



Original: English

No. ICC-02/05-01/20

Date: 3 October 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 redacted version of

**Decision on the Defence's request for reconsideration or, alternatively, leave to
appeal Decision on the Defence's Request for an order prohibiting disclosure of
some Defence witnesses' identities to [REDACTED]**

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 8 September 2023, Trial Chamber I (the ‘Chamber’) issued its decision rejecting the Defence’s request to issue an order prohibiting disclosure of some Defence witnesses’ identities to [REDACTED] (the ‘Impugned Decision’).¹
2. On 11 September 2023, the Defence filed a request for reconsideration or, in the alternative, leave to appeal the Impugned Decision (the ‘Request’).²
3. On 15 September 2023, the Prosecution filed its response, opposing the Request (the ‘Response’).³

II. Applicable Law

4. The Chamber incorporates by reference the general framework applicable to the reconsideration of judicial decisions.⁴
5. 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.⁵

III. Submissions and analysis

6. The Defence seeks reconsideration of the Impugned Decision. It requests that the Chamber order the non-disclosure of the Defence witnesses’ identities to [REDACTED].⁶ Alternatively, the Defence seeks leave to appeal the Impugned Decision.⁷

A. Reconsideration

¹ Decision on the Defence’s Request for an order prohibiting disclosure of some Defence witnesses’ identities to [REDACTED], ICC-02/05-01/20-1013-Conf (a public redacted version was notified on 11 September 2023, ICC-02/05-01/20-1013-Red).

² Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1013-Conf, ICC-02/05-01/20-1014-Conf (with one confidential annex). A public redacted version was notified on the same date, ICC-02/05-01/20-1014-Red.

³ Prosecution’s response to “Demande de reconsidération ou, à titre subsidiaire, d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1013-Conf”, ICC-02/05-01/20-1016-Conf.

⁴ 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 date, ICC-02/05-01/20-650-Red.

⁵ 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.

⁶ Request, ICC-02/05-01/20-1014-Conf, para. 9.

⁷ Request, ICC-02/05-01/20-1014-Conf, para. 13.

7. In its Request, the Defence contends that ‘eight findings’ render this case an exceptional one and justify the ‘extremely limited and reasonable’ order of non-disclosure of the Defence witnesses’ identities to [REDACTED].⁸ The Defence submits that the Impugned Decision would cause a ‘major injustice’ considering that it exposes the safety of Defence’s witnesses and their families, further dissuades witnesses from appearing before the Court and encroaches upon the equality of arms between the Prosecution and the Defence.⁹

8. The Defence avers that the Impugned Decision is ill-founded as it reverses an *inter partes* agreement, was rendered without prior consultation with the Victims and Witnesses Unit (the ‘VWU’), and is based on erroneous facts.¹⁰

9. In its Response, the Prosecution contends that the standard for reconsideration has not been met. It avers that Rule 87(1) of the Rules of Procedure and Evidence (the ‘Rules’) refers to a chamber’s discretion – not obligation – to consult with the VWU prior to ordering protective measures.¹¹ It contends that none of the ‘eight findings’ mentioned by the Defence are either exceptional or uncontested.¹² The Prosecution avers that although it agreed not to disclose the identities of Defence witnesses to [REDACTED], it gave no further assurances to the Defence.¹³ The Prosecution further argues that the proposed Defence alternative means of investigation into the Defence witnesses would be inadequate.¹⁴ It contends that despite facing the same challenges mentioned by the Defence, the Prosecution managed to call and protect its witnesses throughout its case.¹⁵ It submits that it is unclear how better cooperation [REDACTED] may have materially impacted the Defence’s ability to investigate Prosecution’s witnesses or how the Prosecution would benefit from better cooperation to investigate Defence witnesses.¹⁶

10. 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’¹⁷ or ‘to correct the record

⁸ Request, ICC-02/05-01/20-1014-Conf, paras 5-6.

⁹ Request, ICC-02/05-01/20-1014-Conf, para. 7.

¹⁰ Request, ICC-02/05-01/20-1014-Conf, para. 8.

¹¹ Response, ICC-02/05-01/20-1016-Conf, para. 5.

¹² Response, ICC-02/05-01/20-1016-Conf, para. 6.

