



**Original: English**

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

**Date: 29 March 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**

**Decision on Defence request for reconsideration of “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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**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

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**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Procedural history

1. On 8 and 12 October 2021, the Defence filed its fifth and sixth requests on the Court's cooperation with and activities in Sudan (the 'Fifth Request' and 'Sixth Request' respectively).<sup>1</sup> In the Sixth Request, the Defence requested: (i) the immediate and *sine die* suspension of all activities of the parties, participants and the Registry in Sudan likely to expose victims, witnesses or other persons at risk as a result of the activities of the Court; (ii) determine the minimum legal conditions to be met for the resumption of the activities of the Court in Sudanese territory; and (iii) reclassification of the Cooperation Agreement of 10 May 2022 between the Court and Sudan (the 'Cooperation Agreement'),<sup>2</sup> as public.<sup>3</sup>

2. On 21 January 2022, Trial Chamber I (the 'Chamber') issued its decision, rejecting the Defence's Fifth and Sixth Requests (the 'Cooperation Decision').<sup>4</sup> On 7 February 2022, in an oral ruling, the Chamber also rejected the Defence's request for leave to appeal the Cooperation Decision.<sup>5</sup>

3. On 7 March 2022, the Registry filed its fourth report on the current status of cooperation with Sudan (the 'Registry's Fourth Report').<sup>6</sup> The Registry observes that its '[s]ecurity expert recommends that the suspension of missions to Khartoum be lifted with immediate effect',<sup>7</sup> and outlined the Joint Threat Assessment Group's (the 'JTAG') recommendations issued on 4 March 2021 relating to the conduct of missions to Sudan.<sup>8</sup>

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<sup>1</sup> 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. A public redacted version was notified on 13 October 2021, ICC-02/05-01/20-481-Red; 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. A public redacted version was notified on 13 October 2021, ICC-02/05-01/20-485-Red.

<sup>2</sup> Annex A to the 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, 8 October 2021, ICC-02/05-01/20-481-Conf-AnxA.

<sup>3</sup> Sixth request, ICC-02/05-01/20-485-Conf.

<sup>4</sup> Decision on Defence submissions on cooperation with Sudan, ICC-02/05-01/20-561-Conf. A public version was notified on the same date, ICC-02/05-01/20-561-Red.

<sup>5</sup> Transcript of hearing, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25.

<sup>6</sup> Registry's Fourth Report on the current status of cooperation with the Republic of Sudan, ICC-02/05-01/20-619-Conf-Exp. A confidential redacted version was notified on the same date, ICC-02/05-01/20-619-Conf-Red. The Chamber notes that a public redacted version of the document has not been notified.

<sup>7</sup> Registry's Fourth Report, ICC-02/05-01/20-619-Conf-Exp, para. 36.

<sup>8</sup> Registry's Fourth Report, ICC-02/05-01/20-619-Conf-Exp, para. 38.

4. On 7 March 2022, upon the Chamber's instructions,<sup>9</sup> the Prosecution disclosed five items to the Defence, including three investigators' reports relating to P-0986, P-0874 and P-0994,<sup>10</sup> expressing security concerns in relation to their cooperation with the Court.<sup>11</sup>

5. On 10 March 2022, the Defence filed a request for reconsideration of the Cooperation Decision (the 'Request').<sup>12</sup> The Defence first provides a summary of the information disclosed in the investigators' reports relating to P-0986, P-0874 and P-0994.<sup>13</sup> It then submits that this information undermines the factual basis of the Chamber's findings in the Cooperation Decision on the following issues: (i) the decriminalisation of cooperation with the Court under Sudanese law;<sup>14</sup> and (ii) the adequacy of the legal framework for cooperation between the Court and Sudan, particularly the Cooperation Agreement being a 'special agreement' within the meaning of Article 4(2) of the Rome Statute (the 'Statute').<sup>15</sup> The Defence submits that the Chamber should grant its Sixth Request,<sup>16</sup> and thereby suspend all operations of the Court in Sudan until certain conditions proposed by the Defence in relation to decriminalisation of cooperation with the Court are met.<sup>17</sup>

6. On 11 March 2022, the Chamber instructed the Registry and the Prosecution to file observations on the Defence Request.<sup>18</sup>

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<sup>9</sup> Email from the Chamber to the Prosecution, 3 March 2022, at 17:33.

