

**Cour
Pénale
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**International
Criminal
Court**

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Date: 12 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 “Observations on confidential redacted version of
Defence ‘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-
01/20-925-Conf, 3 May 2023**

Source: The Common Legal Representative of Victims

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Ms Nazhat Shameem Khan
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta
Ms Marie O'Leary

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Common Legal Representative of Victims (“CLR V”), on behalf of the 488 individuals presently admitted to participate in these proceedings, files these observations on the Defence for Mr Abd-Al-Rahman’s (“Defence”) confidential redacted “Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-916-CONF-EXP”.¹
2. Under its primary prong of relief, the Request seeks: (i) a finding from the Trial chamber that the Defence has been diligent at all times and that delays in the progress of its investigations have and continue to be outside of its control; and (ii) a postponement *sine die* of the presentation of its case, or alternatively a minimum three-month delay to 27 November 2023, of the opening of the Defence case, on a ‘provisional’ basis.²
3. In the CLR V’s respectful view, the Request, and its eleven identified questions or issues, does not meet the high bar required to reconsider the Trial Chamber’s decision of 17 April 2023,³ which modified the schedule for the presentation of the Defence case by granting the Defence additional time for its preparations, but rejected the Defence proposal that the presentation of its case be postponed *sine die*. Nor, in the CLR V’s view, has the Defence satisfied the test for leave to appeal the Impugned Decision.
4. The CLR V recalls and incorporates by reference in this filing her written⁴ and oral observations on the Defence’s underlying “Requête aux fins de report de la phase de présentation de la Défense, ICC-02/05-01/20-902-Conf-Exp”.⁵ In particular, and

¹ Version confidentielle expurgée de la Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-916-CONF-EXP, 24 April 2023, ICC-02/05-01/20-920-Conf-Red (“Request”). Public redacted version filed on the same day ([ICC-02/05-01/20-920-Red](#)).

² Request, para. 13 and p. 19.

³ Decision on the Defence’s Request for postponement of the presentation of its case, 17 April 2023, ICC-02/05-01/20-916-Conf-Exp (“Impugned Decision”). Confidential and public redacted versions of the decision ([ICC-02/05-01/20-916-Red](#)) were issued on the same day.

⁴ Observations on behalf of victims on the confidential redacted version of Defence “Requête aux fins de report de la phase de présentation de la Défense”, 19 March 2023, ICC-02/05-01/20-904-Conf (“CLR V Observations”). A public redacted version ([ICC-02/05-01/20-904-Red](#)) was filed on the same day.

⁵ Requête aux fins de report de la phase de présentation de la Défense, 14 March 2023, ICC-02/05-01/20-902-Conf-Exp (“Postponement Motion”). Confidential redacted and public redacted versions ([ICC-02/05-01/20-902-Red](#)) filed on the same day.

as succinctly summarised in the Impugned Decision,⁶ the CLRV adopts her prior submissions on:

- i. the participating victims' interest in the process of justice moving forward in a fair and expeditious fashion,⁷ and the CLRV's concern that the Defence's original Postponement Motion indicates that its investigations have not progressed sufficiently at a fundamental level;⁸
- ii. assessing the sufficiency of time granted for Defence preparations in light of the date of the Accused's initial appearance on 15 June 2020, and the time between the appearance of the last Prosecution witness and the commencement of the Defence case;⁹
- iii. the relevance of the Defence's core position on whether Mr Abd-Al-Rahman is also the individual known as "Ali Kushayb", as alleged by the Prosecution, when assessing: (a) the nature of the assistance sought by the Defence from the Sudanese authorities; (b) the Defence's mooted missions to Sudan; and (c) the efficacy of the alternative solutions mentioned by the Defence, as well as the timeline under which the Defence has pursued these alternatives;¹⁰
- iv. the fact that it is not readily apparent that the Registry acted unreasonably, improperly or in breach of Rule 20(1)(b) of the Rules of Procedure and Evidence when it refused the Defence's requests for disclosure of certain information or documents,¹¹ but accepting that the Trial Chamber should examine the Defence's assertions in light of its claims of delays, obstacles and the impossibility of conducting investigations on the territory of Sudan;¹² and
- v. the period of fourteen months between the confirmation of charges against the Accused and the recruitment of a particular Defence resource person.¹³

⁶ Impugned Decision, paras 18-24.

⁷ CLRV Observations, paras 12-14; Transcript of hearing, 4 April 2023, ICC-02/05- 01/20-T-115-ENG, p. 36.

⁸ CLRV Observations, para 16.