¹³ Response, ICC-02/05-01/20-1016-Conf, paras 7-8.

¹⁴ Response, ICC-02/05-01/20-1016-Conf, paras 10-11.

¹⁵ Response, ICC-02/05-01/20-1016-Conf, para. 12.

¹⁶ Response, ICC-02/05-01/20-1016-Conf, para. 13.

¹⁷ Decision on the reconsideration request of the cooperation decision, ICC-02/05-01/20-650-Conf, para. 10.

or to make new submissions that could have been made when the request [...] was discussed.’¹⁸ The Chamber further recalls that reconsideration is not justified, on the basis that ‘it seems more “appropriate” than a leave to appeal,¹⁹ considering the time the Appeals Chamber would take in resolving the issues arising from the Impugned Decision’.²⁰

11. The Chamber observes 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.²¹

12. As regards the first limb, the Defence has failed to demonstrate a clear error of reasoning. Contrary to the Defence’s arguments, the Impugned Decision considered the parties’ partial agreement on the Request. In rendering the Impugned Decision, the Chamber observed that whilst the Prosecution agreed to the non-disclosure of the identities of the Defence’s witnesses [REDACTED], it opposed the issuance of an order that would prohibit disclosure [REDACTED].²² As observed by the Prosecution,²³ no further agreement was reached between the parties.

13. The Defence made no request that the VWU’s observations be sought prior to issuance of the Impugned Decision. The Chamber recalls that reconsideration cannot be justified due to a party’s ‘failure to address important points in its written submissions and during the status conference convened specifically to discuss’ a request.²⁴ The Defence’s argument misconstrues the Impugned Decision to the extent that the decision: (i) [REDACTED];²⁵ (ii) reminded the parties and participants of their obligation to consult with VWU in accordance with the Protocol on the handling of confidential information and contact with witnesses (the

¹⁸ 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, 11 May 2023, ICC-02/05-01/20-938-Conf (hereinafter ‘First Reconsideration Decision’), para. 12. A public redacted version was notified on the same date, ICC-02/05-01/20-938-Red.

¹⁹ Request, ICC-02/05-01/20-1014-Conf, para. 3.

²⁰ First Reconsideration Decision, ICC-02/05-01/20-938-Conf, para. 12.

²¹ Decision on the reconsideration request of the cooperation decision, 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10.

²² Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 7.

²³ Response, ICC-02/05-01/20-1016-Conf, paras 7-8.

²⁴ First Reconsideration Decision, ICC-02/05-01/20-938-Conf, para. 14.

²⁵ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 13.

‘Protocol’);²⁶ and (iii) directed the Defence to apply, on a case-by-case basis and in prior consultation with the VWU, should it consider that a deviation from the Protocol is necessary.²⁷

14. The Defence’s submissions concerning alleged factual errors in the Impugned Decision,²⁸ constitute no more than a mere disagreement with the Chamber’s findings. Although the Defence may disagree with the Chamber’s conclusions, the Chamber considered the scope of the requested non-disclosure order;²⁹ [REDACTED];³⁰ the alleged exceptional situation of the Defence *vis-à-vis* the Prosecution,³¹ and in respect of other cases,³² and the feasibility of alternative protective measures (less restrictive to the Prosecution’s investigative activities than the requested non-disclosure order).³³ Moreover, as observed by the Prosecution,³⁴ the Impugned Decision considered the feasibility of alternative investigative means into Defence witnesses.³⁵ Furthermore, as noted in the Impugned Decision,³⁶ no such restriction was issued in respect of the Prosecution’s witnesses.

15. Regarding the second limb, the Chamber is not satisfied, as submitted by the Defence, that the Impugned Decision would cause a ‘major injustice’. At the outset, the Chamber notes that the Defence’s,³⁷ and Prosecution’s,³⁸ arguments on equality of arms refer to cooperation issues which the Chamber has already decided upon in previous decisions.³⁹ Moreover, in respect of the ‘eight findings’ identified by the Defence,⁴⁰ as pointed out by the Prosecution,⁴¹ these ‘findings’ are not ‘undisputed’ and do not fall into the category of ‘exceptional’ so as to justify the requested order of non-disclosure. The Chamber has repeatedly rejected these

²⁶ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 13.

²⁷ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 16.

