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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”)**

Confidential

**Prosecution’s Response to “Requête aux fins d’autorisation d’intenter appel de la
décision ICC-02/05-01/20-561-Conf”**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Defence's request ("Request") for leave to appeal¹ the Trial Chamber's Decision on Defence submissions on cooperation with Sudan ("Decision")² should be rejected because none of the issues raised for certification are appealable within the meaning of article 82(1)(d) of the Rome Statute.

2. The Defence identify seven purportedly appealable issues ("Issues") which allegedly arise from the Decision. However, the Issues either misconstrue the Decision and/or are premised on a mere disagreement with it and therefore do not constitute appealable issues genuinely arising from the Decision.³ But even if, *arguendo*, the Chamber were to find that any of the Issues were appealable issues, the Prosecution also demonstrates that the proposed Issues fail to fulfil the cumulative criteria of article 82(1)(d), as they do not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and would not materially affect the conduct of the proceedings.

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), this response is filed confidentially because it responds to a Request and makes reference to a Decision of the same classification.

III. SUBMISSIONS

First Issue: The scope and content of the Chamber's obligation to state reasons for its decision, and, specifically, whether the Chamber's assertion that the Defence did not submit any arguments of fact and/or law, when the Defence alleges it clearly had, was sufficient to fulfil the Chamber's obligation to give reasons.⁴

4. The First Issue is not appealable within the meaning of article 82(1)(d) of the Statute as it mischaracterises the Chamber's findings and as such it does not arise from the Decision. In any event, it merely expresses the Defence's disagreement with the Decision.

¹ Defence Request to Appeal Decision 561, [ICC-02/05-01/20-566-Conf](#) ("Request").

² Decision on Defence Submissions on Cooperation with Sudan, [ICC-02/05-01/20-561-Conf](#) ("Decision").

³ *DRC Situation* Extraordinary Review Judgment, [ICC-01/04-168](#) ("DRC Extraordinary Review Judgment"), para. 9; see also *Bemba et al.* Joint Decision on Applications for Leave to Appeal, [ICC-01/05-01/13-801](#), para. 12; *Gbagbo & Blé Goudé* Decision on Leave to Appeal 4 September 2017 Oral Decision, [ICC-02/11-01/15-1051](#), paras. 5-7.

⁴ [Request](#), para. 4.

5. The Defence argues that many of its submissions were rejected by the Chamber on the basis that they lacked any 'legal or factual basis' and as such, were not properly considered by the Chamber.⁵ Contrary to the Defence's submission, the Chamber addressed its arguments and provided sufficient reasoning throughout the Decision.⁶ The Chamber's conclusion that the Defence failed to provide a legal or factual basis for its arguments without addressing each and every argument of the Defence does not mean that the Chamber failed to properly consider them. Rather, these conclusions by the Chamber reflected its view that it was not satisfied that the Defence's arguments had a persuasive legal or factual basis. In raising this as an issue for appeal, the Defence only disagrees with the Chamber's reasoning. In any case, by pointing to the Chamber's alleged failings wholesale without addressing how each individual failure to give reasons meets the criteria of article 82(1)(d),⁷ the Defence fails to meet its burden in seeking leave to appeal the First Issue.

6. Moreover, the Defence fails to identify any provision under the Court's legal framework that would require the Chamber to address each and every argument raised by a Party in its reasoning. Chambers retain discretion under the Statute to address the core issues and disregard alternative, peripheral, irrelevant or mischaracterised arguments. Thus, the Appeals Chamber has held concerning judicial decisions:

The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.⁸

7. As the Chamber observed, to date, the Defence have made six filings that are interrelated, overlapping and often contain identical arguments.⁹ These arguments have been

⁵ [Request](#), para. 4 and fn. 3.

⁶ See e.g. [Decision](#), paras. 24-25 (finding that the Defence did not provide any legal basis for its assertion that the Cooperation Agreement is invalid, setting out the reasons why in answer to the Defence's submissions at the third status conference), 26 (finding that the Defence provided no legal basis for the assertion that the confidential classification of the Cooperation Agreement alters its status as an international convention), 29 (finding that the Defence provided no legal or factual basis to assert that the mere execution of requests from the Court under Sudanese national law undermines Resolution 1593, providing reasons in that paragraph), 31 (finding that the Defence provided no legal or factual basis for the assertion that the Cooperation Agreement was not executed for the implementation of the Court's mandate or that it supersedes the authority of Resolution 1593). *Contra* [Request](#), fn. 3.

