

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: **8 May 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 "Prosecution's response to 'Demande de reconsidération ou, à titre subsidiaire, d'autorisation d'interjeter appel de la décision ICC-02/05-01/20-916-CONF-EXP'", 3 May 2023, ICC-02/05-01/20-926-Conf**

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## I. INTRODUCTION

1. The Prosecution respectfully requests the Chamber to reject the Defence’s request for reconsideration or, in the alternative, leave to appeal (“Request”)<sup>1</sup> the “Decision on the Defence’s Request for postponement of the presentation of its case” (“Decision”).<sup>2</sup> The Request—which is replete with mischaracterisations and incorrect assertions—does not demonstrate that the Chamber made a clear error of reasoning in the Decision, nor that reconsideration is necessary to prevent an injustice. In addition, the issues identified in the Request are not appealable issues, and do not satisfy the cumulative criteria for granting leave to appeal under article 82(1)(d) of the Rome Statute.<sup>3</sup>

## II. SUBMISSIONS

2. On 14 March 2023, the Defence requested the Chamber to indefinitely postpone the timeline for the presentation of the Defence’s case (“Postponement Request”).<sup>4</sup> In its Decision, the Chamber found that there was no basis to adjourn the presentation of the Defence’s case *sine die*, but rather allowed the Defence further time to prepare by amending certain deadlines.<sup>5</sup> In the Request, the Defence maintains its original request to postpone its case *sine die*, but now also proposes, as an alternative, a postponement of not less than three months, with opening statements and the presentation of evidence to commence no earlier than 27 November 2023.<sup>6</sup> The Defence advances 11 issues in support of the Request.

3. At the outset, the Defence is incorrect in stating that the Chamber did not give the Defence the opportunity to fully inform it of the relevant facts regarding the Postponement Request,<sup>7</sup> in particular, in relation the Defence’s ongoing efforts to advance its investigations.<sup>8</sup> First, it was incumbent on the Defence to support its Postponement Request with relevant facts. Second, the Chamber convened a status conference on 4 April 2023 for the very purpose of discussing the Postponement Request (“Status Conference”), and allowed the Defence to make

<sup>1</sup> Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-916-CONF-EXP, [ICC-02/05-01/20-920-Conf-Red](#).

<sup>2</sup> Decision on the Defence’s Request for postponement of the presentation of its case, [ICC-02/05-01/20-916-Conf-Red](#).

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

<sup>4</sup> Requête aux fins de report de la phase de présentation de la Défense, [ICC-02/05-01/20-902-Conf-Red](#).

<sup>5</sup> [Decision](#), paras. 31, 33, 43-45.

<sup>6</sup> [Request](#), para. 13 and p. 19.

<sup>7</sup> The Defence makes this argument in relation to Issues Two, Four, Five, Six, Seven and Eight. See [Request](#), paras. 20, 23-25, 27.

<sup>8</sup> [Request](#), para. 7.

further oral submissions in reply to the responses of the Prosecution and Registry.<sup>9</sup> During the hearing, the Chamber invited the Defence to submit any additional information in support of its request on multiple occasions.<sup>10</sup> The Defence thus had ample opportunity to fully substantiate the Postponement Request. That the Chamber did not fully accept the Defence's arguments does not mean that the Chamber did not hear and properly consider those arguments.

4. The Prosecution further notes that, in the Request, the Defence again predicates achieving significant progress in preparing its case on obtaining the cooperation of the Government of Sudan ("GoS").<sup>11</sup> However, as the Chamber correctly found, "continuation of trial proceedings at this Court cannot be contingent upon a State's cooperation being forthcoming".<sup>12</sup> Moreover, the Defence again fails to demonstrate how the lack of cooperation prevents it from investigating its core position on "Ali Kushayb".<sup>13</sup> In the circumstances, the Chamber's decision extending the timeline for the presentation of the Defence case was reasonable and correct, and there is no basis for reconsidering or granting leave to appeal the Decision.