<sup>10</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>11</sup> Annex A to the Prosecution's notification of the disclosure of evidence, 8 March 2022, ICC-02/05-01/20-620-Conf-AnxA, p. 5.

<sup>12</sup> Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-561, ICC-02/05-01/20-623-Conf. A public redacted version was notified on 11 March 2022, ICC-02/05-01/20-623-Red (hereinafter: 'Request').

<sup>13</sup> Request, ICC-02/05-01/20-623-Conf, paras 5-7, *referring to* DAR-OTP-0220-2371, DAR-OTP-0220-2374, DAR-OTP-0220-2376.

<sup>14</sup> Request, ICC-02/05-01/20-623-Conf, para. 10, *referring to* Cooperation Decision, ICC-02/05-01/20-561-Conf, para. 40.

<sup>15</sup> Request, ICC-02/05-01/20-623-Conf, para. 16, *referring to* Cooperation Decision, ICC-02/05-01/20-561-Conf, paras 19-39.

<sup>16</sup> Request, ICC-02/05-01/20-623-Conf, para. 15.

<sup>17</sup> Contribution à l'Agenda de la Troisième Conférence de Mise en État, 8 December 2021, ICC-02/05-01/20-532-Conf, para. 11. A public redacted version was notified on the same date, ICC-02/05-01/20-532-Red.

<sup>18</sup> Email from the Chamber, at 12:52.

7. On 21 March 2022, the Registry filed its observations on the Request (the ‘Registry’s Observations’).<sup>19</sup> The Registry provides a report of its latest mission to Sudan. Additionally, in relation to the Request, it observes that ‘[t]o date, the Registry has not received any indication that the confirmation of decriminalisation is open to doubt’.<sup>20</sup>

8. On the same day, the Prosecution filed its response to the Request (the ‘Prosecution’s Response’).<sup>21</sup> The Prosecution submits that the Request does not meet the criteria for reconsideration since the information disclosed in the investigators’ reports relating to P-0986, P-0874 and P-0994: (i) does not appear relevant to, nor does it affect, the legal framework guiding the cooperation of the Court with Sudan; and (ii) does not indicate that cooperation with the Court is a criminal offence in Sudan’.<sup>22</sup>

9. On 23 March 2022, the Defence filed a further motion, (which whilst purportedly doing no more than providing the Chamber with documents, in fact contained further submissions on the issue) (the ‘Subsequent Motion’).<sup>23</sup>

## II. Analysis

### A. General framework

10. The Chamber notes that the Statute does not provide guidance on reconsideration of judicial decisions. However, the Chamber has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute.<sup>24</sup> Trial chambers have determined that reconsideration is exceptional

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<sup>19</sup> Registry Observations on the “Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-561”, ICC-02/05-01/20-623-Conf, and update on the security situation in Sudan, ICC-02/05-01/20-639-Conf (hereinafter: ‘Registry’s observations’). The Chamber notes that a public redacted version of the document has not been notified.

<sup>20</sup> Registry’s observations, ICC-02/05-01/20-639-Conf, para. 13.

<sup>21</sup> Prosecution’s response to “Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-561”, ICC-02/05-01/20-638-Conf. A public redacted version was notified on 28 March 2022, ICC-02/05-01/20-638-Red.

<sup>22</sup> Prosecution’s Response, ICC-02/05-01/20-638-Conf, paras 6-8, 15.

<sup>23</sup> Enregistrement de documents faisant suite à la Conférence de mise en état du 23 mars 2022, ICC-02/05-01/20-643-Conf. A public redacted version was notified on 24 March 2022, ICC-02/05-01/20-643-Red.