⁷ The Defence only highlights in one footnote the instances in the Decision that it claims fails to address certain Defence submissions, without further explanation as to how these instances met the criteria in article 82(1)(d): [Request](#), fn. 3.

⁸ *Lubanga* Rule 81 Appeal Judgment, [ICC-01/04-01/06-773](#), para. 20; *Lubanga* Rule 82 Appeal Judgment, [ICC-01/04-01/06-774](#), para. 30; Judgment on the Appeal against Two Oral Decisions, [ICC-02/05-01/20-236](#), para. 14.

⁹ [Decision](#), para. 15.

previously addressed by the Pre-Trial, Trial and Appeals Chambers.¹⁰ In circumstances where the Defence has already received reasons in relation to these arguments, the Chamber is not required to repeat them again in its Decision.

8. The First Issue is therefore “merely a question over which there is disagreement or conflicting opinion”¹¹ in that the Defence disagrees with the Chamber’s finding and is thus, not an appealable issue under the meaning of article 82(1)(d) of the Statute.

9. In addition, the mere fact that the adequacy of a chamber’s reasoning was the subject of a prior appeal certified under article 82(1)(d) does not automatically render the same topic certifiable in this instance.¹² The prior appeal cited by the Defence involved the question of whether the obligation to provide reasons under article 74(5) of the Statute applied to *all* decisions rendered by chambers.¹³ In rejecting that appeal, the Appeals Chamber criticised the Pre-Trial Chamber for certifying the issue without explaining how the criteria under article 82(1)(d) had been satisfied, on a matter that “ha[d] little importance to the outcome of the trial or to the fair and expeditious conduct of the proceedings”.¹⁴ The Defence cannot now seek to certify a similar question on appeal when it has failed to concretely demonstrate how the First Issue would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Second Issue: Whether the right to a fair trial can be ensured when provisions of the Statute, such as articles 4(2), 64(2), 64(6)(e) or 68(1) are not respected.¹⁵

10. The Second Issue also does not meet the criteria set in article 82(1)(d) of the Statute and as such, is not appealable. This is because the Defence mischaracterises the Decisions and identifies an Issue that does not arise from it.

11. First, the Chamber did not make any finding that an accused’s fair trial rights are unaffected by any violation of the provisions of the Statute, such as articles 4(2), 64(2), etc.¹⁶

¹⁰ See e.g. Decision on Defence Stay Request, [ICC-02/05-01/20-186](#); Decision on Defence Article 87(5)(b) Request, [ICC-02/05-01/20-295](#); Judgment on Defence Jurisdiction Appeal, [ICC-02/05-01/20-503](#).

¹¹ [DRC Extraordinary Review Judgment](#), para. 9; *Bemba et al.* Decision on Application for Leave to Appeal pursuant to Article 61(7)(a) and (b), [ICC-01/05-01/08-532](#), para. 17; *Abu Garda* Decision on Application for Leave to Appeal the Confirmation Decision, [ICC-02/05-02/09-267](#), para. 22; *Lubanga* Decision on Application for Leave to Appeal the Disclosure and Protective Measures Decision, [ICC-01/04-01/06-1557](#), para. 30; *Katanga et al.* Decision on Application for Leave to Appeal the Addition of Witnesses, [ICC-01/04-01/07-2035](#), para. 25; *Banda* Decision on Application for Leave to Appeal Counsel Appointment Decision, [ICC-02/05-03/09-179](#), para. 27.

¹² *Contra Request*, para. 4.

¹³ Defence Application for Leave to Appeal Three Decisions, [ICC-02/05-01/20-130-ENG](#), para. 14.

¹⁴ Judgment on Defence Appeal against Two Oral Decisions, [ICC-02/05-01/20-236](#), para. 12.

¹⁵ [Request](#), paras. 5-6.

