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No. **ICC-02/05-01/20**
Date: **21 January 2022**

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 the
Decision on Defence submissions on cooperation with Sudan

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

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I. Procedural Background

1. On 26 June 2020, the Defence filed a request (the ‘First Request’) before Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) to order the Registry or any other competent authority to, *inter alia*, request funding from the United Nations for costs incurred in relation to the situation in Darfur pursuant to Article 115(b) of the Rome Statute (the ‘Statute’).¹

2. On 23 July 2020, the Single Judge of the Pre-Trial Chamber (the ‘Single Judge’) rejected the First Request, noting that, ‘the request plainly falls outside the ambit of the Defence, and that the Defence has no legal standing to either evaluate nor provide recommendations regarding the Court’s financial management’.² On 13 August 2020, the Pre-Trial Chamber denied the Defence leave to appeal the decision.³ On 23 September 2020, the Pre-Trial Chamber also rejected the Defence request for reconsideration of the decision on leave to appeal.⁴

3. On 25 September 2020, the Defence filed a request (the ‘Second Request’) identical to its First Request, before the Presidency of the Court (the ‘Presidency’).⁵

4. On 12 October 2020, the Presidency dismissed the Second Request *in limine*.⁶ The Presidency stated that, ‘[...] issues concerning the general administration of the Court, including in matters of diplomatic relations, do not give rise to an entitlement to a remedy for parties in proceedings’.⁷ The Presidency also observed that, ‘**[s]uch duplication of proceedings is unwarranted, interferes with the expeditious administration of justice and may even be considered an abuse of process**’

¹ Requête en vertu de l’Article 115-b, ICC-02/05-01/20-10.

² Decision on the Defence request under article 115(b) of the Rome Statute, ICC-02/05-01/20-101, para. 7.

³ Decision on Defence Request for Leave to Appeal the ‘Decision on the Defence request under article 115(b) of the Rome Statute’, ICC-02/05-01/20-110.

⁴ Décision relative à la demande aux fins de réexamen de la décision ICC-02/05-01/20-110 présentée par la défense (ICC-02/05-01/20-113), ICC-02/05-01/20-163.

⁵ Requête en vertu des Articles 38-3-a, 43-2 et 115-b, ICC-02/05-01/20-165.

⁶ Decision on the ‘Requête en vertu des Articles 38-3-a, 43-2 et 115-b’ dated 25 September 2020 (ICC-02/05-01/20-165), ICC-02/05-01/20-180 (hereinafter: ‘Presidency Decision’).

⁷ Presidency Decision, ICC-02/05-01/20-180, para. 4.

(emphasis added) and that the Second Request ‘could have been rejected on this basis alone’.⁸

5. On 5 October 2020, the Defence filed a request before the Pre-Trial Chamber to stay or terminate proceedings (the ‘Third Request’) citing *inter alia*, the lack of cooperation from the Government of Sudan.⁹

6. On 16 October 2020, the Single Judge rejected the Third Request.¹⁰ The Single Judge noted that, although ‘the Defence expresses concern about potential delays, it fails to consider that, if granted, the requested relief of a stay of proceedings would itself result in a delay to the proceedings, thus harming the interests of the suspect’.¹¹ On 9 November 2020, the Pre-Trial Chamber also rejected the Defence leave to appeal the above decision.¹²

7. On 19 January 2021, the Defence filed a request (the ‘Fourth Request’) before the Pre-Trial Chamber pursuant to Article 87(5) of the Statute to find that the Sudanese authorities have not cooperated with the Court in relation to three cooperation requests by the Defence, to take all useful measures pursuant to article 57(3)(b) of the Statute in relation to these cooperation requests, and to inform the Security Council of Sudan’s alleged non-cooperation.¹³ On 9 March 2021, the Single Judge rejected the Fourth Request.¹⁴

8. Once the charges were confirmed and the case file transmitted to Trial Chamber I (the ‘Chamber’); on 8 October 2021,¹⁵ and again on 12 October 2021, the Defence made submissions which were not only repetitive of each other but also repetitive of

⁸ Presidency Decision, ICC-02/05-01/20-180, para. 6.

