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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 the Defence's request for reconsideration or, alternatively, leave to
appeal the Decision on the Defence's Request for postponement of the
presentation of its case**

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

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Other

I. Procedural background

1. On 17 April 2023, Trial Chamber I (the ‘Chamber’) issued its ‘Decision on the Defence’s Request for postponement of the presentation of its case’ (the ‘Postponement Request’),¹ rejecting the Defence’s Request and amending the deadlines concerning the Defence’s case (the ‘Impugned Decision’).²
2. On 24 April 2023, the Defence filed a request for reconsideration or, alternatively, leave to appeal the Impugned Decision (the ‘Request’).³
3. On 3 May 2023, the Prosecution filed its response, opposing the Request (the ‘Response’).⁴
4. On the same date, the Common Legal Representative of Victims (the ‘CLRv’) filed her Observations to the Request, equally opposing the Request (the ‘Observations’).⁵
5. On 8 May 2023, the Defence filed its Reply (the ‘Reply’).⁶

II. Applicable Law

6. The Chamber incorporates by reference the general framework applicable to the reconsideration of judicial decisions.⁷
7. The Chamber further incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), as set out in previous decisions.⁸

¹ Requête aux fins de report de la phase de présentation de la Défense, ICC-02/05-01/20-902-Conf-Exp, confidential, ex parte, available to the Defence only (with six confidential ex parte, available to the Defence only, annexes). Confidential redacted and public redacted versions were notified on the same date, ICC-02/05-01/20-902-Conf-Red and ICC-02/05-01/20-902-Red, respectively.

² Decision on the Defence’s Request for postponement of the presentation of its case, ICC-02/05-01/20-916-Conf-Exp. A confidential redacted and a public redacted version were notified on the same date, ICC-02/05-01/20-916-Conf-Red and ICC-02/05-01/20-916-Red.

³ 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-Exp. A confidential redacted and a public redacted version were notified on the same date, ICC-02/05-01/20-920-Conf-Red and ICC-02/05-01/20-920-Red.

⁴ 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”, ICC-02/05-01/20-926-Conf.

⁵ 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.

⁶ Réplique aux paragraphes 9 et 22 des écritures ICC-0205-0120-926-Conf, ICC-02/05-01/20-930.

⁷ Decision on Defence request for reconsideration of “Decision on Defence submissions on cooperation with Sudan”, 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10 (the ‘Decision on the reconsideration request of the cooperation decision’). A public redacted version was notified on the same day, ICC-02/05-01/20-650-Red.

⁸ Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. *See also* oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

III. Submissions and analysis

8. The Defence seeks reconsideration of the Impugned Decision. It requests that the Chamber postpone *sine die* the presentation of the Defence's case or, subsidiarily, for at least three months.⁹ Alternatively, the Defence seeks leave to appeal the Impugned Decision.¹⁰

A. General matters related to reconsideration

9. The Defence submits that the Chamber could not have reasonably reached the same conclusions if it had considered all of the information available or if it had given the Defence the opportunity to inform the Chamber about its constant efforts to prepare the Defence of Mr Abd-Al-Rahman since his initial appearance. The Defence also states that its objective in the Request is also to correct the record, considering erroneous factual conclusions in the Impugned Decision.¹¹

10. The Defence further submits that considering the time the Appeals Chamber would take in resolving these issues, and the uncertainty that this would cause to the Defence, reconsideration is a better avenue.¹² The Defence submits that the deadlines set in the Impugned Decision are not reasonable and do not consider the difficulties encountered by the Defence due to non-cooperation and *vis-à-vis* the Registry.¹³ The Defence thus argues that a delay of at least until 27 November 2023, would be necessary to start its case. However, the Defence submits that even this date would be provisional, as it is dependent on cooperation from Sudan and [REDACTED]. The Defence thus argues that *sine die* postponement is still the most reasonable solution, but it would be amenable to accept a limited postponement subject to periodic re-examination.¹⁴

11. The Prosecution and the CLRV both submit that reconsideration is not justified.¹⁵

⁹ Request, ICC-02/05-01/20-920-Conf-Exp, paras 3, 13, 34.

¹⁰ Request, ICC-02/05-01/20-920-Conf-Exp, para. 3.

¹¹ Request, ICC-02/05-01/20-920-Conf-Exp, paras 7, 14.

¹² Request, ICC-02/05-01/20-920-Conf-Exp, para. 11.