Rather, it found at various instances in the Decision that the Defence had not demonstrated how any alleged failings in the legal framework applicable to the Court's activities in Sudan, or alleged violations of other provisions of the Statute, affected the Accused's fair trial rights in this case.¹⁷ In other words, the Chamber applied a case-by-case analysis to determine whether any alleged violation of the Statute had a deleterious impact on the Accused's rights that might warrant certain measures from the Chamber. The First Issue ignores the Chamber's case-by-case analysis and instead generalises its findings in a manner that mischaracterises the Decision and, consequently, does not arise from it.

12. Second, and in any event, the Chamber rejected the Defence's allegation that there had been any violation of article 4(2) of the Statute, finding that the cooperation agreement between the Court and Sudan dated 10 May 2021 ("Cooperation Agreement") was a special agreement within the meaning of article 4(2) of the Statute, in light of the Cooperation Agreement's purpose, scope and contents.¹⁸ By seeking leave to appeal on the issue of whether the Accused's fair trial rights can be ensured when article 4(2) is not respected, the Defence simply ignores the Chamber's finding that there was no violation of article 4(2) and identifies an issue that does not arise from the Decision.

13. Third, the Defence merely speculates that articles 64(2), 64(6)(e) or 68(1) of the Statute may not have been respected, and fails to provide any factual or legal basis for such assertions.¹⁹ Moreover, in none of its prior written or oral submissions before the Chamber did the Defence identify any concrete prejudice to Mr Abd-Al-Rahman's fair trial rights as a result of any purported violation of these provisions.²⁰

14. The Defence's reliance on speculation and its repetition of arguments already rejected by the Chamber does not give rise to an issue that affects the fair and expeditious conduct of the proceedings, or one whose resolution by the Appeals Chamber may materially advance the proceedings.²¹ Moreover, the Defence does not require appellate guidance on the Second Issue to enable it to be more selective in the violations it brings to the Chamber's attention.²²

¹⁶ *Contra* [Request](#), para. 5.

¹⁷ *See e.g.* [Decision](#), paras. 16, 48.

¹⁸ [Decision](#), paras. 22-23.

¹⁹ [Request](#), paras. 5-6.

²⁰ *See generally* Sixth Defence Request for Safety Measures in Sudan, [ICC-02/05-01/20-485-Conf](#) ("Sixth Request"); Defence Observations on Security in Sudan, [ICC-02/05-1/20-481-Conf](#) ("Fifth Request"); ICC-02/05-01/20-501-Conf ("Defence Response to Second Registry Report on Cooperation"); Defence Observations on Third Status Conference Agenda, [ICC-02/05-01/20-532-Conf](#) ("Defence Third Status Conference Observations"); Third Status Conference Transcript, [ICC-02/05-01/20-T-018-Conf-Eng](#) ("Third Status Conference").

²¹ *Contra* [Request](#), para. 6.

²² *Contra* [Request](#), para. 6.

The Appeals Chamber does not have such an advisory function.²³ As the Defence would be aware, it is incumbent on the Defence to legally and factually substantiate any violations of the Statute that it alleges, along with an explanation of how those violations prejudice the rights of the Accused—this principle should already aid the Defence in being selective in the violations it alleges.

Third Issue: Whether the Cooperation Agreement meets the criteria of article 4(2).²⁴

15. The Third Issue is similarly not appealable as the Defence merely disagrees with the Chamber. As set out above, the Chamber set out its interpretation of article 4(2) of the Statute and rejected the Defence's submissions on the issue.²⁵ The Chamber found that—despite the absence of a reference to Article 4(2) of the Statute in its text—the purpose, scope and contents of the Cooperation Agreement clearly qualify it as a 'special agreement' within the meaning of Article 4(2) of the Statute.²⁶

16. The Third Issue therefore only repeats an issue already resolved by the Chamber.²⁷ That the Defence simply disagrees with the Chamber is readily apparent from the lack of explanation or examination as to how the Third Issue arises from the Chamber's reasoning.

17. Moreover, the Defence fails to demonstrate that the Third Issue meets the remaining criteria under article 82(1)(d).²⁸ The Defence does not explain how the validity of the Prosecution's investigations and protection of victims and witnesses in Sudan affects the fairness of proceedings, in particular the rights of the Accused. In this context, the alleged impact of the Third Issue on the proceedings is purely speculative at this stage. The Defence cannot merely speculate in the abstract that a decision causes prejudice to the rights of an accused in order to invoke arguments regarding the fairness of the proceedings.²⁹

²³ *DRC Situation* Victim Participation Appeal Decision, [ICC-01/04-503](#), para. 30, citing *Katanga & Ngudjolo* Netherlands Directions Decision, [ICC-01/04-01/07-3132](#), para. 7; *Lubanga* Victim Participation Procedure Decision, [ICC-01/04-01/06-3026](#), para. 4.