⁹ Requête aux fins d’arrêt ou de suspension temporaire des procédures, ICC-02/05-01/20-174.

¹⁰ Decision on Defence Request for a Stay of Proceedings, ICC-02/05-01/20-186.

¹¹ Decision on Defence Request for a Stay of Proceedings, ICC-02/05-01/20-186, para. 10.

¹² Decision on Defence Request for Leave to Appeal the ‘Decision on Defence Request for a Stay of Proceedings’, ICC-02/05-01/20-202.

¹³ Requête en vertu de l’Article 87-5-b du Statut de la Cour, ICC-02/05-01/20-263-Conf-Exp, the public version of the document was notified on the same day, ICC-02/05-01/20-263-Red2.

¹⁴ Decision on the Defence request pursuant to article 87(5)(b) of the Statute, ICC-02/05-01/20-295 (hereinafter: ‘Decision on Defence Article 87(5)(b) Request’).

¹⁵ Observations de la Défense en relation avec la sécurité des témoins, des victimes et des autres personnes à risque du fait des activités de la Cour, y compris son personnel, au Soudan, ICC-02/05-01/20-481-Conf, the public version of the document was notified on 13 October 2021, ICC-02/05-01/20-481-Red (hereinafter: ‘Fifth Defence request’).

submissions that were pending before the Presidency and other divisions of the Court, on what it argued were urgent matters related to the subject matter of the Court's cooperation with and activities in Sudan (the 'Fifth Request' and 'Sixth Request' respectively).¹⁶

9. On 15 October 2021, the Chamber decided to make no order on the Fifth and Sixth Requests, considering them to be premature in light of the fact that a Registry report on cooperation with Sudan was pending at the time.¹⁷

10. On 22 October 2021, the Registry filed its report on the status of cooperation with Sudan (the 'Registry's Report').¹⁸

11. On 29 October 2021, the Defence filed its response to the Registry's Report.¹⁹

12. On 1 November 2021, the Appeals Chamber rejected the Defence appeal against a decision of the Pre-Trial Chamber, challenging the jurisdiction of the Court and authority of United Nations (the 'UN') Security Council Resolution 1593 ('Resolution 1593').²⁰

13. On 12 November 2021, during the second status conference, the Registry²¹ and the Office of the Prosecutor (the 'Prosecution')²² provided updates to the Chamber on the situation in Sudan and the Court's activities, particularly in light of the political developments of 25 October 2021. During that same hearing, the Chamber decided to

¹⁶ Requête aux fins de mesures urgentes visant à préserver la sécurité des témoins, des victimes et des autres personnes à risque du fait des activités de la Cour, y compris son personnel, au Soudan, ICC-02/05-01/20-485-Conf, the public version of the document was notified on 13 October 2021, ICC-02/05-01/20-485-Red (hereinafter: 'Sixth Defence request').

¹⁷ Decision on Defence Submission on Missions in Sudan, ICC-02/05-01/20-485-Conf, ICC-02/05-01/20-490.

¹⁸ Registry's Second Report on the current status of cooperation with the Republic of Sudan, ICC-02/05-01/20-496 (hereinafter: 'Registry's Report').

¹⁹ Réponse au Second Rapport du Greffe sur la Coopération, ICC-02/05-01/20-501-Conf, the public version of the document was notified on 29 October 2021, ICC-02/05-01/20-501-Red (hereinafter: 'Defence response to the Registry's Report').

²⁰ Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 1 November 2021, ICC-02/05-01/20-503 OA8 (hereinafter: 'Appeals Chamber judgment').

²¹ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 3, line 18 to p. 5, line 20.

²² Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 8, line 22 to p. 5, line 20.

postpone any further discussion on the matter and discuss the issues during the third status conference on 17 December 2021.²³

14. On 17 December 2021, during the third status conference, the Registry updated the Chamber on recent developments in Sudan and its implications on cooperation with Sudan, and responded to the related questions raised the Defence.²⁴ The Prosecution updated the Chamber on its brief mission to Sudan between 11 and 15 December 2021.²⁵

15. As set out above, the Defence has made a total of six filings that are interrelated, overlapping and often contain identical arguments: three filings before the Pre-Trial Chamber, one before the Presidency, one before the Appeals Chamber, and two before this Chamber.