<sup>24</sup> See for example Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734, para. 11 (hereinafter: ‘*Al Hassan Reconsideration Decision*’).

and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.<sup>25</sup> **New facts** (emphasis added) and arguments arising since the decision was rendered may be relevant to this assessment.<sup>26</sup> A request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber.<sup>27</sup> However, if new facts are matters which the Chamber would have taken into account when arriving at the impugned decision, then it is clearly in the interests of justice that the Chamber considers whether those facts would provide good and sufficient reason to alter that decision.

## **B. Decriminalisation of cooperation with the Court under Sudanese law**

11. At paragraph 40 of the Cooperation Decision, referred to by the Defence, the Chamber dismissed the Defence claim that ‘Sudan continues to criminalise cooperation with the Court as unfounded’ and the Chamber also stated that ‘[n]o evidence has been put before’ it ‘to suggest that the confirmation of decriminalisation is open to doubt’.<sup>28</sup>

12. The Defence submits that the investigators’ reports relating to P-0986, P-0874 and P-0994,<sup>29</sup> confirm and corroborate the criminalisation of cooperation with Court, presumably under the umbrella of ‘treason’ or ‘espionage’.<sup>30</sup> The Defence submits that the Chamber is now obliged to reconsider its conclusion at paragraph 40 of the Cooperation Decision, to find that individuals are being prosecuted for their

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<sup>25</sup> *Al Hassan* Reconsideration Decision, ICC-01/12-01/18-734, para. 11; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request seeking partial reconsideration of the ‘Decision on Defence request for admission of evidence from the bar table’, 22 February 2018, ICC-01/04-02/06-2241, para. 4 (hereinafter: ‘*Ntaganda* Reconsideration Decision’); Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4 (hereinafter: ‘*Ongwen* Reconsideration Decision’).

<sup>26</sup> *Al Hassan* Reconsideration Decision, ICC-01/12-01/18-734, para. 11; *Ntaganda* Reconsideration Decision, ICC-01/04-02/06-2241, para. 4; *Ongwen* Reconsideration Decision, ICC-02/04-01/15-468, para. 4; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’, 24 September 2015, ICC-01/05-01/13-1282, para. 8; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19.

<sup>27</sup> Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Decision on Mr Ntaganda’s request for reconsideration of the decision on time and page extensions, 1 October 2019, ICC-01/04-02/06-2426, para. 6.

<sup>28</sup> Cooperation Decision, ICC-02/05-01/20-561-Conf, para. 40.

<sup>29</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>30</sup> Request, ICC-02/05-01/20-623-Conf, para. 13.

cooperation with the Court.<sup>31</sup> The Defence further submits that the Registry's use of the IRS [REDACTED].<sup>32</sup> The Chamber notes that the Defence also restates arguments it had forwarded on previous occasions,<sup>33</sup> —having no apparent connection to the recently disclosed information— which have already been rejected by the Chamber in the Cooperation Decision.<sup>34</sup>

13. The Prosecution submits that 'the security concerns expressed by the witnesses [REDACTED]' is 'insufficient to conclude that cooperating with the Court is prohibited or considered a criminal act in Sudanese law'.<sup>35</sup> The Prosecution further submits that, [REDACTED], and the Sudanese authorities have already expressly stated that such cooperation is not a criminal offense in Sudan.<sup>36</sup>

14. The Registry observes that, to date, it has not received any indication that the confirmation of decriminalisation is open to doubt.<sup>37</sup> The Registry states that it is not privy to the investigative activities of the Prosecution and it defers to the Prosecution's Response on the issues raised in the investigators' reports relating to P-0986, P-0874 and P-0994.<sup>38</sup> Furthermore, the Victim and Witnesses Unit ("VWU") is also not in a position to corroborate the incidents reported by the Prosecution's investigators.<sup>39</sup> The Registry also notes that during its mission to Sudan from 6 to 10 March 2022, it did not receive any indication from the UN agencies and the diplomatic missions in Sudan that cooperation with the Court is a criminal offence in that country.<sup>40</sup> The VWU informs it has resumed operations in Sudan, [REDACTED], especially in witness protection arrangements, is continuing unabated.<sup>41</sup> The Registry further states that, [REDACTED], the VWU is ready to receive protection referrals from the parties and

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<sup>31</sup> Request, ICC-02/05-01/20-623-Conf, para. 15.