²⁴ [Request](#), para. 7.

²⁵ [Decision](#), paras. 22-23. See above para. 12.

²⁶ [Decision](#), para. 38.

²⁷ [Decision](#), paras. 22-23.

²⁸ *Contra* [Request](#), para. 7.

²⁹ See [DRC Extraordinary Review Judgment](#), para. 10; *Kony et al.* Decision on Leave to Appeal Victim Participation Decision, [ICC-02/04-01/05-316](#), p. 6; *Kenyatta et al.* Decision on Leave to Appeal Redactions Decision, [ICC-01/09-02/11-211](#), paras. 33 and 39; *Kenyatta et al.* Decision on Leave to Appeal Disclosure Decision, [ICC-01/09-02/11-88](#), para. 25, see also para. 23-27; *Lubanga* Decision on Leave to Appeal Victim Participation Decision, [ICC-01/04-01/06-2109](#), para. 22; *Bemba* Decision on Leave to Appeal Additional Evidence Decision, [ICC-01/05-01/08-680](#), para. 36; *Kenyatta et al.* Decision on Leave to Appeal Witness Decision, [ICC-01/09-02/11-275](#), para. 28-29; *Ruto et al.* Decision on Leave to Appeal Confirmation Postponement Decision, [ICC-01/09-01/11-301](#), para. 30.

Fourth Issue: Whether the Cooperation Agreement must be registered with the United Nations (“UN”) to be valid.³⁰

18. The Fourth Issue is not an appealable issue within the meaning of article 82(1)(d) of the Statute as it misconstrues the Decision and the legal instruments cited by the Chamber, and expresses mere disagreement with the Chamber’s reasoning.

19. The Defence submitted before the Chamber that the failure to register the Cooperation Agreement with the UN Secretariat pursuant to article 80(1) of the Vienna Convention on the Law of Treaties (“VCLT”) rendered it invalid.³¹ The Chamber rightly rejected this submission, finding that there was no obligation to register agreements concluded between the Court and States with the UN Secretariat.³² This was on the basis that: (i) article 1 of the VCLT stipulates that the Convention only applies to treaties between *States*;³³ and (ii) article 14 of the Negotiated Relationship Agreement (being the primary legal instrument concerning the Court’s relationship with the UN) provides that the registration or filing of agreements concluded by the Court with States be done in consultation with the UN ‘when appropriate’.³⁴

20. At the outset, there is no merit to the Defence’s claim that it should have been given an opportunity to respond to these arguments which it alleges the Chamber raised for the first time in its Decision.³⁵ The Defence should have been aware of the fundamental relevance of provisions governing the scope of the VCLT and of the specific relevance of the Negotiated Relationship Agreement between the Court and the UN to any obligations that apply to agreements concluded between the Court with States, and could readily have addressed these aspects in its submissions before the Chamber. Its failure to do so at the appropriate time does not give rise to an appealable issue.

21. The Defence’s arguments regarding the other legal provisions it cites also fail to give rise to an appealable issue as they misconstrue the Decision and the relevance of the cited legal provisions:

³⁰ [Request](#), para. 8.

³¹ [Sixth Request](#), para. 12; [Fifth Request](#), para. 13.

³² [Decision](#), para. 25.

³³ [Decision](#), para. 25, citing VCLT article 1(a). Although there is no sub-provision “a” in Article 1 of the VCLT, the Chamber may have intended to refer to Article 2(1)(a), which defines a “treaty” as “an international agreement concluded between States in written form and governed by international law [...]”: VCLT, adopted 23 May 1969, 1155 UNTS 331, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, article 2(1)(a).

³⁴ [Decision](#), para. 25, citing Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, available at https://legal.un.org/ola/media/UN-ICC_Cooperation/UN-ICC%20Relationship%20Agreement.pdf, art. 14.