II. Legal framework for cooperation with Sudan

A. UN Security Council Resolution 1593

16. The Defence questions the authority of Resolution 1593 owing to the fact that Sudan's purported non-cooperation has not been followed by sanctions by the UN Security Council.²⁶ The Defence, however, has failed to demonstrate a link between its assertions and the rights of Mr Abd-Al-Rahman to a fair trial.

17. The Chamber notes that subsequent to the Defence's filing of the Fifth and Sixth Requests before this Chamber on this matter, the Appeals Chamber issued its judgment on a previous Defence challenge to the authority of Resolution 1593. The Appeals Chamber concluded that Resolution 1593 'represents a clear and unambiguous submission to the Court's jurisdiction of violations of international humanitarian law and human rights law in Darfur'.²⁷ Previously, the Appeals Chamber also held that the

²³ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 7, line 16 to p. 9, line 21. *See also* Order setting the agenda for the third status conference, 13 December 2021, ICC-02/05-01/20-533.

²⁴ Transcript of hearing, 17 December 2021, ICC-02/05-01/20-T-018-CONF-ENG, p. 8, line 14 to p. 14, line 16 (hereinafter: 'Transcript of Third Status Conference').

²⁵ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 15, line 25 to p. 16, line 16.

²⁶ Sixth Defence request, ICC-02/05-01/20-485-Red, para. 10. *See also* Fifth Defence request, ICC-02/05-01/20-481-Red, para. 11.

²⁷ Appeals Chamber judgment, ICC-02/05-01/20-503 OA8, para. 45.

cooperation regime for States Parties to the Rome Statute is applicable to Sudan's cooperation with the Court.²⁸

18. In light of the Appeals Chamber's judgment, the Chamber is satisfied that there is no merit to this part of the Defence submissions. This matter has been settled definitively by the Appeals Chamber with full reasons, confirming the Court's jurisdiction in Darfur and the legal authority of Resolution 1593. The Chamber sees no reason to depart from the Appeal Chamber's ruling on this matter.

B. The Cooperation Agreement of 10 May 2021,²⁹

19. The Defence claims that the legal framework for the Court's cooperation with Sudan is insufficient and thereby infringes Mr Abd-Al-Rahman's rights under Article 67(1) of the Statute. In support of this claim the Defence argues that:

(i) the Cooperation Agreement cannot be considered to be a 'special agreement' within the meaning of Article 4(2) of the Statute since it does not refer to the statutory provision in its text;³⁰

(ii) the Cooperation Agreement does not meet the criteria for an international convention as prescribed by the Vienna Convention on the Law of Treaties (VCLT) due to the fact that the Cooperation Agreement is classified as confidential and is not registered with the UN Secretariat;³¹

(iii) Article 8(2) of the Cooperation Agreement undermines Resolution 1593 by subjecting Sudan's cooperation to the requirement of its municipal law;³²

²⁸ See also Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, Judgement in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr OA2, para. 141.

²⁹ Annex A to Observations de la Défense en relation avec la sécurité des témoins, des victimes et des autres personnes à risque du fait des activités de la Cour, y compris son personnel, au Soudan, ICC-02/05-01/20-481-Conf-AnxA (hereinafter: 'Cooperation Agreement').

³⁰ Sixth Defence request, ICC-02/05-01/20-485-Red, para. 12; Fifth Defence request, ICC-02/05-01/20-481-Red, para. 13.

³¹ Defence response to the Registry's Report, ICC-02/05-01/20-501-Red, para. 9; Sixth Defence request, ICC-02/05-01/20-485-Red, paras 12-13; Fifth Defence request, ICC-02/05-01/20-481-Red, para. 13.

³² Sixth Defence request, ICC-02/05-01/20-485-Red, para. 11; Fifth Defence request, ICC-02/05-01/20-481-Red, para. 12.