### **Reconsideration is not justified in the present circumstances**

5. Reconsideration is an exceptional remedy.<sup>14</sup> The Chamber has previously held that "[f]or reconsideration to take place, there must be a clear error of reasoning, or a necessity to prevent an injustice", and that "[a] Trial Chamber must assess whether new facts and arguments have arisen since the impugned decision was rendered."<sup>15</sup> Thus, a request for reconsideration cannot be based on arguments which could have been raised in the initial request.<sup>16</sup>

<sup>9</sup> See Email from Chamber on 21 March 2023 at 15:30.

<sup>10</sup> Status Conference of 4 April 2023, T-115-CONF ET, 12:23-13:2 ("[...] so what we really want to know at this stage - and we may have a couple of questions about some of the things that were said - is, if there is anything further you want to add in support of your application?") and 27:19-21 [REDACTED] and 32:25 [REDACTED].

<sup>11</sup> [Request](#), para. 13 ("*aucun progrès significatif ne pourra être atteint tant que le Soudan refuse de coopérer, ne répond pas aux demandes d'assistance judiciaire pendantes et ne permet à la Défense d'accéder à son territoire pour rencontrer ses témoins et mener ses enquêtes*").

<sup>12</sup> [Decision](#), para. 32.

<sup>13</sup> [Decision](#), para. 31.

<sup>14</sup> *Katanga* Article 108 Decision, [ICC-01/04-01/07-3833](#), para. 25.

<sup>15</sup> Decision on the Defence's request for reconsideration of the Decision on victims' participation, [ICC-02/05-01/20-759](#), para. 17 citing *Al Hassan* Witness Preparation and Familiarisation Reconsideration/Leave to Appeal Decision, [ICC-01/12-01/18-734](#), para. 11; *Ntaganda* Bar Table Partial Reconsideration Decision, [ICC-01/04-02/06-2241](#), para. 4; *Ongwen* Disclosure of Requests for Assistance Reconsideration Decision, [ICC-02/04-01/15-468](#), para. 4.

<sup>16</sup> *Ongwen* List of Evidence Reconsideration/Leave to Appeal Decision, [ICC-02/04-01/15-1547](#), para. 7.

Furthermore, “a request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber.”<sup>17</sup>

6. For the reasons detailed in the following section, none of the 11 issues raised by the Defence, whether individually or taken together, justify reconsideration in this case. The request to reconsider the Decision should therefore be rejected.

*Issue One: The Chamber did not err by not taking into account the time it took to issue a decision [REDACTED]*

7. The Defence argues that the Chamber erred in fact and/or law by failing to take into account the Chamber’s “*absence prolongée*” to issue a decision [REDACTED].<sup>18</sup> The Defence fails to show any error. There was no need for the Chamber to take this into account since it (i) considered any impact of the non-cooperation of the GoS on the Defence’s preparations;<sup>19</sup> and (ii) took into account the potential prejudice that the present state of affairs may have caused to Mr Abd-Al-Rahman when deciding to allow the Defence further time to prepare.<sup>20</sup>

8. In any event, the Defence’s characterisation of the time taken by the Chamber as a “delay” is unmerited. From the time that the Defence first requested the Chamber to make a finding of non-cooperation against the GoS (on 18 January 2022), until the Chamber [REDACTED]<sup>21</sup> [REDACTED]<sup>22</sup> [REDACTED]<sup>23</sup> [REDACTED].<sup>24</sup>

9. Moreover, on the issue of delay, the Prosecution notes that during the pre-trial phase, the Defence declined, purely on principle, the invitation of the Pre-Trial Chamber on 9 March 2021<sup>25</sup> to submit a request pursuant to article 57(3)(b) of the Statute to obtain the cooperation of the Sudanese authorities,<sup>26</sup> given that only the Court has the power to issue binding requests

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<sup>17</sup> Decision on the Defence’s request for reconsideration of the Decision on victims’ participation, [ICC-02/05-01/20-759](#), para. 19 citing *Ntaganda* Time and Page Limit Extensions Reconsideration Decision, [ICC-01/04-02/06-2426](#), para. 6.

<sup>18</sup> [Request](#), paras. 16-17.

<sup>19</sup> [Decision](#), paras. 31-33.

<sup>20</sup> [Decision](#), para. 43.

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

<sup>22</sup> [REDACTED].