⁹ *Id.*, paras 16-18.

¹⁰ *Id.*, paras 18-10; Transcript of hearing, 4 April 2023, ICC-02/05- 01/20-T-115-ENG, p. 36.

¹¹ CLRV Observations, para. 21.

¹² *Id.*, para. 23.

¹³ *Id.*, para. 24.

5. In relation to the eleventh issue or question raised in the Request – alleging that the Trial Chamber erred when it ignored the armed conflict that broke out in Sudan on 15 April 2023¹⁴ – the CLRV notes that the Impugned Decision provides a specific procedure by which the Defence may seek further postponement of the presentation of its case: namely, demonstrating “good cause and provid[ing] specific reasons for the postponement of a given deadline”.¹⁵ Rather than the outbreak of conflict compromising the ‘very foundations’ of the Impugned Decision,¹⁶ the Defence could have pursued the relief it deems necessary in light of these developments per the indicated procedure, and concurrent with its request for reconsideration or leave to appeal the Impugned Decision.
6. The CLRV further recalls her relevant submissions at the status conference of 4 April 2023,¹⁷ in which she highlighted the long wait for justice the participating victims have endured, but also empathised with the real difficulties that have been and continue to be encountered by the Defence, Prosecution, and CLRV in these proceedings in carrying out their respective mandates. As addressed in her submissions below, and in line with the CLRV’s understanding of the Impugned Decision and the Court’s legal framework, any claimed difficulties in respect of case preparations (and ameliorating efforts taken) must however be properly identified, articulated, and justified by the party or participant in a timely manner before the relevant Chamber.

II. Applicable law

7. As previously determined by the Trial Chamber in respect of motions for reconsideration of a decision of a Chamber:

[T]he 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

¹⁴ Request, para. 33.

¹⁵ Impugned Decision, para. 43.

¹⁶ Request, para. 6.

¹⁷ Transcript of hearing, 4 April 2023, ICC-02/05- 01/20-T-115-ENG, pp 36-37.

Statute. Trial chambers have determined that reconsideration is exceptional 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. **New facts** (emphasis added) and arguments arising since the decision was rendered may be relevant to this assessment. A request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber. 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.¹⁸

8. The test for seeking leave to appeal an interlocutory decision of a Chamber is set out under Article 82(1)(d) of the Statute. As a preliminary matter, a party seeking leave to appeal must identify an issue that arises from and materially impacts the decision in question, and which does not constitute merely a disagreement with a Chamber's findings or determinations.¹⁹

III. Submissions

9. In the CLRV's considered view, the eleven issues or questions raised in the Request do not identify clear errors of reasoning or relevant new facts sufficient to justify the exceptional remedy of reconsideration of the Impugned Decision, or otherwise that such relief is necessary to prevent an injustice. Similarly, in the CLRV's assessment, the eleven issues or questions do not arise from the Impugned Decision, constitute mere disagreement with the Chamber's findings, or otherwise fail to demonstrate that the issue independently or in conjunction with other purported issues materially impacted the outcome of the Impugned Decision. Accordingly, in the CLRV's view, the test for leave to appeal the Impugned Decision has not been satisfied, and the Chamber need not engage in evaluating the remainder of the elements of the leave to appeal test.

¹⁸ Decision on Defence request for reconsideration of "Decision on Defence submissions on cooperation with Sudan", 29 March 2022, [ICC-02/05-01/20-650-Red](#), para. 10 (emphasis in original) (internal citations omitted).

¹⁹ See Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, [ICC-01/04-168](#) OA 3, 13 July 2016, para. 9.

10. The Request's claim of the Trial Chamber's "bias" is unsupported by the record of the case.²⁰ Similarly, in the CLRV's view, the Request's repeated assertions that the Defence's submissions in reply were ignored by the Chamber²¹ is unfounded, and mistakes the Trial Chamber's finding such submissions unconvincing as a lack of consideration of the same. Much of the Request instead appears to constitute re-argument or goes no further than mere disagreement with the Chamber's findings. As such, in the CLRV's assessment, the Request should be rejected in full.

a. Question 1: alleged prolonged absence of [REDACTED] (Impugned Decision, paragraph 6)

11. The Request asserts that the Impugned Decision erred in its non-consideration²² of Defence submissions on the alleged one-year delay in [REDACTED], as this delay prolonged by the same period the 'impossibility' of the Defence progressing in its investigations.²³

12. Question 1 does not identify a clear error of reasoning in the Impugned Decision for purposes of reconsideration, nor an appealable issue under the Article 82(1)(d) test for leave to appeal. Question 1 is premised on a mere disagreement with the Trial Chamber's separate finding that [REDACTED].²⁴ Question 1's claim of 'impossibility' of progressing Defence investigations [REDACTED] is accordingly one that the Trial Chamber rejected, and in respect of which the Defence has identified no challengeable error for purposes of reconsideration or leave to appeal in the context of Question 1.