(iv) Sudan's two reservations to the Vienna Convention on Diplomatic Relations (VCDR) renders inoperative all provisions of the Cooperation Agreement relating to immunities and privileges of Court and its staff, victims, and witnesses in Sudan;³³ and

(v) the legal framework is insufficient due to the lack of a municipal law in Sudan on cooperation, the absence of guarantees of good cooperation within the applicable legal framework, and the delays in transfer of persons and responses to requests for cooperation.³⁴

20. The Defence also requests the reclassification of the Cooperation Agreement as public.³⁵

21. The Registry, in its Report filed on 22 October 2021, submitted that the Cooperation Agreement is binding under international law, and its provisions are standard provisions, which are generally included in cooperation agreements with situation countries.³⁶ According to the Registry, the Sudanese authorities [REDACTED].³⁷

i. The Cooperation Agreement cannot be considered a 'special agreement' within the meaning of Article 4(2) of the Statute

22. Article 4(2) of the Statute states that the Court may exercise its functions and powers, as provided in this Statute by way of a special agreement on the territory of any other State. The Defence gives no reason for its assertion that specific reference of Article 4(2) of the Statute is necessary in the text of an agreement entered into by the Court and a State for that agreement to be considered a 'special agreement' within the meaning of the Article 4(2) of the Statute.³⁸

³³ Defence response to the Registry's Report, ICC-02/05-01/20-501-Red, para. 10.

³⁴ Sixth Defence request, ICC-02/05-01/20-485-Red, paras 8-9, 12-13. *See also* Fifth Defence request, ICC-02/05-01/20-481-Red, paras 9, 15.

³⁵ Sixth Defence request, ICC-02/05-01/20-485-Red, paras 12-13.

³⁶ Registry's Report, ICC-02/05-01/20-496, para. 18. *See also* Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 32, line 10 to p. 33, line 5.

³⁷ Annex I to the Registry's Report, ICC-02/05-01/20-496-Conf-AnxI, para. 10.

³⁸ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 19, line 21 to p. 24, line 13.

23. The Chamber notes that Article 1(1) of the Cooperation Agreement [REDACTED].³⁹ The Chamber is satisfied that, despite the absence of a reference to Article 4(2) of the Statute in its text; the purpose, scope and contents of the Cooperation Agreement clearly qualify it as a ‘special agreement’ within the meaning of Article 4(2) of the Statute. Accordingly, the Chamber rejects the Defence’s assertions on this issue.

ii. The Cooperation Agreement is not an international convention due to its confidentiality and non-registration with the UN Secretariat

24. The Defence does not provide any legal basis for its assertion that the Cooperation Agreement is invalid owing to its non-registration with the UN Secretariat and its confidential classification.⁴⁰

25. The Chamber notes that Article 1(a) of the VCLT limits the scope of application of the VCLT to ‘international agreements concluded between States’.⁴¹ Therefore, VCLT provisions relating to registration are inapplicable to an agreement signed between the Court, i.e. an international organisation, and a State, i.e. Sudan. The same reasoning is also applicable to any purported obligations to register agreements under the Charter of the UN.⁴² Moreover, Article 14 of the Negotiated Relationship Agreement between the Court and the UN states that only ‘when appropriate’ shall the Court and the UN consult on ‘the registration or filing and recording with the United Nations of agreements concluded by the Court with States’.⁴³ Thus further stressing that there is no obligation to register agreements concluded between the Court and States with the UN Secretariat.

26. Further, the Chamber also finds that the Defence provides no legal basis for its assertion that the mere confidential classification of the Cooperation Agreement in any way alters its status as an international convention. It is not submitted by the Defence that either of the signatories are denying the legal validity of, or are refusing to

³⁹ Cooperation Agreement, ICC-02/05-01/20-481-Conf-AnxA p. 4.

⁴⁰ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 17, line 12 to p. 19, line 20.

⁴¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 1(4).

⁴² See Charter of the United Nations, art. 104(1).

⁴³ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, art. 14.

implement, the Cooperation Agreement. As a matter of practicality, the Court often concludes confidential cooperation agreements with States on varied matters, such as witness protection.