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

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

<sup>25</sup> Decision on the Defence request pursuant to article 87(5)(b) of the Statute, [ICC-02/05-01/20-295](#), paras. 6-8.

<sup>26</sup> Decision on Defence requests and procedural challenges, [ICC-02/05-01/20-402](#), para. 46.

for cooperation under part 9 of the Statute.<sup>27</sup> The Defence chose to delay for over 10 months, only submitting a request under article 57(3)(b) to the Chamber on 18 January 2022.<sup>28</sup>

*Issue Two: The Chamber did not apply an incorrect test in deciding the Postponement Request*

10. The Defence argues that the Chamber erred in law by equating its request to indefinitely postpone the presentation of the Defence's case to a request for a stay of proceedings, and thus applied the wrong test in deciding the Postponement Request.<sup>29</sup> The Defence fails to demonstrate any error in the Chamber's reasoning. First, the Defence mischaracterises the Decision in submitting that the Chamber required that the test for a stay of proceedings be satisfied in order to extend the deadlines.<sup>30</sup> Although the Chamber found that the Defence had not demonstrated that the drastic remedy of a stay was appropriate in this case,<sup>31</sup> and therefore rejected the request to postpone the case *sine die*,<sup>32</sup> it nonetheless amended the deadlines to allow the Defence further time to prepare.<sup>33</sup>

11. Second, the Chamber correctly noted that the Postponement Request, although submitted by the Defence under regulation 35 of the Regulations, "in reality seeks an adjournment *sine die*, which, if granted effectively would amount to a stay of the proceedings."<sup>34</sup> In making this finding, the Chamber correctly considered the substance of the Postponement Request—in which the Defence requested an indefinite postponement of the presentation of its case, with periodic reporting to the Chamber<sup>35</sup>—over its form. Indeed, the Defence's request, if granted, would amount to a temporary or conditional stay of the proceedings, which the Chamber would, in the ordinary course, be obliged to monitor in order to review its decision from time to time.<sup>36</sup> The Defence merely disagrees with the Chamber's correct characterisation of the Postponement Request.

12. The two examples that the Defence provides of requests under regulation 35 of the Regulations that were not treated as requests for a stay of proceedings<sup>37</sup> are inapposite since, in

<sup>27</sup> Decision on the Defence request pursuant to article 87(5)(b) of the Statute, [ICC-02/05-01/20-295](#), para. 11.

<sup>28</sup> Requête relative à la non-coopération du Soudan, [ICC-02/05-01/20-557-Red](#).

<sup>29</sup> [Request](#), paras. 18-21.

<sup>30</sup> [Request](#), paras. 20-21.

<sup>31</sup> [Decision](#), para. 31.

<sup>32</sup> [Decision](#), paras. 33, 45.

<sup>33</sup> [Decision](#), paras. 43-45.

<sup>34</sup> [Decision](#), para. 29 (fn. omitted).

<sup>35</sup> [Postponement Request](#), para. 24.

<sup>36</sup> *Lubanga Stay of Proceedings Appeals Judgment*, [ICC-01/04-01/06-1486](#), paras. 80-81.

<sup>37</sup> [Request](#), para. 18.

each case, the Prosecution did not request a postponement *sine die*, but rather concrete extensions of time with proposed new dates.<sup>38</sup>

13. Furthermore, as noted above,<sup>39</sup> the Defence incorrectly claims that the Chamber refused to hear the Defence on this issue.<sup>40</sup> In any case, the Defence does not now advance any argument in the Request to explain the purported difference between a stay of proceedings and the remedy it requested.

*Issue Three: The Chamber did not err in finding unpersuasive the Defence's claim that the documents it requested from the GoS were essential to its case*

14. The Defence argues that the Chamber erred in fact and/or law in finding unpersuasive its claim that the documents, information and witnesses it had requested access to from the GoS were essential to its preparation.<sup>41</sup> The Defence mischaracterises the Chamber's finding. Contrary to the Defence's submissions, there is no inconsistency between the Chamber's earlier findings [REDACTED],<sup>42</sup> and its finding in the Decision that "it is not readily apparent to the Chamber how these documents may be considered to be so essential as to prevent the defence from putting forward any kind of case".<sup>43</sup> This latter finding therefore does not amount to a reconsideration by the Chamber of its previous findings. Furthermore, the Defence has not demonstrated that the finding was unreasonable on the facts of this case. Notably, neither in the Postponement Request nor the Request does the Defence advance any specific and concrete arguments as to why it cannot present any kind of defence case in the absence of these documents and information.