13. Further, the Defence's position is speculative, and presumes that [REDACTED] would have *ipso facto* resulted in [REDACTED].

²⁰ Request, paras 7, 30.

²¹ *Id.*, paras 20, 23-27.

²² Impugned Decision, para. 6.

²³ *Id.*, para. 16.

²⁴ *Id.*, para. [REDACTED].

**b. Question 2: alleged error in applying the standard for a stay of proceedings
(Impugned Decision, paragraph 29 *et seq.*)**

14. In Question 2, the Request conflates the Impugned Decision's finding that the relief requested by the Defence – an adjournment *sine die* – amounts to the 'drastic remedy' of a stay of the proceedings,²⁵ with the standard applied by the Trial Chamber in assessing the individual arguments put forward by the Defence in support of its requested relief. Contrary to the Defence's assertion,²⁶ nothing in the Impugned Decision indicates that the Trial Chamber assessed the Defence's submissions in the Postponement Motion on a stricter standard than that of "good cause" under Regulation 35(2) of the Regulations of the Court. Instead, after carefully considering the full submissions of the parties, CLRV, and Registry, the Chamber found the Defence's arguments to be unpersuasive,²⁷ unsupported,²⁸ or otherwise not in conformity with the Court's legal framework.²⁹ Nor is the Trial Chamber's declining to entertain the Defence's eleventh hour emailed request to take into account the outbreak of conflict in Sudan in the Impugned Decision amount to an abrogation of the good cause standard;³⁰ this is even more so the case where, as submitted above,³¹ the Impugned Decision itself provides a 'good cause' procedure under which the Defence may seek further postponement of individual deadlines.
15. Question 2 accordingly does not identify a clear error of reasoning or an appealable issue arising from the decision.

²⁵ Impugned Decision, paras 29-30.

²⁶ Request, para. 21.

²⁷ Impugned Decision, paras 33, 38.

²⁸ *Id.*, para. 35

²⁹ *Id.*, para. 36.

³⁰ Request, para. 21.

³¹ *See* para. 5 *supra*.

c. Question 3: Alleged [REDACTED] on the ‘essential’ nature of the documents requested from Sudan (Impugned Decision, paragraph 33)

16. Under Question 3, the Request claims that the Impugned Decision improperly [REDACTED] on the nature of the documents the Defence has requested from Sudan.³² No such [REDACTED] has taken place.
17. The relevant findings of the Trial Chamber took place in distinct factual and legal contexts. The Trial Chamber’s determinations that [REDACTED]³³ and that [REDACTED],³⁴ were made in the context of [REDACTED]. These determinations were issued pursuant to [REDACTED]. Such determinations do not amount to a Chamber also holding or otherwise accepting that the documents, information or other assistance requested are “essential” in the separate context of assessing whether a party can put forward any kind of case at all, including alternative sources or avenues for obtaining the underlying information or potential evidence a party seeks.³⁵
18. Question 3 neither identifies a clear error of reasoning nor an appealable issue arising from the decision.

d. Question 4: Alleged error in refusing the Defence an opportunity to address the Trial Chamber’s findings on the Defence’s lack of diligence in pursuing its investigations (Impugned Decision, paragraphs 34-41)

19. It is the responsibility of a party seeking relief from a Chamber to put before the Chamber all relevant information and submissions, and in sufficient detail, to support its motion. In the CLRV’s view, the Defence was granted every opportunity to do so through its initial motion, substantive submissions in reply submitted by email, and by way of oral submissions. In the context of a motion for postponement of the presentation of the Defence case, and particularly one centred on claimed investigative difficulties and blockages, it should have been

³² Request, para. 22.

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ Impugned Decision, para. 33.

obvious and apparent to the Defence that the details of its own investigative efforts, and the timeline for such efforts, was an essential component of such a motion.