27. Accordingly, the Chamber rejects the Defence argument that the Cooperation Agreement does not constitute an international convention due to its non-registration with the UN Secretariat and its continued confidential classification.

iii. Article 8(2) of the Cooperation Agreement undermines Resolution 1593 by subjecting Sudan's cooperation to the requirement of its municipal law

28. [REDACTED].⁴⁴

29. The Defence asserts, without any legal or factual basis, that the mere execution of requests from the Court in accordance with relevant procedure under Sudanese national law (in addition to other requirements imposed by the request itself as well as the Cooperation Agreement) results in Article 8(2) of the Cooperation Agreement undermining Resolution 1593. In fact, any cooperation regime or cooperation agreement between a State and the Court would require domestic action by the concerned State; which is naturally undertaken through its domestic legal system and following procedures under its national laws.

30. The Chamber notes that the purpose of the Cooperation Agreement is to facilitate the expeditious fulfilment of the Court's mandate pursuant to Resolution 1593, within the territory of Sudan, in the context of the present case.⁴⁵ Moreover, [REDACTED].⁴⁶

31. The Defence provides no legal or factual basis for its assertion that the object and purpose of the Cooperation Agreement is anything but the implementation of the Court's mandate pursuant to Resolution 1593, nor that it in any way supersedes the authority of and obligations generated by Resolution 1593. Accordingly, the Chamber rejects the Defence argument that Article 8(2) of the Cooperation Agreement undermines Resolution 1593.

⁴⁴ Cooperation Agreement, ICC-02/05-01/20-481-Conf-AnxA, p. 7.

⁴⁵ Cooperation Agreement, ICC-02/05-01/20-481-Conf-AnxA, p. 4.

⁴⁶ Cooperation Agreement, ICC-02/05-01/20-481-Conf-AnxA, p. 4.

iv. Sudan's two reservations to the Vienna Convention on Diplomatic Relations renders inoperative all provisions of the Cooperation Agreement relating to immunities and privileges of Court and its staff, victims, and witnesses in Sudan

32. Sudan's two reservations to the VCDR are:

The diplomatic immunities and privileges provided for in article 37 paragraph 2 of the Vienna Convention on Diplomatic Relations of 1961, recognized and admitted in customary law and in the practice of States in favour of heads of missions and members of diplomatic staff of the mission, cannot be granted by the Government of the Democratic Republic of the Sudan for other categories of mission staff except on the basis of reciprocity.

The Government of the Democratic Republic of the Sudan reserves the right to interpret article 38 as not granting to a diplomatic agent who is a national of or permanent resident in the Sudan any immunity from jurisdiction, and inviolability, even though the acts complained of are official acts performed by the said diplomatic agent in the exercise of his functions.

33. [REDACTED].⁴⁷

34. The Chamber notes that the reference to the VCDR in the Cooperation Agreement is limited [REDACTED].

35. The Defence provides no legal or factual basis for its assertion that this limited reference to the VCDR in Cooperation Agreement—in light of the nature, scope and legal effect of the Sudan's two reservations—renders inoperative all provisions of the Cooperation Agreement relating to immunities and privileges of the Court and its staff, victims, and witnesses in Sudan.

36. Accordingly, the Chamber rejects the Defence assertion that Sudan's two reservations to the VCDR renders inoperative all provisions of the Cooperation

⁴⁷ Cooperation Agreement, ICC-02/05-01/20-481-Conf-AnxA,

Agreement relating to immunities and privileges of the Court and its staff, victims, and witnesses in Sudan.

v. The legal framework is insufficient due to the lack of a municipal law in Sudan on cooperation, the absence of guarantees of good cooperation within the applicable legal framework, and the delays in transfer of persons and responses to requests for cooperation

37. The Defence provides no legal or factual basis for its assertion that the lack of a municipal law on cooperation in Sudan and the lack of additional guarantees of cooperation renders the present legal framework insufficient. The Defence has failed to demonstrate any link between purported delays in transfers of other persons to the Court and responses to requests for cooperation, and the alleged insufficiency of the legal framework for cooperation with Sudan in this case.

38. The Chamber notes that according to the Registry's submissions, Sudan has cooperated with the Court, although the Registry accepted that there may be delays in responses to requests for cooperation.⁴⁸ The Chamber finds that the operational effectiveness of the cooperation regime within the relevant legal framework is a matter within the purview of the Registry. The Defence's assertions do not merit a departure from or addition to the current legal framework of cooperation with Sudan, as negotiated, implemented and assessed by the Registry, and are rejected.