³⁵ *Contra* [Request](#), para. 8.

- Contrary to the Defence's claim, the Chamber did not ignore the Defence's arguments regarding article 102(1) of the UN Charter.³⁶ The Chamber expressly found article 102(1)³⁷ of the UN Charter to be inapplicable to the Cooperation Agreement on the basis that article 102(1) only applies to treaties between States;³⁸
- While the Defence now asserts that article 81(1) of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations applies to the Cooperation Agreement, requiring it to be registered with the UN Secretariat,³⁹ it did not discuss this provision in its submissions before the Chamber, but had only cited to it in a footnote to its argument that *"les conventions sont publiques et doivent faire l'objet d'un enregistrement auprès du Secrétariat des Nations Unies en vertu de l'Article 80-1 de la Convention de Vienne de 1969 sur le droit des traités entre États"*.⁴⁰ In any case, as the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations has not yet entered into force, the obligations which the Defence claims purportedly arises under that convention are not applicable;⁴¹
- Article 2(3) of the Negotiated Relationship Agreement has no relevance to the Fourth Issue, given that the provision merely states that "[t]he Court recognises the responsibilities of the United Nations under the Charter".⁴²

22. Finally, the Defence relies upon its submissions on the Third Issue in arguing that the Fourth Issue would significantly affect the fair and expeditious conduct of the proceedings or

³⁶ [Request](#), para. 8.

³⁷ While the Decision refers to article 104(1) of the UN Charter (regarding the UN's legal capacity), the Prosecution understands this to be a typographical error given that the Chamber's reasoning clearly relates to article 102(1) of the Charter: see [Decision](#), para. 25 (fn. 42).

³⁸ [Decision](#), para. 25.

³⁹ [Request](#), para. 8, citing Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, adopted 21 March 1986, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf, article 81(1) ("Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication"). Article 2(1)(a) specifies that a "treaty" means "an international agreement governed by international law and concluded in written form (i) between one or more States and one or more international organisations [...]").

⁴⁰ [Sixth Request](#), para. 12 (fn. 42). See also [Fifth Request](#), para. 13 (fn. 40); [Third Status Conference](#), 17:23-19:20.

⁴¹ See United Nations Treaty Collection, Status as at 1 February 2022 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, Vienna, 21 March 1986, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXIII-3&chapter=23&clang=en.

⁴² *Contra* [Request](#), para. 8.

outcome of the trial or that an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁴³ For the same reasons as set out above, the Defence fails to demonstrate that the Fourth Issue meets the remaining criteria in article 82(1)(d).⁴⁴

Fifth Issue: Whether the Cooperation Agreement is comparable with witness protection agreements concluded by the Court, justifying maintaining its confidentiality.⁴⁵

23. The Fifth Issue is not an appealable issue as it mischaracterises the Decision by stating that “*la Décision s’appuie sur une comparaison avec d’autres accords techniques passés par la Cour avec des États, notamment en matière de protection des témoins*”.⁴⁶ To the contrary, the Chamber did not base its decision on a comparison with other agreements concluded by the Court when finding that the confidentiality of the Cooperation Agreement did not render it invalid.⁴⁷ The Chamber found that (i) the Defence had not provided any legal basis to assert that the mere confidential classification rendered the Cooperation Agreement invalid; (ii) nor had the Defence submitted that either of the signatories considered the agreement to be invalid or were refusing to implement it.⁴⁸ The Chamber then went on to state that “as a matter of practicality, the Court often concludes confidential cooperation agreements with States on varied matters, such as witness protection”.⁴⁹ By this statement, the Chamber was clearly providing a point of comparison to other confidential agreements only from a practical, illustrative perspective, and this comparison was not the basis of its decision as the Defence erroneously asserts.

24. The Defence relies upon its submissions in relation to the Third Issue in arguing that the Fifth Issue would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial or that an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵⁰ For the same reasons as set out above, the Defence fails to demonstrate that the Fifth Issue meets the remaining criteria in article 82(1)(d).⁵¹

⁴³ [Request](#), para. 8, citing to para. 7 (re the Third Issue).

⁴⁴ *See above* para. 17.

⁴⁵ [Request](#), para. 9.

⁴⁶ [Request](#), para. 9.

⁴⁷ *Contra Request*, para. 9.