¹³ Request, ICC-02/05-01/20-920-Conf-Exp, para. 12.

¹⁴ Request, ICC-02/05-01/20-920-Conf-Exp, para. 13.

¹⁵ Response, ICC-02/05-01/20-926-Conf, para. 5; Observations, ICC-02/05-01/20-925-Conf, para. 9.

12. The Chamber recalls that a request for reconsideration ‘cannot be used as an attempt to re-argue points which have already been made before the Chamber.’¹⁶ Accordingly, reconsideration cannot be used—as is being attempted by the Defence—to correct the record or to make new submissions that could have been made when the request for postponement was discussed (i.e., by proposing now a new deadline of at least 27 November 2023). Reconsideration is also not justified, when, as proposed by the Defence,¹⁷ it seems more ‘appropriate’ than a leave to appeal, considering the time the Appeals Chamber would take in resolving the issues arising from the Impugned Decision.

13. The Chamber recalls that reconsideration is an exceptional measure. As such, it is incumbent upon the Defence to demonstrate that there was either a clear error of reasoning or that it is necessary to do so to prevent an injustice.¹⁸

14. As regards the first limb, the Defence has failed to identify any clear error of reasoning. The Defence merely disagrees with the Chamber’s reasoning and conclusions. At no stage did the Defence provide information or evidence in respect of steps it had taken, or was preparing to take, in the preparation of its case. Therefore, when rendering the Impugned Decision, the Chamber could only so do based on the information before it. Contrary to the submissions of the Defence, the Chamber gave the parties ample opportunity to make written and oral submissions on the Postponement Request. As submitted by the Prosecution and the CLRV,¹⁹ it is the responsibility of the party seeking relief (in this case the Defence, which was seeking postponement), to include all relevant information when presenting submissions to support its motion. Thus, reconsideration cannot be justified because of the Defence’s failure to address important points in its written submissions and during the status conference convened specifically to discuss the Postponement Request.

15. Moreover, as submitted by the CLRV²⁰ and as noted below, while the Defence may disagree with the Chamber’s findings, no clear error of reasoning has been identified.

¹⁶ Decision on Defence request for reconsideration of “Decision on Defence submissions on cooperation with Sudan”, 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10.

¹⁷ Request, ICC-02/05-01/20-920-Conf-Exp, para. 11.

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-Conf, para. 10.

¹⁹ Response, ICC-02/05-01/20-926-Conf, para. 15; Observations, ICC-02/05-01/20-925-Conf, para. 19.

²⁰ Observations, ICC-02/05-01/20-925-Conf, para. 20.

16. As regards the second limb, the Defence has also failed to identify how new circumstances which have materialised since the decision was rendered, provide good and sufficient reason to alter the Impugned Decision. Contrary to the submissions of the Defence, the Impugned Decision does not ignore the armed conflict in Sudan and its impact on the Defence's ability to investigate. In fact, in the status conference, the Chamber acknowledged that it was aware of the current armed conflict in Sudan, noting that this was important to the Defence's case.²¹ The Chamber has a duty to ensure—in the absence of evidence to show that a prolonged delay is warranted, let alone an adjournment *sine die*—that the trial of an accused person in custody proceeds as expeditiously as possible. As the Presiding Judge observed,²² on the evidence before it, there has been delay by the Defence in its preparation for investigations. Although the Chamber fully appreciates problems caused by the current events in Sudan, it is incumbent upon the Defence to seek other avenues of obtaining evidence for the trial to proceed. Reconsideration is not one of these avenues.

17. Although the Defence may disagree with the Impugned Decision, the Request is misconceived to the extent that: (i) a delay was granted; and (ii) in setting a schedule of monthly status conferences, the Impugned Decision foresees a mechanism that will allow the Chamber to monitor the Defence's progress in the preparation of its case. Moreover, as the CLRV and the Prosecution observe,²³ the Impugned Decision anticipates, although as an exceptional measure, the possibility for the Defence to request postponement of any of the deadlines, when good cause has been shown and when specific reasons for the postponement have been provided.²⁴

B. Issues identified by the Defence

18. The Defence identifies the following eleven issues for reconsideration or alternatively leave to appeal.

Issue 1: Au paragraphe 6 de la Décision #916, la Chambre erre-t-elle en droit et/ou en fait en excluant les aspects relatifs à son absence prolongée de constat de la non-coopération du Soudan depuis près d'un an de l'examen de la Demande de Report ?²⁵

²¹ Transcript of the hearing on 19 April 2023, ICC-02/05-01/20-T-116-CONF-ENG ET, p. 13, lines 6-12.

²² Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp. 32-33.

²³ Response, ICC-02/05-01/20-926-Conf, para. 36; Observations, ICC-02/05-01/20-925-Conf, paras 5, 14, 34.

²⁴ Impugned Decision, ICC-02/05-01/20-916-Conf-Red, para. 43.

²⁵ Request, ICC-02/05-01/20-920-Conf-Exp, para. 15. The Chamber has unofficially translated the issue as follows: In paragraph 6 of Decision 916, did the Chamber err in law and/or fact when it excluded aspects relative to the delayed decision of the Chamber determining non-cooperation from Sudan?

19. The Defence submits that the Chamber failed to consider its own delay in making a determination of non-cooperation from Sudan. It argues that this played an essential role in the difficulties encountered by the Defence.²⁶ The Defence further argues that it was diligent and made requests since November 2020 (before the Pre-Trial Chamber) and since March 2022 before this Chamber.²⁷

20. The Prosecution and the CLRV submit that the Defence does not identify an appealable issue under Article 82(1)(d) of the Statute.²⁸ The CLRV further avers that the Defence's allegations constitute mere disagreements with the Impugned Decision.²⁹ The Prosecution contends that on the issue of delay, the Defence chose to delay for over 10 months, a cooperation request before the Chamber.³⁰ The Prosecution also submits that the issue is not essential to the judicial cause under determination.³¹

21. In its Reply, the Defence submits that contrary to the Prosecution's submission, it did not wait more than 10 months to request cooperation, as in its view, the [REDACTED], rendered the Pre-Trial Chamber decision on cooperation matters invalid.³²

22. In rendering the Impugned Decision, the Chamber considered the impact of the non-cooperation of Sudan in the Defence's preparation.³³ Moreover, in the context of the Impugned Decision, the Defence failed to provide any specific information on what were the difficulties it encountered because of the Chamber's approach to non-cooperation. Accordingly, as noted by the CLRV,³⁴ the submissions of the Defence are speculative, as the Defence fails to show either: (i) how reporting non-cooperation to the Security Council would have *ipso facto* resulted in cooperation;³⁵ or (ii) how the Chamber's approach of taking reasonable steps to resolve the issue of cooperation pursuant to the statutory framework specifically impacted the ability of the Defence to prepare its case. The Chamber will not address the issue arising from paragraph 9 of the Prosecution's Response and the Defence's Reply, as it does not arise from the Impugned Decision and is thus inconsequential to the present decision.

²⁶ Request, ICC-02/05-01/20-920-Conf-Exp, para. 16.

²⁷ Request, ICC-02/05-01/20-920-Conf-Exp, para. 17.

²⁸ Response, ICC-02/05-01/20-926-Conf, para. 33; Observations, ICC-02/05-01/20-925-Conf, para. 12.

²⁹ Observations, ICC-02/05-01/20-925-Conf, para. 12.

³⁰ Response, ICC-02/05-01/20-926-Conf, para. 9.

³¹ Response, ICC-02/05-01/20-926-Conf, para. 33.

³² Reply, ICC-02/05-01/20-930, para. 5.

³³ Impugned Decision, ICC-02/05-01/20-916-Conf-Exp, paras 31-33.

³⁴ Observations, ICC-02/05-01/20-925-Conf, para. 13.

³⁵ See Observations, ICC-02/05-01/20-925-Conf, para. 13.

Issue 2: Aux paragraphes 29 et suivants de la Décision #916, la Chambre erre-t-elle en droit en identifiant la Demande de Report à une demande aux fins de suspension des procédures (« stay of proceedings ») et en appliquant par conséquent le mauvais test dans sa détermination sur la Demande de Report?³⁶

23. The Defence argues that unlike the Postponement Request, the Prosecution applications to delay the confirmation hearing (before the Pre-Trial Chamber) were never considered as a stay of proceedings. The Defence further argues that the Chamber, instead of applying Regulation 35, confused the two measures (stay of the proceedings and Regulation 35) and applied another standard which is not justified.³⁷ The Defence argues that the fact that it did not have the necessary information to propose a new date to start its case, did not mean that the Defence was requesting a stay of proceedings. It submits that Chamber erred by applying the exceptional standard applicable to a drastic remedy of a stay of the proceedings.³⁸ The Defence further argues that the Chamber ignored the Defence invitation to consider new developments in Sudan when taking the Impugned Decision.³⁹