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<sup>38</sup> In the present case, at the pre-trial stage, the Prosecution requested postponement of the confirmation hearing from 7 December 2020 to 1 June 2021, and subsequently from 22 February 2021 to 31 May 2021. *See* Decision on the Prosecutor's Request for Postponement of the Confirmation Hearing and related deadlines, [ICC-02/05-01/20-196](#), paras. 3, 6; Decision on the Prosecutor's Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits, [ICC-02/05-01/20-238](#), paras. 8-9. In *Al Hassan*, the Prosecution requested that certain trial deadlines be extended for 30 days. *See Al Hassan* Extension of Deadlines Decision, [ICC-01/12-01/18-677](#), para. 2.

<sup>39</sup> *See above*, para. 3.

<sup>40</sup> [Request](#), para. 20.

<sup>41</sup> [Request](#), para. 22.

<sup>42</sup> [REDACTED].

<sup>43</sup> [Decision](#), para. 33.

*Issue Four: The Chamber properly heard the Defence on the issue of its diligence in its preparations*

15. The Defence argues that the Chamber erred in fact and law by refusing to properly hear the Defence on the diligence of its preparations before rendering the Decision.<sup>44</sup> The Defence fails to demonstrate that the Chamber erred. As detailed above,<sup>45</sup> the Chamber provided the Defence with ample opportunity to support its Postponement Request with the facts and submissions it considered relevant. If the Defence was of the view that it had important points to address, including corrections to factual matters, it should have made these points at the Status Conference.

16. In any case, as detailed below,<sup>46</sup> the Defence does not advance any new arguments on this issue that warrant reconsideration of the Decision. This is especially so since, despite its findings as to the Defence's lack of diligence, the Chamber nonetheless held that it was "obliged to remedy any prejudice that the present state of affairs may have caused to the Accused" and, accordingly, extended certain deadlines.<sup>47</sup>

*Issue Five: The Chamber's finding on the Defence's refusal to accept Sudan's visa requirements does not merit reconsideration of the Decision*

17. The Defence argues that the Chamber erred in fact in concluding that the Defence alone had refused to comply with Sudan's new visa requirements, at a time when the Prosecution and Registry had accepted them.<sup>48</sup> The Prosecution is not privy to the relevant information regarding planned Defence missions, and is therefore not in a position to respond to the Defence's factual allegations on this issue. Specifically, the Prosecution is not aware of when the Registry notified the Defence that the Prosecution and the Registry had agreed to comply with the GoS requirement [REDACTED] when applying for a visa, or of the precise details of the cancelled mission. Nonetheless, even if the Chamber had made a factual error in relation to this finding, given its very limited nature, it would not be of such significance to merit reconsideration of the Decision.

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<sup>44</sup> [Request](#), para. 23.

<sup>45</sup> *See above*, para. 3.

<sup>46</sup> *See below*, paras. 2323-2626.

<sup>47</sup> [Decision](#), paras. 43-45.

<sup>48</sup> [Request](#), para. 24.



*Issue Six: The Chamber did not err in rejecting the Defence's submissions regarding the [REDACTED]*

18. The Defence argues that the Chamber erred in fact in rejecting the Defence's submissions on the [REDACTED].<sup>49</sup> The Defence fails to demonstrate that the Chamber erred. To the contrary, it was reasonable for the Chamber to rely on the Registry's submissions [REDACTED].<sup>50</sup> Furthermore, there is no basis for the Defence's assertion that the Chamber did not take into account the submissions made by the Defence on this issue in its Postponement Request and reply.<sup>51</sup> [REDACTED].<sup>52</sup>

*Issue Seven: The Chamber did not err in dismissing the Defence's submissions on the Registry's non-transmission of certain internal documents*

19. The Defence argues that the Chamber erred in law in dismissing its submissions on the Registry's non-transmission of its internal risk assessment documents, and that this non-transmission amounted to an obstacle to the preparation of the Defence case.<sup>53</sup> The Chamber merely found that, since security is a matter for the Registry, the non-transmission by Registry of certain internal documents requested by the Defence did not amount to an obstacle to the preparation of the Defence's case.<sup>54</sup> The Defence fails to demonstrate that the Chamber erred, and advances no new arguments as to why the non-disclosure of these documents has impacted the Defence's preparations.