20. While the Defence may disagree with the Trial Chamber's findings on the sufficiency of the Defence's diligence in pursuing its investigations and preparations, it is certainly no clear error or appealable issue in the context of these proceedings for the Trial Chamber to have made such a determination after providing the Defence, as the moving party, multiple opportunities to meet its evidentiary and substantive burdens.

e. Question 5: Alleged error in finding that the Defence alone refused to comply with Sudan's new demands for the issuance of visas (Impugned Decision, paragraph 34)

21. If, as the Defence submits, there has been a clear factual misunderstanding on the part of the Trial Chamber when assessing the (perhaps somewhat opaque) submissions of the parties' and Registry on this discrete issue,³⁶ then there may be justification for a correction in the record. The CLRV does not have access to all of the information and submissions relevant to this topic, and accordingly cannot assist the Trial Chamber further from a factual standpoint.

22. Nonetheless, even presuming such an error took place, by itself it would not justify, in the CLRV's view, wholesale reconsideration of the Impugned Decision, which is founded on a multitude of specific and considered findings,³⁷ and particularly where the Trial Chamber granted a postponement of several months to the original deadlines for the presentation of the Defence case.

f. Question 6: Alleged error in the Trial Chamber's finding that the Defence has not demonstrated that [REDACTED] (Impugned Decision, paragraph 35)

23. Question 6 amounts to no more than re-argument and mere disagreement with the Trial Chamber's findings on this Defence submission. Contrary to the

³⁶ Request, para. 34.

³⁷ Impugned Decision, paras 31-43.

Request's assertion,³⁸ the Trial Chamber did not ignore the Defence's submissions on this issue, but instead determined that the Defence had not provided any evidence in support of its assertion.³⁹ Question 6 does not identify a clear error of reasoning in the Impugned Decision, or otherwise qualify as an appealable issue.

g. Question 7: Alleged error in rejecting Defence submissions on the transmission of Registry risk assessment documents solely on the grounds of the Registry's exclusive competence (Impugned Decision, paragraph 36)

24. Question 7 does not arise from the Impugned Decision. The Trial Chamber did not determine, as the Defence asserts, that the Registry falls beyond judicial control any time its actions may have an impact on the proceedings.⁴⁰ Instead, properly understood, the Impugned Decision determined that there was no need or justification for the Trial Chamber to intervene on this particular subject – not that it lacked the authority to intervene – as security matters related to proceedings are “a matter for the Registry, (ultimately not the parties)”.⁴¹ Question 7 accordingly does not identify a clear error of judgment in the Impugned Decision, or otherwise qualify as an appealable issue.

h. Question 8: Alleged error of comparing the situation of the Prosecution and/or CLRV to that of the Defence in respect of contacting and interviewing witnesses (Impugned Decision, paragraphs 38-39)

25. Question 8 is premised on a misunderstanding of the Trial Chamber's findings at paragraphs 38 and 39 of the Impugned Decision. The Trial Chamber was not drawing hard equivalencies between the situations of the Prosecution and CLRV on the one hand, and the Defence on the other, in respect to the conduct of witness-related investigations and case preparations. Instead, as set out in the first

³⁸ Request, para. 25.

³⁹ Impugned Decision, para. 35.

⁴⁰ Request, para. 26.

⁴¹ Impugned Decision, para. 36.

sentence of paragraph 38, the Chamber was “unpersuaded by the Defence’s submission that it has not been able to interview potential witnesses” at all.⁴²

26. Reference to the activities of the Prosecution and CLRV were accordingly for purposes of evidencing the fact that reasonable and feasible alternatives to contacting and interviewing witnesses inside Sudan do exist, and that, on the basis of the facts presented by the Defence in its written and oral submissions, the “Defence failed to explore these avenues diligently and in a timely manner”.⁴³

27. Contrary to the Request,⁴⁴ there is no indication that the Impugned Decision ignored the Defence’s emailed submissions in reply, which asserted that “the Defence witnesses [] are all in Sudan”. The Chamber, as stated above, was engaging with the Defence’s foundational submission that it had not been able to interview any witnesses at all.

28. In the CLRV respectful view, and based on the information available to her, the additional submissions the Defence puts forward in the Request on the [REDACTED] are unsupported by evidence or otherwise speculative.⁴⁵ The Defence appears to acknowledge that it requires additional time to collect information in support of the latter assertion.⁴⁶ As noted in the Impugned Decision, and per the Registry, “the Defence has not referred any witness to the Victims and Witness Unit”,⁴⁷ which is mandated to provide equal and impartial service to the parties, as well as assistance to participating victims.

29. Question 8 does not identify a clear error in the Impugned Decision, or otherwise qualify as an appealable issue.

⁴² Impugned Decision, para. 38.

⁴³ *Id.*, para. 39. *See also* Impugned Decision, para. 40 (“But equally it is clear that there are other methods, as yet not properly explored, by which they may obtain evidence in support of their [defence] case.”).