24. The Prosecution and the CLRV submit that the Defence mischaracterises the Impugned Decision.⁴⁰ The Prosecution further submits that the identified issue amounts to mere disagreement with the Chamber's findings.⁴¹

25. As noted by the Prosecution,⁴² although the Defence made the Postponement Request under Regulation 35, it was in reality seeking an adjournment *sine die* which was equivalent to a stay of proceedings. The Defence submissions are thus mere disagreements with the Chamber's characterisation of the Postponement Request. Furthermore, the Chamber accepts the submissions of the Prosecution and the CLRV that the Defence mischaracterises the Impugned Decision when it submits that the Chamber required the test for a stay of proceedings to extend the deadlines.⁴³ As noted by the Prosecution, the Chamber correctly considered the substance of the Postponement Request, in which the Defence requested an indefinite

³⁶ Request, ICC-02/05-01/20-920-Conf-Exp, para. 17. The Chamber has unofficially translated the issue as follows: In paragraph 29 et seq. of Decision 916, did the Chamber err in law when it identified the Defence postponement request as a stay of proceedings request and thus applying the wrong test?

³⁷ Request, ICC-02/05-01/20-920-Conf-Exp, paras 18-19.

³⁸ Request, ICC-02/05-01/20-920-Conf-Exp, para. 20.

³⁹ Request, ICC-02/05-01/20-920-Conf-Exp, para. 21.

⁴⁰ Response, ICC-02/05-01/20-926-Conf, paras 10, 33; Observations, ICC-02/05-01/20-925-Conf, para. 14.

⁴¹ Response, ICC-02/05-01/20-926-Conf, paras 11, 33.

⁴² Response, ICC-02/05-01/20-926-Conf, para. 11.

⁴³ Response, ICC-02/05-01/20-926-Conf, paras 10, 33; Observations, ICC-02/05-01/20-925-Conf, para. 14.

postponement of its case.⁴⁴ Furthermore, as noted above,⁴⁵ in the Impugned Decision the Chamber in fact amended the deadlines and included the possibility for the Defence to request any extension of deadline pursuant to Regulation 35 of the Regulations of the Court when good cause is shown.

Issue 3: Au paragraphe 33 de la Décision #916, la Chambre erre-t-elle en fait et/ou en droit en considérant que les documents, informations et témoins auxquels la Défense demande à avoir accès et ne peut l'obtenir faute de coopération du Soudan ne sont pas indispensables à sa préparation ?⁴⁶

26. The Defence argues that the Chamber erred when it reconsidered its previous decisions determining that the documents subject to the cooperation requests were necessary for the preparation of the Defence. The Defence argues that the non-cooperation of Sudan does not justify the Chamber's reconsideration of the essential character of the documents and information sought by the Defence.⁴⁷

27. The CLRV and the Prosecution contend that the Defence misconstrues the Impugned Decision.⁴⁸ The Prosecution further submits that the Defence's allegations amount to mere disagreement with the Chamber's findings.⁴⁹

28. The Chamber emphasises, as noted by the CLRV,⁵⁰ that there is a difference between 'necessary' and 'essential'. The Request thus misconstrues the Impugned Decision and the Chamber's previous findings that the documents were necessary for the preparation of the Defence case. Therefore, there is no inconsistency or reconsideration of the Chamber's earlier determination.

Issue 4: Aux paragraphes 34 à 41 de la Décision, la Chambre erre-t-elle en fait et droit en constatant un prétendu manque de diligence de la Défense dans ses enquêtes et la

⁴⁴ Response, ICC-02/05-01/20-926-Conf, para. 11.

⁴⁵ See para. 17 above.

⁴⁶ Request, ICC-02/05-01/20-920-Conf-Exp, para. 21. The Chamber has unofficially translated the issue as follows: In paragraph 22 of Decision 916, did the Chamber err in law and/or fact when it considered that the documents, information and witnesses required by the Defence (and not obtained due to lack of cooperation) are not necessary for the preparation of the Defence?

⁴⁷ Request, ICC-02/05-01/20-920-Conf-Exp, para. 22.