39. Accordingly, the Chamber rejects the Defence arguments (i) to (v) above, as well as the overarching Defence claim that the current legal framework for the Court's cooperation with Sudan is insufficient. In any event, the Defence has failed to demonstrate how any of these assertions (focused mostly on general public international law and its relationship with the Court's statutory framework), even if correct, impact the rights of Mr Abd-Al-Rahman under Article 67(1) the Statute.⁴⁹

III. Decriminalisation of cooperation with the Court

⁴⁸ Registry's Second Report, ICC-02/05-01/20-496, paras 19-24.

⁴⁹ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 17, line 12 to p. 24, line 13.

40. The Registry provided detailed information surrounding its communication with the Sudanese authorities on the issue of decriminalisation of cooperation with the Court under Sudanese law,⁵⁰ and observed that on 11 October 2021 the Sudanese authorities confirmed that cooperation with the Court is not criminalised by law in Sudan.⁵¹ The Defence, however, asserts that the Sudanese authorities have been unable to demonstrate decriminalisation of cooperation with the Court and argues that mere amendment of the Sudanese Code of Criminal Procedure in April-June 2020 is insufficient to constitute decriminalisation.⁵² No evidence has been put before the Chamber to suggest that the confirmation of decriminalisation is open to doubt. The Registry makes no such suggestion in its report. Accordingly, the Chamber dismisses the Defence claim that Sudan continues to criminalise cooperation with the Court as unfounded.

IV. The Registry's role in the transmission of Defence requests for cooperation

41. The Defence asserts without any factual basis that the Registry failed to fulfil its role in the transmission and processing of the Defence requests for cooperation, thus violating its obligation of neutrality and procedural fairness.⁵³

42. The Registry provided a detailed account of its correspondence with the Defence, and the processing and transmission of specific Defence requests for cooperation to the Sudanese authorities.⁵⁴ The Registry also stated that considering the complex nature of the cooperation requests and the fact that they are new to the Sudanese authorities, more time may be required to consider and process the requests.⁵⁵

43. The Chamber accepts, on the basis of the Registry's observations, that the Defence cooperation requests have been processed and transmitted in accordance with

⁵⁰ Annex I to the Registry's Second Report on the current status of cooperation with the Republic of Sudan, 22 October 2021, ICC-02/05-01/20-496-Conf-AnxI (hereinafter: 'Annex I to the Registry's Report').

⁵¹ Registry's Report, ICC-02/05-01/20-496, para. 23.

⁵² Defence response to the Registry's Report, ICC-02/05-01/20-501-Red, para. 15; Sixth Defence request, ICC-02/05-01/20-485-Red, paras 5-6; Fifth Defence request, ICC-02/05-01/20-481-Red, paras 6, 14.

⁵³ Defence response to the Registry's Report, ICC-02/05-01/20-501-Red, para. 13.

⁵⁴ Annex II to the Registry's Report on the current status of cooperation with the Republic of Sudan, 22 October 2021, ICC-02/05-01/20-496-Conf-AnxII (hereinafter: 'Annex II to the Registry's Report'). *See also* Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 27, lines 4-14.

⁵⁵ Registry's Report, ICC-02/05-01/20-496, paras 23-24.

the Registry's general practice and the applicable legal framework. Moreover, the Defence accepts that the problem is not the Registry's failure to transmit or implement Defence requests but rather the delayed response from the Sudanese authorities.⁵⁶ The Defence provides no reason why the Chamber should hold the Registry responsible for the Sudanese authorities' purported delay in responding (or lack thereof) to the Defence's requests for cooperation.

44. Accordingly, the Chamber rejects the Defence request seeking a determination from the Chamber that the Registry violated its obligation of neutrality and procedural fairness by failing to fulfil its role in the transmission and processing of the Defence's requests for cooperation.

V. Registry's responsibility under Rule 13(2) of the Rules

45. Rule 13(2) of the Rules states that '[t]he Registrar shall also be responsible for the internal security of the Court in consultation with the Presidency and the Prosecutor, as well as the host State'.