*Issue Eight: The Chamber did not err in comparing the Defence's situation in interviewing witnesses to that of the Prosecution and Common Legal Representative for Victims ("CLR")*

20. The Defence argues that the Chamber erred in fact and/or law by comparing the situations of the Prosecution and the CLRV with the Defence in relation to finding and contacting witnesses.<sup>55</sup> The Defence mischaracterises the Chamber's finding, and fails to demonstrate that the Chamber erred. The Chamber correctly found that both the Prosecution and the CLRV had explored other avenues for the preparation of their respective cases, such as contacting witnesses in third countries, and that such avenues were also open to the Defence,

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<sup>49</sup> [Request](#), para. 25.

<sup>50</sup> [Decision](#), paras. 35-36.

<sup>51</sup> [Request](#), para. 25.

<sup>52</sup> [REDACTED].

<sup>53</sup> [Request](#), para. 26.

<sup>54</sup> [Decision](#), para. 36.

<sup>55</sup> [Request](#), para. 27.

which failed to explore these avenues diligently and in a timely manner.<sup>56</sup> In making this finding, the Chamber did not make a detailed comparison of the respective situations of the Parties and Participants in relation to finding and contacting witnesses—whether under the Court’s legal framework generally, or specifically in the circumstances of this case—nor was it required to for the purposes of the Decision. Rather, the Chamber reasonably cited the Prosecution and CLRV’s activities as a point of reference to assess the Defence’s diligence in conducting its investigations.

21. Although the Chamber does not need to decide this question in order to resolve the Request, the Prosecution does not accept the Defence’s general claim, unsupported by any evidence, that [REDACTED].<sup>57</sup> Furthermore, the Defence’s assertion that [REDACTED] is similarly baseless.<sup>58</sup>

22. The Defence submits that the Prosecution “*a bénéficié pour ses enquêtes de la période au cours de laquelle le Soudan a le plus coopéré avec la Cour, jusqu’au coup d’état du 25 octobre 2021*”.<sup>59</sup> However, the Defence does not explain why it did not take advantage of this same window of opportunity to advance its investigations, following the signing of the Cooperation Agreement between the Registry and the GoS in May 2021.<sup>60</sup> In this context, the Prosecution recalls that the Defence chose not to conduct a mission to Sudan in November 2021 due to a purported “lack of a legal basis to carry out activities in the field”.<sup>61</sup> In any case, the military takeover in October 2021 did not represent the end of cooperation with the GoS, with the Prosecution resuming activities in Khartoum from December 2021<sup>62</sup> and other organs of the Court from March 2022.<sup>63</sup>

*Issue Nine: The Chamber did not err in finding that the Defence failed to explore avenues other than [REDACTED] to prepare its case diligently and in a timely manner*

23. The Defence claims that the Chamber erred in fact and/or law in finding that the Defence did not “*exploré à temps les solutions permettant de résoudre le problème [REDACTED]*”.<sup>64</sup>

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<sup>56</sup> [Decision](#), paras. 38-39.

<sup>57</sup> [Request](#), para. 27.

<sup>58</sup> [Request](#), para. 27.

<sup>59</sup> [Request](#), para. 27.

<sup>60</sup> 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.

<sup>61</sup> Status Conference of 17 December 2021, T-18-CONF CT, 25:22-26:7.

<sup>62</sup> Status Conference of 17 December 2021, T-18-CONF CT, 16:4-16; [REDACTED].

<sup>63</sup> [REDACTED].

<sup>64</sup> [Request](#), para. 28.