<sup>32</sup> Subsequent Motion, ICC-02/05-01/20-643-Conf, paras 15-16.

<sup>33</sup> Request, ICC-02/05-01/20-623-Conf, para. 11. *See* Réponse au Second Rapport du Greffe sur la Coopération, 29 October 2021, ICC-02/05-01/20-501-Conf, para. 15. A public redacted version was notified on 29 October 2021, ICC-02/05-01/20-501-Red; *See also* Sixth request, ICC-02/05-01/20-485-Red, paras 5-6; Fifth request, ICC-02/05-01/20-481-Red, paras 6, 14.

<sup>34</sup> *See* Cooperation Decision, ICC-02/05-01/20-561-Conf, para. 40.

<sup>35</sup> Prosecution's Response, ICC-02/05-01/20-638-Conf, para. 8.

<sup>36</sup> Prosecution's Response, ICC-02/05-01/20-638-Conf, para. 8.

<sup>37</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 13.

<sup>38</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 14. *See* DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>39</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 15.

<sup>40</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 12.

<sup>41</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 18.

participants, conduct the necessary assessments, and decide upon and implement protection measures.<sup>42</sup>

15. At the outset, the Chamber regrets that the Prosecution did not see fit to disclose the five items, including three investigators' reports relating to P-0986, P-0874 and P-0994 to the Defence,<sup>43</sup> (in line with its obligations under Rule 77 of the Rules of Procedure and Evidence) until ordered so to do. The Chamber is unconvinced by the reasons provided by the Prosecution for non-disclosure of the information prior to the said order.<sup>44</sup> The Chamber notes that, irrespective of the actual impact of the disclosed information on the Cooperation Decision, it is relevant and the Chamber would have taken it into account in its analysis.

16. The Chamber notes the security concerns expressed by P-0986, P-0874 and P-0994 in the three investigators' reports, [REDACTED].<sup>45</sup> The Chamber also notes the Prosecution's submission that none of its witnesses have actually been prosecuted due to their cooperation with the Court.<sup>46</sup> The Chamber further notes that the Registry has recently been on mission to Sudan, during which it met with high ranking officials in the Sudanese government. The Registry reports it is in regular communication with the Sudanese authorities, particularly the primary focal point, who confirmed their continued cooperation with the Court.<sup>47</sup> The fact that Sudanese authorities facilitated, met with and assured the Registry delegation of their continued cooperation with the Court, demonstrates the opposite to any alleged criminalisation of such acts under Sudanese law.

17. The Chamber is satisfied that the new facts, namely the information provided in the three investigators' reports relating to P-0986, P-0874 and P-0994,<sup>48</sup> reflect no more than the, all too common, fears of witnesses to the events described by them, and do not directly have any bearing on the actual issue of criminalisation by the State. In the

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<sup>42</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 20.

<sup>43</sup> See Email from the Chamber to the Prosecution, 3 March 2022, at 17:33. See also DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>44</sup> Prosecution's Response, ICC-02/05-01/20-638-Conf, paras 12-15.

<sup>45</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>46</sup> Prosecution's Response, ICC-02/05-01/20-638-Conf, para. 8.

<sup>47</sup> Transcript of hearing, 23 March 2022, ICC-02/05-01/20-T-025-CONF-ENG, p. 12, line 14 to p. 15, line 25.

<sup>48</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.



Chamber's judgment the information does not demonstrate any error of reasoning or an injustice *vis-à-vis* the Chamber's finding that cooperation with the Court is not criminalised under Sudanese law.<sup>49</sup> Accordingly, the Chamber rejects the Defence's request to reconsider its findings in paragraph 40 of the Cooperation Decision.