46. The Defence asserts that the Joint Threat Assessment Group's (the 'JTAG') evaluation that [REDACTED],⁵⁷ and the [REDACTED],⁵⁸ both attached to the Registry's Report, equates to the Registry abdicating its responsibility under Rule 13(2) of the Rules.⁵⁹

47. The Registry provided a detailed account of the security situation in Sudan based on the [REDACTED], and [REDACTED].⁶⁰

48. The Defence does not provide any specific information or analysis in support of this generalised assertion that the JTAG evaluation and recommendation specifically violate Rule 13(2) of the Rules, and yet again any link to Mr Abd-Al-Rahman's right to a fair trial. Moreover, the Defence has failed to make any link between its assertions

⁵⁶ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 25, lines 5-13.

⁵⁷ Annex III to the Registry's Report on the current status of cooperation with the Republic of Sudan, 22 October 2021, ICC-02/05-01/20-496-Conf-AnxIII, para. 3 (hereinafter: 'Annex III to the Registry's Report').

⁵⁸ Annex III to the Registry's Report, ICC-02/05-01/20-496-Conf-AnxIII, para. 10.

⁵⁹ Defence response to the Registry's Report, ICC-02/05-01/20-501-Red, paras 18, 20.

⁶⁰ Annex II to the Registry's Report, ICC-02/05-01/20-496-Conf-AnxII.

and the quoted rule. Accordingly, the Chamber rejects the Defence assertion that the Registry abdicated its responsibility under Rule 13(2) of the Rules in its Report.

VI. Conduct of missions in Sudan

49. Article 64(2) of the Statute states that ‘[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’.

50. The Defence alleges the lack of adequate legal framework and unsuitable conditions for its inability to conduct missions and undertake investigative steps in Sudan.⁶¹ The Defence states that it has a ‘maximal concept of the powers of the Chamber’⁶² under Article 64(2) of the Statute, and accordingly requests the Chamber to order a halt on all field activities in Sudan until certain preconditions self-identified by the Defence for the resumption of field activities in Sudan are met.⁶³

51. The Chamber notes that this issue was discussed at length at the third status conference.⁶⁴ The Chamber has already dismissed the Defence claim regarding the inadequacy of the legal framework for the Court’s cooperation with Sudan. Whilst the Chamber has powers under Article 64(2) of the Statute to regulate matters that impact the conduct of the trial; these, however, do not extend to prohibiting parties and participants in the case from undertaking investigative measures and missions in Sudan. Accordingly, the Chamber dismisses the Defence request to order a halt on all field activities in Sudan.⁶⁵

⁶¹ See Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 31, lines 14-15. (Original French: ‘*conception maximale des pouvoirs de la Chambre*’).

⁶² Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 25, line 25 to p. 26, line 16.

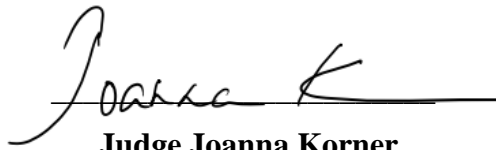
⁶³ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 28, line 10 to p. 31, line 15. See also Contribution à l’Agenda de la Troisième Conférence de Mise en État, 8 December 2021, ICC-02/05-01/20-532-Conf, paras 11-12 (hereinafter: ‘Defence submission on the agenda of the Third Status Conference’).

⁶⁴ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 28, line 15 to p. 31, line 16.

⁶⁵ Transcript of Third Status Conference, ICC-02/05-01/20-T-018-CONF-ENG, p. 28, line 10 to p. 31, line 15. See also Defence submission on the agenda of the Third Status Conference, ICC-02/05-01/20-532-Conf, paras 11-12.

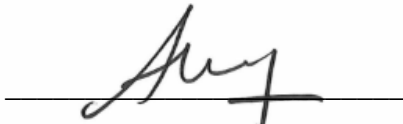
52. For these reasons, the Chamber:

- i. rejects the Defence's Fifth and Sixth Requests, and
- ii. instructs the Registry to submit a report on the status of cooperation with Sudan by 3 February 2022.

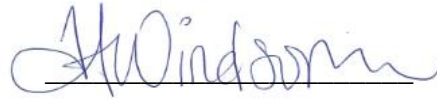


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 21 January 2022

At The Hague, The Netherlands