⁴⁸ [Decision](#), para. 26.

⁴⁹ [Decision](#), para. 26.

⁵⁰ [Request](#), para. 9, citing to para. 7 (re the Third Issue).

⁵¹ *See above* para. 17.

Sixth Issue: Whether the Chamber's finding that cooperation with the Court has been decriminalised in Sudan is compatible with the Chamber's responsibility to protect victims and witnesses under articles 64(2), 64(6)(e) and 68(1) of the Statute.⁵²

25. The Sixth Issue is not an appealable issue. The Defence does not correctly represent the Chamber's findings or the underlying documents on which it was based, and many of its arguments amount to mere disagreements with the Decision.

26. First, the Defence simply disagrees with the Chamber's finding that cooperation with the Court is not criminalised by law in Sudan.⁵³ As the Chamber stated, the Sudanese authorities confirmed to the Registry on 11 October 2021 that cooperation with the court is not criminalised by law in Sudan,⁵⁴ as confirmed in the Registry's report to the Chamber,⁵⁵ and the Sudanese authorities' written communications with the Registry.⁵⁶ By continuing to assert—as it has done in numerous filings to date⁵⁷—that the laws cited by the Sudanese authorities did not have the effect of decriminalising cooperation with the Court, the Defence merely disagrees with the Chamber's finding and the information supplied by the Sudanese authorities and the Registry.

27. The Defence's disagreement is further evidenced by its failure—as the Chamber noted—to supply any evidence to show that the confirmation of decriminalisation was open to doubt.⁵⁸ Instead, the Defence only cites to materials dated 2009 and 2014 to support its submission that “[l]e fait que des personnes aient été arrêtées, détenues, torturées et condamnées en raison de leur coopération suspectée avec la Cour qualifiée d'espionnage ou de trahison est de notoriété publique”.⁵⁹

28. Second, the Defence incorrectly asserts that the Decision fails to acknowledge that cooperation with the Court had previously constituted a criminal offence in Sudan, at least until July 2020.⁶⁰ The Defence fails to explain how such an omission has any relevance to the Sixth Issue given that the issue concerns the *present* ability of victims and witnesses to cooperate with the Court. In any case, it is implicit throughout the Chamber's reasoning that

⁵² [Request](#), paras. 10-11.

⁵³ [Request](#), para. 10.

⁵⁴ [Decision](#), para. 40, citing Annex I to Registry's Second Report on the Current Status of Cooperation with Sudan, [ICC-02/05-01/20-496-Conf-AnxI](#) (“Registry Report Annex”).

⁵⁵ [Registry Report Annex](#).

⁵⁶ Annex V to Registry's Second Report on the Current Status of Cooperation with Sudan, [ICC-02/05-01/20-496-AnxV-tENG](#).

⁵⁷ [Request](#), para. 10, citing Defence Reconsideration Request, [ICC-02/05-01/20-438-Conf](#) (“Defence Reconsideration Request”), paras. 5, 11-13; [Sixth Request](#), paras. 3(i), 5; [Defence Response to Second Registry Report on Cooperation](#), paras. 14-16; [Defence Third Status Conference Observations](#), para. 11(ii).

⁵⁸ [Decision](#), para. 40.

⁵⁹ [Defence Response to Second Registry Report on Cooperation](#), para. 15.

⁶⁰ [Request](#), para. 10.

cooperation with the Court may once have been criminalised in Sudan. This is apparent from the Chamber's reference to the "*decriminalisation* of cooperation with the Court" and its dismissal of the Defence's claim that Sudan "*continues* to criminalise cooperation with the Court"—language which acknowledges that cooperation with the Court had been criminalised at an earlier point in time.⁶¹

29. Third, the Defence mischaracterises the Decision by stating that the Chamber disputed the materiality of the risk posed to people for cooperating with the Court.⁶² The Chamber made no reference to any such risk in its Decision. Rather, it made findings only in relation to the decriminalisation under Sudanese law regarding cooperation with the Court.⁶³