⁴⁸ Response, ICC-02/05-01/20-926-Conf, paras 14, 33; Observations, ICC-02/05-01/20-925-Conf, paras 16-18.

⁴⁹ Response, ICC-02/05-01/20-926-Conf, paras 14, 33.

⁵⁰ Observations, ICC-02/05-01/20-925-Conf, para. 17.

*préparation de sa preuve après avoir refusé d'entendre la Défense sur ces questions, en violation du principe du contradictoire ?*⁵¹

29. The Defence submits that the Chamber erred in fact and law when it determined a lack of diligence from the Defence in its investigations and preparation, having rejected the Defence's request to make submissions on this issue, and thus violating the principle of adversarial proceedings. The Defence submits that during the hearing of 4 April, the Presiding Judge assured the Defence that the arguments mentioned in its request for leave to reply would be considered, although these were ignored in the Impugned Decision. The Defence argues that if the Chamber had the intention to conclude that the Defence was responsible for delays, it should have asked the Defence to justify what it had done (or had not done), since the start of the trial.⁵²

30. The CLRV submits that the Defence's arguments amount to mere disagreement with the Impugned Decision.⁵³ The Prosecution contends that the Request mischaracterises the Impugned Decision.⁵⁴

31. In the e-mail of 21 March 2023, the Defence not only requested leave to reply, but as noted by the Presiding Judge in court,⁵⁵ the Defence set out the details of its submissions. Further the Presiding Judge invited Defence Counsel to expand on those submissions. He took full advantage of that invitation.⁵⁶ This information was considered by the Chamber in rendering the Impugned Decision. The fact that the Chamber did not accept the submissions or that it rejected the Postponement Request despite the submissions, does not mean that the Chamber ignored them or in any way violated the adversarial principle of proceedings.

Issue 5: Au paragraphe 34 de la Décision #916, la Chambre erre-t-elle en fait en concluant que la Défense a refusé seule de se plier aux nouvelles exigences du Soudan pour l'octroi des visas, alors qu'elle était informée que le Greffe et le BdP les avaient acceptées?⁵⁷

⁵¹ Request, ICC-02/05-01/20-920-Conf-Exp, para. 22. The Chamber has unofficially translated the issue as follows: In paragraphs 34 to 41 of the Decision, did the Chamber err in fact and law when it determined a lack of diligence from the Defence in its investigations and preparation, having rejected the Defence's request to make submissions on this issue, and thus violating the principle of adversarial proceedings?

⁵² Request, ICC-02/05-01/20-920-Conf-Exp, para. 23.

⁵³ Observations, ICC-02/05-01/20-925-Conf, para. 20.

⁵⁴ Response, ICC-02/05-01/20-926-Conf, para. 33.

⁵⁵ Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 12.

⁵⁶ Transcript of hearing 4 April 2023, ICC-02/05-01/20-T-115-ENG, pp.13-15.

⁵⁷ Request, ICC-02/05-01/20-920-Conf-Exp, para. 23. The Chamber has unofficially translated the issue as follows: In paragraph 34 of Decision 916, did the Chamber err in fact when it concluded that the Defence refused to comply with the new requirements of Sudan to grant visas, although OTP and Registry had agreed?

32. The Defence submits that the factual conclusion is wrong and that the Defence never declined to go on mission because of the new visa requirements.⁵⁸

33. The Prosecution and the CLRV contend that they are not privy to all information and submissions on this issue. They argue that even presuming that such an error took place, it would not by itself justify wholesale reconsideration of the Impugned Decision.⁵⁹

34. In the context of the Impugned Decision the Registry reported that the mission had been cancelled by the Defence:

To be entirely clear, maybe I spoke a little bit too fast for the interpreters, but I said that the request, of which there were four in number, were cancelled by the Defence because there was a requirement on the part of the Sudanese authorities to receive a CV. There we have it.⁶⁰

35. The Chamber further notes that although this information was provided during the status conference, the Defence did not object or attempt to clarify the above assertion. Furthermore, the information now provided by the Defence does not cause the Chamber to reconsider its decision in this regard. Indeed, this issue was one of the many factors taken into consideration by the Chamber in the Impugned Decision.