²⁸ Request, ICC-02/05-01/20-1014-Conf, para. 8.

²⁹ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 12.

³⁰ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 13.

³¹ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 14.

³² Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 15.

³³ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 15.

³⁴ Response, ICC-02/05-01/20-1016-Conf, paras 10-11.

³⁵ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 12.

³⁶ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 14.

³⁷ Request, ICC-02/05-01/20-1014-Conf, para. 8 (iii).

³⁸ Response, ICC-02/05-01/20-1016-Conf, para. 13.

³⁹ See Decision on the Defence’s Motion pursuant to Article 67(1)(e) of the Rome Statute, 18 July 2023, ICC-02/05-01/20-995-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-995-Red); 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 (confidential redacted and public redacted versions were notified on the same date, ICC-02/05-01/20-916-Conf, and ICC-02/05-01/20-916-Red, respectively); Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-561-Red).

⁴⁰ Request, ICC-02/05-01/20-1014-Conf, para. 5.

⁴¹ Response, ICC-02/05-01/20-1016-Conf, para. 6.

arguments and sees no reason to depart from its previous findings. Accordingly, the Chamber will disregard these arguments.

16. The Chamber notes the Defence's submissions concerning the risk to which its witnesses would be exposed and their possible unwillingness to give testimony should the Impugned Decision be maintained.⁴² As observed in the Impugned Decision,⁴³ no information suggests that the available protective measures have been or would be ineffective to protect the Defence witnesses. Moreover, as submitted by the Prosecution,⁴⁴ the Impugned Decision does not prevent the Defence from seeking further protective measures for its witnesses, provided that the mechanism foreseen in the Protocol is followed.⁴⁵ Furthermore, the Defence fails to explain why this mechanism,⁴⁶ would be insufficient or would further dissuade its witnesses from testifying before the Chamber.

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

B. Leave to Appeal

18. The Defence identifies the following three issues for leave to appeal:

*La Chambre a-t-elle failli à s'acquitter de son obligation de protection des témoins de la Défense en vertu des Articles 64-2 et 64-6-e du Statut en rejetant la mesure raisonnable et limitée de protection demandée par la Défense et initialement acceptée par le BdP? (the 'First Issue');*⁴⁷

*La Chambre a-t-elle violé la Règle 87-1 du RPP en ne consultant pas la DAVT sur la mesure de protection demandée avant de statuer sur la demande de protection? (the 'Second Issue');*⁴⁸

⁴² Request, ICC-02/05-01/20-1014-Conf, para. 7.

⁴³ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 15.

⁴⁴ Response, ICC-02/05-01/20-1016-Conf, para. 12.

⁴⁵ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 16.

⁴⁶ Impugned Decision, ICC-02/05-01/20-1013-Conf, para. 16.

⁴⁷ Request, ICC-02/05-01/20-1014-Conf, para. 10. The Chamber has unofficially translated the issue as follows: Did the Chamber fail to discharge its obligation to protect Defence's witnesses under Articles 64(2) and 64(6)(e) of the Statute by rejecting the reasonable and limited measures of protection requested by the Defence and initially accepted by the OTP?

⁴⁸ Request, ICC-02/05-01/20-1014-Conf, para. 10. The Chamber has unofficially translated the issue as follows: Did the Chamber breach Rule 87(1) of the Rules of Procedure and Evidence by not consulting the VWU on the requested protection measure before ruling on the request for protection?

*La Décision est-elle conforme au principe d'égalité entre le BdP et la Défense, dans la mesure où elle autorise le BdP à mener des opérations d'enquête dont la Défense a de facto été privée par [REDACTED] ? (the 'Third Issue')*⁴⁹

19. The Defence submits that the Impugned Decision incurs five errors of fact, three of law and one of procedure. The Defence avers that the three issues it seeks to appeal directly and significantly affect the fair conduct of the proceedings and the outcome of the trial considering that its witnesses would now be prevented from appearing before the Chamber.⁵⁰

20. The Defence contends that the Impugned Decision requires immediate resolution by the Appeals Chamber to advance the proceedings. It argues that appellate review would allow the Defence's witnesses to be granted protection, and to be able to give evidence. The Defence further argues that it would restore the equality of arms between the Prosecution and the Defence.⁵¹

