even given the extraordinary pace of the presentation of the Prosecution's case. The team never requested additional resources of the Registry beyond the limits of the Legal Aid Scheme on the basis of insufficiency. No mission was ever cancelled on the grounds of a lack of resources. Where investigations failed to progress in Sudan, it was always, even if not exclusively, because the Defence had not received the requisite entry visas.

**(iii) Criticism that the Defence "has been aware of possible difficulties in securing cooperation from Sudan since 2020 and should have planned accordingly"**

14. Throughout the proceedings, the Defence was reassured on multiple occasions by the Registry and by the OTP about the purported overall good level of cooperation of Sudan. All the difficulties with which it was confronted were essentially attributed to bureaucratic delays and dysfunction. The Defence was constantly reassured that it would receive visas in due course. The same excuses were even repeated on 4 April 2023,<sup>20</sup> after the Sudanese authorities had suggested [REDACTED].<sup>21</sup> It is worth recalling that the Chamber's own eventual finding of non-cooperation against Sudan<sup>22</sup> was delayed because of the hope, if not expectation, that Sudan would then cooperate. Against that background, the Defence has difficulty understanding the Chamber's criticism of the Defence for giving Sudan the same chances to cooperate.

**(iv) Criticism that the Defence "recruited its resource person 14 months after the charges were confirmed"**

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<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> ICC-02/05-01/20-913-Conf and its public redacted version [ICC-02/05-01/20-913-Red](#).



15. The Defence experienced significant challenges in identifying and recruiting, remotely, an experienced investigator in Sudan. However, the reality of the Defence's use of its current resource person is far more nuanced than the Chamber's criticism suggests. The Trial Chamber will recall that, since the very earliest stages of the case in 2020, and long before the confirmation of charges proceedings, the Defence engaged its current resource person on an informal and *pro bono* basis. The assistance furnished by the resource person has been significant. Indeed, he accompanied the Defence team on its mission to Khartoum [REDACTED]. He was formally recruited when it became clear that he needed access to confidential material from the case. It is this that precipitated the decision to recruit him *formally* in [REDACTED].

16. Following his appointment in [REDACTED], the resource person was unable to deploy to Sudan [REDACTED] with which the Chamber is familiar. [REDACTED].<sup>23</sup> The armed conflict that then exploded in Sudan 11 days later has prevented his deployment. He was part of the Defence investigatory mission to [REDACTED].

**(v) Criticism that the Defence “without proper justification, postponed missions to Sudan on the basis of the non-transmission of security-related documents by the Registry”**

17. Whilst it is correct that the Defence sought transmission of information and security-related documents from the Registry, no mission request was ever cancelled or postponed exclusively on the basis that such documentation was not forthcoming (see also paragraphs 10-11 above). The principal reason for missions to Sudan not going ahead has always been the lack of entry visas. Evidence that the Defence did not consider that the non-receipt of the requested security-related documentation was a critical factor in its plans to travel to Sudan can be found in the fact that, when the Defence did undertake its mission to Sudan [REDACTED], having secured visas, it had still not received the requested information from the Registry.

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<sup>23</sup> [REDACTED].

- (vi) **Criticism that the Defence “requested assistance for missions in third countries only in 2023”**

18. The Defence’s reply to this criticism is in essence the same as that for point (iii) above.

- (vii) **Criticism that the Defence “has provided no information in respect of its exploration of other avenues to obtain evidence, notwithstanding it has been aware of the contours of the case since the confirmation of charges in 2021”**

19. The Defence’s first mission request for Sudan was submitted in [REDACTED] 2020.<sup>24</sup> The nature of the first line of the Defence case rests on evidence rebutting the Prosecution’s allegation that Mr Abd-Al-Rahman is “*Ali Kushayb*”, through eye-witness and documentary evidence of Mr Abd-Al-Rahman’s identity and activities in 2003-2004. As the Trial Chamber will be aware, documentary evidence has been sought, in vain, through Requests for Assistance since 9 November 2020.<sup>25</sup> The Trial Chamber will recall that the eye-witnesses that support the Defence case *vis-à-vis* Mr Abd-Al-Rahman’s identity [REDACTED]. Unlike many of the Prosecution’s witnesses, [REDACTED] around the world. It would not be productive for the Defence to expend precious time and resources exploring “*other avenues*” by searching for eye-witnesses that speak to the heart of the Defence case in locations [REDACTED].

20. The Trial Chamber is aware that a substantial number of potential Defence witnesses [REDACTED].<sup>26</sup>

## CONCLUSION

21. Finally, the Defence places on record that the mere fact it has been undertaking, and continues to undertake, its investigative activities in defence of its client can in no way be construed as an abandoning of its long-held position regarding the

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<sup>24</sup> [REDACTED].

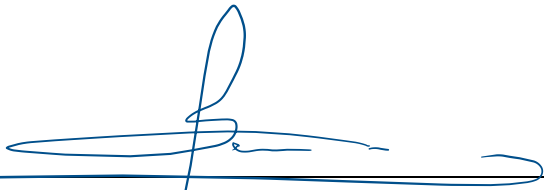
<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

insufficiency of the legal framework of the Court's activities in Sudan, or of the legal and factual consequences flowing from that insufficiency. The position applies as much to evidence collected in Sudan by the Defence as by the OTP. The Defence maintains its position and will pursue its arguments after judgment, in the event it becomes necessary, to the Appeals Chamber.

22. The Defence has done, and is doing, its best to work efficiently and effectively in conditions that are extraordinarily challenging, involving organisation of missions, deployment of team members, and making arrangements for the movement of witnesses in a country suffering a full-blown civil war. The Trial Chamber should be in no doubt that the Defence takes seriously its obligations to work conscientiously and responsibly.

23. The Defence places this Note on the record, and in as public a format as possible, to reply to the Trial Chamber's public criticisms, and in order to give context and clarification. That context and clarification, it is hoped, will in turn provide nuance and will explain why the Defence takes such issue with the Chamber's criticisms.



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

Dated this 14 July 2023, at The Hague, The Netherlands.