First, the Defence mischaracterises the Decision. The Chamber found that the Defence had failed to explore, diligently and in a timely manner, avenues *other than* [REDACTED] to prepare its case.<sup>65</sup> The number of requests that the Defence made to the Chamber [REDACTED] is thus irrelevant to this issue.<sup>66</sup> Second, the Defence fails to demonstrate that the Chamber erred in making this finding. The Prosecution is not privy to all information regarding the timing and destinations of planned Defence missions, and the reasons for their cancellation. However, notably, the Defence does not challenge that it was not until February 2023 that it requested assistance with a mission to a third country.<sup>67</sup>

*Issue Ten: The Chamber did not err in its findings on the Defence's role in delaying the proceedings*

24. The Defence argues that the Chamber erred in fact and/or law in making findings on delays that it attributes to the Defence.<sup>68</sup> First, the Defence fails to demonstrate that the Chamber erred when it found that the Defence “allocated significant time and resources to litigate before the Chamber issues adjudicated by the Pre-Trial Chamber”.<sup>69</sup> Specifically, the Defence mischaracterises the decision of the Pre-Trial Chamber on several Defence requests and procedural challenges.<sup>70</sup> The Pre-Trial Chamber simply noted that, given the limited function of confirmation proceedings, “there is no imperative for the 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>71</sup> Notwithstanding this observation, which was limited to challenges to the admissibility of evidence,<sup>72</sup> the Pre-Trial Chamber *did* resolve the requests and procedural challenges brought by the Defence (by rejecting each of them), and *did not* direct the Defence to bring these issues again before the Trial Chamber.<sup>73</sup> The Defence nonetheless chose to bring these challenges again, and its accusation of bias against the Chamber is unfounded.

25. Second, the Defence fails to demonstrate that the Chamber erred when it found that the Defence “recruited its resource person fourteen months after the charges against Mr Abd-Al-

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<sup>65</sup> [Decision](#), para. 39.

<sup>66</sup> [Request](#), para. 28.

<sup>67</sup> [Decision](#), para. 39; [Request](#), para. 28.

<sup>68</sup> [Request](#), paras. 29-32.

<sup>69</sup> [Decision](#), para. 41.

<sup>70</sup> [Request](#), para. 30.

<sup>71</sup> Decision on Defence requests and procedural challenges, [ICC-02/05-01/20-402](#), para. 37 (fn. omitted).

<sup>72</sup> None of the three examples provided by the Chamber in the Decision relate to the admissibility of evidence. See [Decision](#), para. 41, fn. 83.

<sup>73</sup> Decision on Defence requests and procedural challenges, [ICC-02/05-01/20-402](#), p. 17.

Rahman were confirmed”.<sup>74</sup> As detailed above,<sup>75</sup> the Defence’s submission that the Chamber refused to enter into a discussion during the Status Conference regarding the Defence’s progress to date in its preparations is incorrect.<sup>76</sup> In any case, the Defence does not advance any new arguments that would justify reconsideration of this finding.

26. Third, the Defence fails to demonstrate that the Chamber erred when it found that the Defence “requested assistance for missions to third countries only in 2023”.<sup>77</sup> To explain this delay, the Defence claims, without citing any evidence, that [REDACTED], and, as a result, it had to [REDACTED].<sup>78</sup> As already noted,<sup>79</sup> the Prosecution does not accept this general, unsupported assertion regarding [REDACTED]. The Prosecution further notes that it was the Defence’s choice not to [REDACTED] until very late in the proceedings, despite anticipating that [REDACTED].<sup>80</sup> Also, although it claims to have [REDACTED], the Defence, by choice, has only [REDACTED].<sup>81</sup>

*Issue Eleven: The Chamber did not err in issuing the Decision without taking into account the fighting which began in Sudan on 15 April 2023*

27. The Defence fails to demonstrate that the Chamber erred in issuing its Decision without taking into account the fighting which began in Sudan on 15 April 2023.<sup>82</sup> The Chamber issued the Decision on 17 April 2023, very shortly after the outbreak of the fighting. In the circumstances, it was reasonable for the Chamber to issue the Decision, which provided certainty to the Parties and Participants in relation to the case schedule, in the awareness that a further extension of the deadlines could be considered in the future, if necessary, on the basis of a sufficiently motivated request.<sup>83</sup> The Chamber’s approach occasioned no prejudice to Mr Abd-Al-Rahman, but instead preserved his right to be tried fairly and expeditiously.