Issue 6: Au paragraphe 35 de la Décision #916, la Chambre erre-t-elle en fait en concluant que la Défense ne prouve pas que ses enquêtes [REDACTED] ?⁶¹

36. The Defence submits that the Chamber erred, when, despite [REDACTED], it based the Impugned Decision on the ‘speculations’ of the Registry.⁶²

37. The Prosecution argues that the Request mischaracterises the Impugned Decision.⁶³ The CLRV avers that the Defence’s allegations amount to mere disagreement with the Chamber’s findings on this issue.⁶⁴

38. The Chamber finds that the Defence merely reiterates its disagreement with the Registry’s assessment —referring to it as ‘speculation’— already made in the context of the Impugned Decision. The Defence also disagrees with the Chamber’s findings, particularly that

⁵⁸ Request, ICC-02/05-01/20-920-Conf-Exp, para. 24.

⁵⁹ Response, ICC-02/05-01/20-926-Conf, para. 17; Observations, ICC-02/05-01/20-925-Conf, para. 22.

⁶⁰ Transcript of hearing, 4 April 2023, ICC-02/05-01/20-T-115-ENG, p. 28, lines 12-15. See also pp. 20-21.

⁶¹ Request, ICC-02/05-01/20-920-Conf-Exp, para. 24. The Chamber has unofficially translated the issue as follows: In paragraph 35 of Decision 916, did the Chamber err in fact when it concluded that the Defence did not demonstrate that [REDACTED]?

⁶² Request, ICC-02/05-01/20-920-Conf-Exp, para. 25.

⁶³ Response, ICC-02/05-01/20-926-Conf, paras 18, 33.

⁶⁴ Response, ICC-02/05-01/20-926-Conf, paras 18, 33; Observations, ICC-02/05-01/20-925-Conf, para. 23.

the Defence had failed to provide (and still fails so to do), any evidence which might suggest that its investigations [REDACTED].

Issue 7: Au paragraphe 36 de la Décision #916, la Chambre erre-t-elle en droit en rejetant les soumissions de la Défense relatives à la transmission des documents d'évaluation des risques par le Greffe au seul motif que ces questions relèveraient de la compétence exclusive de ce dernier, alors que son intervention était nécessaire en vertu de l'Article 64-2 du Statut ?⁶⁵

39. The Defence submits that the Chamber erred by refusing to intervene, although the Registry's competence is subject to judicial review when it impacts proceedings.⁶⁶

40. The Prosecution submits that the Defence's allegations amount to mere disagreement with the Impugned Decision.⁶⁷ The CLRV avers that the Request misconstrues the Chamber's findings on this issue.⁶⁸

41. As noted by the CLRV,⁶⁹ the Chamber did not make a determination that Registry was not subject to judicial control. The Defence fails to explain its assertion that there has been a breach of Article 64(2) of the Statute. It misconstrues the Impugned Decision and simply reiterates its disagreement with the Chamber's conclusion in the Impugned Decision (as well as previous decisions),⁷⁰ that security is a matter for the Registry and not the parties, to assess.

Issue 8: Aux paragraphes 38-39 de la Décision #916, la Chambre erre-t-elle en fait et/ou en droit en comparant la situation du BdP et/ou des distingués Représentants Légaux des Victimes (« RLVs ») à celle de la Défense en ce qui concerne la possibilité de contacter et d'interviewer ses témoins ?⁷¹

⁶⁵ Request, ICC-02/05-01/20-920-Conf-Exp, para. 25. The Chamber has unofficially translated the issue as follows: In paragraph 36 of Decision 916, did the Chamber err in law when it rejected the Defence's submissions on the non-transmission of the risk evaluation documents by the Registry, stating that this is a question of exclusive competence of the Registry, although the Chamber's intervention was necessary pursuant to Article 64(2) of the Statute?

⁶⁶ Request, ICC-02/05-01/20-920-Conf-Exp, para. 26.

⁶⁷ Response, ICC-02/05-01/20-926-Conf, para. 33.

⁶⁸ Observations, ICC-02/05-01/20-925-Conf, para. 24.

⁶⁹ Observations, ICC-02/05-01/20-925-Conf, para. 24.

⁷⁰ Impugned Decision, ICC-02/05-01/20-916-Conf-Red, para. 36, referring to 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. 26.

⁷¹ Request, ICC-02/05-01/20-920-Conf-Exp, para. 26. The Chamber has unofficially translated the issue as follows: In paragraphs 38 and 39 of Decision 916, did the Chamber err in law and/or fact when it compared the situation of the OTP and CLRV to that of the Defence in relation to contacting and interviewing witnesses?