⁴⁴ Request, para. 27.

⁴⁵ *Ibid.*

⁴⁶ Request, para. 27 (“La compatibilité de ce déséquilibre avec le droit à un procès équitable ne fait pas l’objet de la présente Requête et sera abordé séparément et en temps opportun, une fois que la Défense disposera de davantage d’éléments sur [REDACTED].”).

⁴⁷ Impugned Decision, para. 27 (citing Registry’s submissions).

i. Question 9: Alleged error in concluding that the Defence did not pursue in a timely manner solutions to the problems posed by [REDACTED] (Impugned Decision, paragraph 39)

30. The CLRV can provide only circumscribed observations on Question 9 in view of the limited information available to her on the details and timelines for the [REDACTED] the Defence indicates it has submitted since November 2020.⁴⁸ The CLRV reiterates her prior observations on assessing the sufficiency of time granted for Defence preparations in light of the date of the Accused's initial appearance on 15 June 2020, and the time between the appearance of the last Prosecution witness and the commencement of the Defence case,⁴⁹ as well as the relevance of the Defence's core position on whether Mr Abd-Al-Rahman is also the individual known as "Ali Kushayb" when evaluating: (a) the nature of the assistance sought by the Defence from the Sudanese authorities; (b) the Defence's planned missions to Sudan; and (c) the efficacy of the alternative solutions mentioned by the Defence, as well as the timeline under which the Defence has pursued these alternatives.⁵⁰

31. In respect of the Defence's repeated submission on the alleged impact of the Trial Chamber's 'delay' [REDACTED] on the progression of the Defence's investigations, the CLRV relies on its observations on Question 1 above.⁵¹

j. Alleged error in the Trial Chamber's 'presentation' of the delays attributed to the Defence (Impugned Decision, paragraphs 40-41)

32. In relation to the Trial Chamber's findings under points (ii), (iii), (iv), (v) and (vi) of paragraph 41 of the Impugned Decision, the CLRV advises that it does not have access to all relevant information to provide full observations on the Defence's submissions. The CLRV reiterates her prior submissions summarised at paragraph 30 above, as well as her prior observation on the timeline of the

⁴⁸ Request, para. 28.

⁴⁹ CLRV Observations, paras 16-18.

⁵⁰ *Id.*, paras 18-10; Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 36.

⁵¹ See paras 11-13 *supra*.

Defence's engagement of a resource person.⁵² In respect of the submissions under paragraph 32 of the Request, relating to the Trial Chamber's finding under paragraph 41 of the Impugned Decision, the CLRV also relies on her observations in paragraph 28 above (concerning Question 8).

33. It is the CLRV's strong and considered view that a review of the case record does not evidence the claimed "bias" on the part of the Trial Chamber against the Defence in relation to its case preparations.⁵³ The Trial Chamber's discrete finding under paragraph 41(i) of the Impugned Decision does no more than set out the obvious point that while a party has wide discretion in determining how it conducts its case preparations and allocates its time and resources, pursuing certain courses of actions (and perhaps ones with diminishing returns) comes at a cost in that such time and resources are then not available to deploy towards other potentially (more) pressing purposes. The Defence's objection to this finding is no more than disagreement with the Trial Chamber's assessment, but does not constitute an appealable issue or otherwise evidence a clear error in reasoning or "bias" against the Defence.

k. Alleged error in ignoring the armed conflict in Sudan that broke out on 15 April 2023

34. As addressed above,⁵⁴ in the CLRV's view, it is neither a clear error, nor an appealable issue arising from the Impugned Decision, for the Trial Chamber to have declined to entertain the Defence's eleventh hour emailed request to take into account the outbreak of conflict in Sudan in the Impugned Decision. This is particularly so when the Impugned Decision itself provides a 'good cause' procedure under which the Defence may seek further postponement of individual deadlines in respect of the presentation of its case.⁵⁵ As far as the CLRV is aware, and to date, the Defence has not sought relief pursuant to this procedure, which,

⁵² CLRV Observations, para. 24

⁵³ Request, para. 30.

⁵⁴ See paras 5, 14 *supra*.

⁵⁵ Impugned Decision, para. 43.

in the CLRV's view, could have been pursued concurrently with the Defence Request.

IV. Conclusion

35. The CLRV respectfully requests the Trial Chamber to take into consideration the above observations in assessing and determining the Defence Request.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a stylized flourish at the end.

Natalie v. Wistinghausen

Common Legal Representative of Victims

Dated this 12 May 2023

At Berlin, Germany