### C. The Cooperation Agreement of 10 May 2022

18. In paragraphs 19 to 39 of the Cooperation Decision, the Chamber rejected the Defence's arguments and the overarching Defence claim that the legal framework for the Court's cooperation with Sudan is insufficient.<sup>50</sup> The Chamber specifically held that the Cooperation Agreement was a 'special agreement' within the meaning of Article 4(2) of the Statute.<sup>51</sup>

19. The Defence submits that the investigators' reports relating to P-0986, P-0874 and P-0994,<sup>52</sup> demonstrate that the Cooperation Agreement has not been sufficient to protect persons cooperating with the Court in Sudan from threats, arrests, torture and prosecution by the Sudanese authorities.<sup>53</sup> The Defence submits that the Chamber is now obliged to reconsider its finding in paragraphs 19 to 39 of the Cooperation Decision.<sup>54</sup> The Chamber notes that the Defence restates arguments it had put forward on previous occasions,<sup>55</sup> —which have no apparent connection to the recently disclosed information— and which have already been rejected by the Chamber.<sup>56</sup>

20. The Prosecution submits that the legal framework assessed by the Chamber in the Cooperation Decision 'remains valid and continues to allow the Court to access and

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<sup>49</sup> See paragraph 13 above.

<sup>50</sup> Cooperation Decision, ICC-02/05-01/20-561-Conf, paras 19-39.

<sup>51</sup> Cooperation Decision, ICC-02/05-01/20-561-Conf, paras 22-23.

<sup>52</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>53</sup> Request, ICC-02/05-01/20-623-Conf, para. 18.

<sup>54</sup> Request, ICC-02/05-01/20-623-Conf, para. 19.

<sup>55</sup> Request, ICC-02/05-01/20-623-Conf, para. 17. See Defence Response to Prosecution's third application under rule 68(3) (witnesses P-0657, P-0673, P-0843 and P-0954), ICC-02/05-01/20-560, 2 February 2022, ICC-02/05-01/20-576-Conf, para. 5. A public redacted version was notified on 3 February 2022, ICC-02/05-01/20-576-Red.

<sup>56</sup> See Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), 8 February 2022, ICC-02/05-01/20-588-Conf, paras 10-17. A public redacted version was notified on the same date, ICC-02/05-01/20-588-Red.

conduct its activities in the territory of Sudan’,<sup>57</sup> and the Request does not provide any grounds for altering the Chamber’s findings on the legal framework.<sup>58</sup>

21. The Registry observes that during its mission to Sudan from 6 to 10 March 2022, its delegation met with the Sudanese authorities who confirmed their continued cooperation with the Court in the context of the present case.<sup>59</sup>

22. The Chamber notes that the issue of decriminalisation was not a factor in its assessment of the adequacy of the legal framework for cooperation between the Court and Sudan in the Cooperation Decision,<sup>60</sup> nor its specific finding that the Cooperation Agreement was a ‘special agreement’ within the meaning of Article 4(2) of the Statute.<sup>61</sup> The Chamber further notes the submissions of the Prosecution and the Registry that the current legal framework for cooperation between the Court and Sudan remains valid. It continues to allow the Court to access and conduct its activities in the territory of Sudan. The Sudanese authorities have also confirmed their continued cooperation with the Court in the context of the present case..

23. The Chamber finds that the three investigators’ reports relating to P-0986, P-0874 and P-0994,<sup>62</sup> and the Request itself, do not demonstrate any error of reasoning or an injustice in the Chamber’s finding that the legal framework for the Court’s cooperation with Sudan is sufficient,<sup>63</sup> and more specifically that the Cooperation Agreement is a ‘special agreement’ within the meaning of Article 4(2) of the Statute.<sup>64</sup> Accordingly, the Chamber rejects the Defence’s request to reconsider its findings in paragraphs 19 to 39 of the Cooperation Decision.

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<sup>57</sup> Prosecution’s Response, ICC-02/05-01/20-638-Conf, para. 9.

<sup>58</sup> Prosecution’s Response, ICC-02/05-01/20-638-Conf, para. 10.

<sup>59</sup> Registry’s observations, ICC-02/05-01/20-639-Conf, para. 12; Transcript of hearing, 23 March 2022, ICC-02/05-01/20-T-025-CONF-ENG, p. 12, lines 14 to 22.

<sup>60</sup> See Cooperation Decision, ICC-02/05-01/20-561-Conf, paras 19-39.

<sup>61</sup> See Cooperation Decision, ICC-02/05-01/20-561-Conf, paras 22-23.