42. The Defence submits that the Chamber erred in law and/or fact when it compared the situation of the Prosecution and CLRV to that of the Defence in relation to contacting and interviewing witnesses. The Defence submits that the Chamber erred by ignoring this reality.⁷²

43. The Prosecution and the CLRV submit that the Request misconstrues the Impugned Decision.⁷³ The Prosecution further contends that the Defence's arguments amount to mere disagreement with the Chamber's findings on this issue.⁷⁴

44. In its Reply, the Defence submits that it was not possible for the Defence to go on mission between October 2021 and at least March 2022 as a result of events in Sudan. It also submits that the so-called 'window of opportunity' between 15 July 2021 to 25 October 2021, was insufficient for the Defence to prepare, particularly since it did not know yet the Prosecution case and it did not have visas to travel to Sudan then.⁷⁵

45. The Defence is merely rearguing points already decided by the Chamber in the Impugned Decision. The Defence mischaracterises the Impugned Decision, which simply found that the Prosecution and the CLRV had explored other avenues for preparation of their cases. As submitted by the Prosecution,⁷⁶ in making this finding, the Chamber did not make a detailed comparison of each party and participants, but simply cited these activities as a point of reference to assess the Defence's diligence in conducting its investigations. Moreover, the Defence's submissions of what is the 'reality' of its witnesses is speculative. As noted by the CLRV,⁷⁷ the Impugned Decision noted that at the time no Defence witness had been referred to the Victims and Witnesses Unit for assessment.

Issue 9: Au paragraphe 39 de la Décision #916, la Chambre erre-t-elle en fait et/ou en droit lorsqu'elle conclut que la Défense n'a pas exploré à temps les solutions permettant de résoudre le problème posé par la non-coopération du Soudan?⁷⁸

⁷² Request, ICC-02/05-01/20-920-Conf-Exp, para. 27.

⁷³ Response, ICC-02/05-01/20-926-Conf, paras 20-21, 33; Observations, ICC-02/05-01/20-925-Conf, paras 25-29.

⁷⁴ Response, ICC-02/05-01/20-926-Conf, paras 20-21, 33.

⁷⁵ Reply, ICC-02/05-01/20-930, paras 7-8.

⁷⁶ Response, ICC-02/05-01/20-926-Conf, para. 20.

⁷⁷ Observations, ICC-02/05-01/20-925-Conf, para. 28, referring to Impugned Decision, ICC-02/05-01/20-916-Conf-Red, para. 27.

⁷⁸ Request, ICC-02/05-01/20-920-Conf-Exp, para. 27. The Chamber has unofficially translated the issue as follows: In paragraph 39 of Decision 916, did the Chamber err in fact and/or law when it concluded that the Defence did not explore in a timely manner other solutions in light of the non-cooperation of Sudan?

46. The Defence submits that the Chamber erred when it ignored its own responsibility in the absence of cooperation. Moreover, the Defence states it made multiple efforts to find a solution, with at least [REDACTED] mission requests since November 2020.⁷⁹

47. The Prosecution submits that the Defence's allegations amount to disagreement and mischaracterise the Impugned Decision.⁸⁰ The CLRV reiterates her submissions made in respect of the Defence's Postponement Request.⁸¹

48. The Chamber decided on the basis of the information available before it and it ruled accordingly. The Defence merely disagrees with the Chamber's decision and as stated above,⁸² with the Chamber's approach to the issue of non-cooperation.

Issue 10: Aux paragraphes 40-41 de la Décision #916, la Chambre erre-t-elle en fait et/ou en droit dans l'exposé des divers retards qu'elle prétend imputer à la Défense ?⁸³

49. The Defence submits that the Impugned Decision does not take into account the fact that some issues are responsibility of the Pre-Trial Chamber and this Chamber. It also submits that the Impugned Decision ignores efforts by the Defence to advance in its investigations.⁸⁴

50. The Prosecution and the CLRV submit that the Defence's allegations amount to no more than disagreement with the Impugned Decision.⁸⁵

51. The Chamber rejects the Defence's allegations of bias as regards the Chamber's findings in the Impugned Decision.⁸⁶ As noted by the CLRV, the Impugned Decision 'does no more than set out the obvious points that while a party had wide discretion in determining how it conducts its case [...], pursuing certain courses of actions comes at a cost in that such time and resources are then not available to deploy towards other potentially (more) pressing purposes'.⁸⁷ The Defence therefore merely disagrees with the Chamber's conclusions. As

⁷⁹ Request, ICC-02/05-01/20-920-Conf-Exp, para. 28.