21. In its Response, the Prosecution submits that none of the three issues identified by the Defence is appealable within the meaning of Article 82(1)(d) of the Statute, affect the fair and expeditious conduct of the proceedings or materially advance the proceedings.⁵² It submits that none of the issues identified by the Defence qualify as issues under Article 82(1)(d) of the Statute.⁵³ Further, the Prosecution submits that the Impugned Decision considered all relevant facts and law identified by the Defence in its Request, the scope of prospective witnesses for whom the order might apply and the considerable potential impact on the Prosecution's investigations.⁵⁴ It argues that the Impugned Decision does not cause prejudice to Mr Abd-Al-Rahman,⁵⁵ and that the Request is premature.⁵⁶ As such, it would not materially advance the proceedings and would create unnecessary delay.⁵⁷

⁴⁹ Request, ICC-02/05-01/20-1014-Conf, para. 10. The Chamber has unofficially translated the issue as follows: Does the decision comply with the principle of equality between the OTP and the Defence, insofar as it authorises the OTP to carry out investigations from which the Defence has *de facto* been deprived [REDACTED].

⁵⁰ Request, ICC-02/05-01/20-1014-Conf, para. 12.

⁵¹ Request, ICC-02/05-01/20-1014-Conf, para. 13.

⁵² Response, ICC-02/05-01/20-1016-Conf, para. 15.

⁵³ Response, ICC-02/05-01/20-1016-Conf, paras 17-19.

⁵⁴ Response, ICC-02/05-01/20-1016-Conf, paras 20-21.

⁵⁵ Response, ICC-02/05-01/20-1016-Conf, para. 21.

⁵⁶ Response, ICC-02/05-01/20-1016-Conf, para. 22

⁵⁷ Response, ICC-02/05-01/20-1016-Conf, para. 22.

22. As regards the First Issue, the Chamber is satisfied that the Prosecution's submission,⁵⁸ that it amounts to mere disagreement with the Impugned Decision, is correct. As noted above,⁵⁹ the Defence merely re-argues points that were already decided by the Chamber in the Impugned Decision. Moreover, the Defence fails to articulate why the mechanism provided for in the Impugned Decision to request further protective measures runs counter to the Chamber's obligation to protect the Defence witnesses under Articles 64(2) and 64(6)(e) of the Statute.

23. In respect of the Second Issue, as submitted by the Prosecution,⁶⁰ no part of Rule 87(1) of the Rules mandates that a Chamber must consult with the VWU before issuing a decision on witness security or protection. As noted above,⁶¹ the Impugned Decision directs the Defence to consult with the VWU before seeking further protective measures for its witnesses (in addition to those provided for in the Protocol). Accordingly, the Chamber finds that the Second Issue does not arise from the Impugned Decision.

24. Regarding the Third Issue, the Chamber is satisfied that the Prosecution's submission that the Defence's arguments are speculative and formulated in the abstract, is correct.⁶² Moreover, the Defence's argument⁶³ that the decision authorises the Prosecution to carry out investigations of which the Defence has *de facto* been deprived does not in any way arise of the Impugned Decision.

25. Therefore, the Chamber is satisfied that none of the three issues identified by the Defence are appealable. Accordingly, the Chamber does not need to determine whether the issues satisfy the cumulative criteria under Article 82(1)(d) of the Statute.

IV. Conclusion

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

⁵⁸ Response, ICC-02/05-01/20-1016-Conf, para. 17.

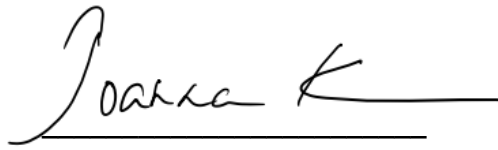
⁵⁹ See para. 14 above.

⁶⁰ Response, ICC-02/05-01/20-1016-Conf, para. 18.

⁶¹ See paras 13, 16 above.

⁶² Response, ICC-02/05-01/20-1016-Conf, para. 19.

⁶³ Request, ICC-02/05-01/20-1014-Conf, para. 13.

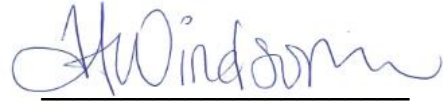


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 3 October 2023

At The Hague, The Netherlands