<sup>62</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>63</sup> Cooperation Decision, ICC-02/05-01/20-561-Conf, paras 19-39.

<sup>64</sup> Cooperation Decision, ICC-02/05-01/20-561-Conf, paras 22-23.

#### **D. Registry's recommendation to resume missions to Sudan and VWU's witness protection measures**

24. The Defence submits that the Registry's recommendation to re-authorise missions of the Court to Sudan,<sup>65</sup> ignores the Prosecution's disclosure of the investigators' reports relating to P-0986, P-0874 and P-0994,<sup>66</sup> and does not take into account the risk to victims, witnesses and persons at risk from the Court's activities in Sudan, including members of the Defence team.<sup>67</sup> The Defence further submits that the Registry should be instructed to submit a new report and recommendations, taking into account the facts highlighted in its Request.<sup>68</sup> In the Subsequent Motion, the Defence submits that the Registry's use of the Immediate Response System (the 'IRS') [REDACTED].<sup>69</sup> The Defence also seeks some kind of declaration that the Registry owes a 'duty of care' to members of the Defence team when on mission.<sup>70</sup>

25. The Registry observes that the concerns raised in the investigators' reports relating to P-0986, P-0874 and P-0994,<sup>71</sup> will not trigger a review of the current general recommendation of the JTAG on missions to Sudan.<sup>72</sup> The Registry clarifies that the JTAG considers the security circumstances and risks in Sudan purely from the perspective of the safety of the Court's personnel on mission, and does not make its evaluation of the security and safety environment from the victims' or witnesses' perspective.<sup>73</sup>

26. The Chamber reiterates its findings in the Cooperation Decision that it does not have the power to prohibit 'parties and participants in the case from undertaking investigative measures and missions in Sudan'.<sup>74</sup> Furthermore, the Chamber notes that the assessment of the security situation, the issuance of JTAG recommendations for a State, the timing and procedure of conducting such assessments, and determining the

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<sup>65</sup> Registry's Fourth Report, ICC-02/05-01/20-619-Conf-Exp, paras 36, 38.

<sup>66</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>67</sup> Request, ICC-02/05-01/20-623-Conf, para. 20.

<sup>68</sup> Request, ICC-02/05-01/20-623-Conf, para. 20.

<sup>69</sup> Subsequent Motion, ICC-02/05-01/20-643-Conf, paras 15-16.

<sup>70</sup> Subsequent Motion, ICC-02/05-01/20-643-Conf, paras 8-14.

<sup>71</sup> DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

<sup>72</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 16.

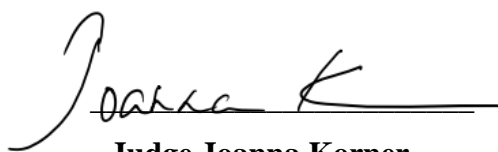
<sup>73</sup> Registry's observations, ICC-02/05-01/20-639-Conf, para. 16.

<sup>74</sup> Cooperation Decision, ICC-02/05-01/20-561-Conf, para. 51.

logistical and operational conditions for missions, is the prerogative of the Registry and is fully within its mandate.

27. Although 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 interfering with the Registry's security assessments, the timing and procedure of conducting such assessments, actions taken in respect of security matters, nor their responsibilities in respect of defence missions.<sup>75</sup> This non-interference extends to the witness protection measures and related activities undertaken by the VWU outside of the Court. Accordingly, the Chamber rejects the Defence's request to instruct the Registry to submit a new report and recommendations, [REDACTED], nor will the Chamber make any declaration that the Registry owes a 'duty of care' to members of the Defence team when they are on mission.

28. In sum, the Defence's arguments do not demonstrate any error of reasoning nor do they point to any issue which makes it necessary for the Chamber to reconsider its decision to prevent an injustice. For these reasons, the Chamber rejects the Defence Request and the Subsequent Motion in their entirety.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 29 March 2022

At The Hague, The Netherlands

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<sup>75</sup> See Cooperation Decision, ICC-02/05-01/20-561-Conf, para. 51.