⁸⁰ Response, ICC-02/05-01/20-926-Conf, paras 23, 33.

⁸¹ Observations, ICC-02/05-01/20-925-Conf, paras 30-31 *referring to* 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" dated 19 March 2023, ICC-02/05-01/20-904-Conf, paras 16-20,

⁸² *See* para. 22 above.

⁸³ Request, ICC-02/05-01/20-920-Conf-Exp, para. 28. The Chamber has unofficially translated the issue as follows: In paragraphs 40 and 41 of Decision 916, did the Chamber err in fact and/or law when it made several statements of delay to be imputed to the Defence?

⁸⁴ Request, ICC-02/05-01/20-920-Conf-Exp, para. 32.

⁸⁵ Response, ICC-02/05-01/20-926-Conf, para. 33; Observations, ICC-02/05-01/20-925-Conf, para. 33.

⁸⁶ Request, ICC-02/05-01/20-920-Conf-Exp, para. 30.

⁸⁷ Observations, ICC-02/05-01/20-925-Conf, para. 33.

noted above,⁸⁸ ‘setting the record straight’ is not a reason justifying either reconsideration or leave to appeal.

Issue 11 : La Chambre a-t-elle erré en fait en ne tenant pas compte du conflit armé qui a éclaté au Soudan le 15 avril 2023?⁸⁹

52. In respect of Issue 11, the Defence argues that the Chamber rejected the Defence request to file a reply or to make submission in the status conference. The Defence contends that despite being aware of the events in Sudan, the Impugned Decision ignores the armed conflict and its impact (direct and essential) in the Defence’s ability to investigate.⁹⁰

53. The Prosecution and the CLRV aver that the Defence’s allegations do not arise from the Impugned Decision.⁹¹

54. As noted above,⁹² the defence was given full opportunity to develop its arguments during the hearing and the Impugned Decision was rendered in full knowledge of and based on the information before the Chamber on the recent developments and prevailing situation in Sudan. Thus, the issue does not arise from the Impugned Decision.

55. The Chamber fully appreciates the difficulties which face the Defence given the prevailing situation in Sudan. It is for this reason that the original deadlines were altered, and that regular Status Conferences will be held. It emphasises that it is incumbent upon the Defence to apprise the Chamber with detailed information of steps taken to prepare its case.

IV. Conclusion

56. For the above reasons the Chamber concludes that the Defence fails to identify a clear error of reasoning or new facts that justify reconsideration of the Impugned Decision.

57. The Defence fails to meet the requirements necessary for the granting of leave to appeal. Indeed, it implicitly acknowledges this fact.⁹³ Moreover, none of the eleven issues identified by the Defence are appealable. As detailed above, none of the issues require a decision for its resolution which is essential for the determination of matters arising in the judicial cause under

⁸⁸ See para 12 above.

⁸⁹ Request, ICC-02/05-01/20-920-Conf-Exp, para. 32. The Chamber has unofficially translated the issue as follows: Did the Chamber err in fact when it did not take into consideration the armed conflict of 15 April 2023?

⁹⁰ Request, ICC-02/05-01/20-920-Conf-Exp, para. 33.

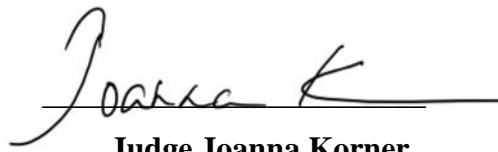
⁹¹ Response, ICC-02/05-01/20-926-Conf, para. 33; Observations, ICC-02/05-01/20-925-Conf, para. 34.

⁹² See paras 14 and 16 above.

⁹³ Request, ICC-02/05-01/20-920-Conf-Exp, para 11.

examination.⁹⁴ Accordingly, the Chamber does not need to determine whether the issues satisfy the cumulative criteria under Article 82(1)(d) of the Statute.

58. Accordingly, the Chamber rejects the Request in its entirety.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 11 May 2023

At The Hague, The Netherlands

⁹⁴ See Decision on the Defence's requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims' participation, 2 December 2021, ICC-02/05-01/20-525, para. 13.