28. The Prosecution does not contest that the Defence is presently unable to travel to Khartoum due to the current security situation, which is serious and volatile.<sup>84</sup> However, the

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<sup>74</sup> [Decision](#), para. 41.

<sup>75</sup> *See above*, paras. 3, 15.

<sup>76</sup> [Request](#), para. 31.

<sup>77</sup> [Decision](#), para. 41.

<sup>78</sup> [Request](#), para. 32.

<sup>79</sup> *See above*, para. 21.

<sup>80</sup> [REDACTED].

<sup>81</sup> [REDACTED].

<sup>82</sup> [Request](#), para. 33.

<sup>83</sup> [Decision](#), para. 43 (“Any further postponement of any of the deadlines below will be exceptional and will be granted solely when the Defence has shown good cause and provided specific reasons”).

<sup>84</sup> [Request](#), para. 33. [REDACTED].

Defence does not demonstrate how this specifically and concretely negatively impacts its investigations, including any efforts to explore other avenues in the preparation of its case.<sup>85</sup> The Prosecution submits that, without this detailed information, the Chamber is not in a position to properly determine whether an extension of the relevant deadlines is justified and, if so, for how long.

29. Finally, the Defence's assertion that the Chamber refused to allow the Defence to [REDACTED] is not correct.<sup>86</sup> Although the Chamber reasonably decided that [REDACTED].<sup>87</sup> [REDACTED].<sup>88</sup>

30. For the reasons outlined above, the Defence's request for reconsideration of the Decision on the basis of the 11 issues should be rejected.

### **The Issues do not arise from the Decision and are not appealable issues**

31. The Prosecution respectfully requests the Chamber to reject the Defence's request for leave to appeal the Decision on the 11 issues.

32. An appealable issue is constituted by "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".<sup>89</sup> A mere disagreement or conflicting opinion does not constitute an appealable issue.<sup>90</sup>

33. None of the 11 issues are appealable issues since, for the reasons demonstrated above, they are not essential to the judicial cause under determination (Issues One and Five), merely disagree with the Decision (Issues Two, Three, Six, Seven, Eight, Nine and Ten), mischaracterise the Decision (Issues Two, Three, Four, Six, Eight and Nine), and/or do not arise from the Decision (Issue Eleven).

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<sup>85</sup> [REDACTED].

<sup>86</sup> [Request](#), para. 33.

<sup>87</sup> [REDACTED].

<sup>88</sup> [REDACTED].

<sup>89</sup> *DRC* Extraordinary Review Judgment, [ICC-01/04-168](#), para. 9; *Gbagbo & Blé Goudé* Leave to Appeal Decision on Admission of Prior Recorded Statements, [ICC-02/11-01/15-1023](#), para. 14; *Bemba et al.* Leave to Appeal Decision on Admissibility of Certain Materials, [ICC-01/05-01/13-1489](#), para. 8; *Abu Garda* Leave to Appeal Decision on Confirmation of Charges, [ICC-02/05-02/09-267](#), paras. 13, 18; *Ongwen* Leave to Appeal Decision on Witness Preparation, [ICC-02/04-01/15-537](#), para. 8.

<sup>90</sup> *DRC* Extraordinary Review Judgment, [ICC-01/04-168](#), para. 9; *Al Hassan* Witness Preparation and Familiarisation Reconsideration/Leave to Appeal Decision, [ICC-01/12-01/18-734](#), para. 14; *Yekatom & Ngaissona* Leave to Appeal Decision, [ICC-01/14-01/18-161](#), para. 21.

### **The Issues do not satisfy the cumulative criteria under article 82(1)(d) of the Statute**

34. Even if the Chamber were to determine that the Issues are appealable, they do not satisfy either of the cumulative requirements under article 82(1)(d) of the Statute.<sup>91</sup>

*The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial*

35. The Defence fails to demonstrate how the Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence asserts that non-resolution of the Issues would have the consequence that “*la possibilité de présenter la Défense de Mr Abd-Al-Rahman serait irrémédiablement compromise*”.<sup>92</sup> The Defence further submits that since the Request was aimed at obtaining the additional time necessary for the conduct of its investigations, maintaining the Decision “*compromettrait définitivement l’équité de la procédure*”.<sup>93</sup>

36. The Defence’s general assertions of prejudice and unfairness are insufficient to satisfy this criterion.<sup>94</sup> The Defence fails to explain how its arguments apply to each of the Issues.<sup>95</sup> The Defence also does not specify how the Issues would affect—whether *significantly* as required under article 82(1)(d) of the Statute or at all—the outcome of the trial. In fact, the Decision did not occasion any prejudice or unfairness to the Defence. The Chamber ultimately allowed the Defence further time to prepare, ordered monthly status conferences to ascertain the Defence’s progress in the preparation of its case, and indicated that it would consider further postponements on an exceptional basis if the Defence shows good cause and provides specific reasons.<sup>96</sup> In these circumstances, the intervention of the Appeals Chamber would only delay, not expedite, the conduct of the proceedings. The Defence itself acknowledges that the time it

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<sup>91</sup> The Prosecution does not agree with the Defence that the Chamber has modified the criteria for leave to appeal under article 82(1)(d) of the Statute (*see Request*, para. 8). The Chamber merely stated, consistent with the Court’s jurisprudence, that the party seeking leave to appeal discretionary findings must demonstrate that the Chamber made an error of law, fact or procedure in exercising its discretion (*see Decision on Defence’s request for leave to appeal the decision on the admissibility of a video, ICC-02/05-01/20-894*, para. 14).

<sup>92</sup> *Request*, para. 10.

<sup>93</sup> *Request*, para. 10.

<sup>94</sup> *See Ongwen Leave to Appeal Decision on Witness Preparation, ICC-02/04-01/15-537*, para. 8; *Bemba Leave to Appeal Decision on Two Decisions, ICC-01/05-01/08-2925-Red*, para. 34; *Kenyatta et al. Leave to Appeal Decision on Redactions and Related Requests, ICC-01/09-02/11-211*, paras. 33, 39; *Kenyatta et al. Leave to Appeal Decision on Disclosure, ICC-01/09-02/11-88*, paras. 23-27; *Lubanga Leave to Appeal Decision on Victim Participation, ICC-01/04-01/06-2109*, para. 22; *Bemba Leave to Appeal Decision on Additional Evidence, ICC-01/05-01/08-680*, para. 36.

<sup>95</sup> *Bemba Leave to Appeal Decision on Two Decisions, ICC-01/05-01/08-2925-Red*, para. 34.

<sup>96</sup> *Decision*, para. 43.

would take the Appeals Chamber to resolve the Issues is not compatible with the current schedule for the presentation of the Defence's case.<sup>97</sup>

*The immediate resolution of the Issue by the Appeals Chamber would not materially advance the proceedings*

37. The Defence also fails to demonstrate that immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings. The Defence submits that resolution of the Issues is “*indispensable afin de rétablir une possibilité réelle et sérieuse d’une présentation sereine de la prévue de la Défense au procès, compatible avec les exigences du droit à un procès équitable.*”<sup>98</sup> Given the Chamber’s intention to monitor the deadlines by monthly status conferences, and to consider further postponements in certain circumstances,<sup>99</sup> it is clear that the intervention of the Appeals Chamber is not necessary to ensure that the proceedings follow the “right course”.<sup>100</sup> To the contrary, and as noted above,<sup>101</sup> the intervention of the Appeals Chamber at this stage would only cause an unnecessary delay in the proceedings.

### III. CONCLUSION

38. The Prosecution respectfully requests the Chamber to reject the Request.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 8<sup>th</sup> day of May 2023

At The Hague, The Netherlands

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<sup>97</sup> [Request](#), para. 11.

<sup>98</sup> [Request](#), para. 10.

<sup>99</sup> [Decision](#), para. 43.

<sup>100</sup> *DRC* Extraordinary Review Judgment, [ICC-01/04-168](#), para. 15.

<sup>101</sup> *See above*, para. 3636.