30. Fourth, the Defence further mischaracterises the Decision by stating that the Chamber accepted that the safety of victims and witnesses in Sudan was based solely on guarantees given by the Sudanese authorities that were not verified or challenged by the Registry.⁶⁴ Again, the Chamber made no such statement. The Chamber referenced a number of factors throughout its Decision that were relevant to the safety of individuals involved in the Court's activities in Sudan, including: (i) the signing of the Cooperation Agreement which was to facilitate the expeditious fulfilment of the Court's mandate pursuant to Resolution 1593;⁶⁵ (ii) Sudan's cooperation with the Court;⁶⁶ and (iii) the decriminalisation of cooperation with the Court under Sudanese law.⁶⁷ Moreover, the Defence ignores that throughout the proceedings, the Chamber has received and considered submissions from the Prosecution and Registry on the safety of their operations carried out in Sudan, any risks to individuals connected with the Court's activities in Sudan, and measures in place to mitigate those risks, including pausing activities where necessary.⁶⁸

31. The Defence thus fails to demonstrate an appealable issue on the basis of these mischaracterisations of and disagreements with the Decision.

32. The Defence's arguments as to the impact of the Sixth Issue on the fairness of the trial are based on speculation. While asserting that the witnesses are exposed to the risk of criminal prosecution incurring the death penalty, and that the risks posed to Prosecution witnesses

⁶¹ [Decision](#), para. 40 (emphases added).

⁶² [Request](#), para. 10.

⁶³ [Decision](#), para. 40.

⁶⁴ [Request](#), para. 10.

⁶⁵ [Decision](#), para. 30.

⁶⁶ [Decision](#), para. 38.

⁶⁷ [Decision](#), para. 40.

⁶⁸ See e.g. Second Status Conference Transcript, [ICC-02/05-01/20-T-017-Conf-Eng](#) ("Second Status Conference"), 3:18-5:24, 8:22-9:21; [Third Status Conference](#), 8:14-12:14, 15:25-16:16.

affects their reliability,⁶⁹ the Defence fails to identify any instance where this has been the case. While the Prosecution does not dispute that Sudan has recently experienced a heavy toll of violence,⁷⁰ the Defence fails to make out a concrete link between the violence and the alleged impact on the fairness of the trial arising from the Sixth Issue, in particular an impact on the Accused's fair trial rights. As stated above, the Defence cannot merely speculate in the abstract in order to invoke arguments regarding the fairness of the proceedings.⁷¹

Seventh Issue: Whether the Chamber's powers under articles 64(2) and 64(6) authorise it to suspend all or part of the activities of the Parties and/or participants if there is a reasonable basis to believe that they are jeopardising the safety or victims/witnesses.⁷²

33. The Seventh Issue fails to identify any appealable issue arising from the Decision. The Chamber found that its powers under article 64(2) of the Statute did not extend to prohibiting the Parties and participants from undertaking activities in Sudan.⁷³ It thus rejected the Defence's scant submissions made at the third status conference that "it is within the remit of the authority of [the] Chamber to have the provisions of the Statute respected [...] within these proceedings",⁷⁴ and that the Defence has "a maximal concept of the powers of the Chamber".⁷⁵ The Defence does not identify any specific issue arising from the Chamber's reasoning. By alleging that this reasoning raises the issue as to whether articles 64(2) and 64(6) authorise the Chamber to suspend all or part of the activities of the Parties/participants in the territory of Sudan,⁷⁶ the Defence merely repeats a topic already resolved by the Chamber, amounting to a disagreement with the Chamber, and does not qualify as an appealable issue.

34. Moreover, the Defence fails to acknowledge that the Chamber had already dismissed its claims that the legal framework for the Court's cooperation with Sudan was inadequate.⁷⁷ As a result, any discussion of the Chamber's power to halt the Court's activities in Sudan is merely hypothetical.

35. The Defence fails to establish that the Seventh Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial or that its resolution would

⁶⁹ [Request](#), para. 11.

⁷⁰ [Request](#), para. 11.

⁷¹ *See above* para. 17 (fn. 29).

⁷² [Request](#), paras. 12-13.

⁷³ [Decision](#), para. 51.

⁷⁴ [Third Status Conference](#), 29:25-30:2.

⁷⁵ [Third Status Conference](#), 31:14-15.

⁷⁶ [Request](#), para. 12.

⁷⁷ [Decision](#), paras. 37-39, 51.

materially advance the proceedings.⁷⁸ Contrary to the Defence's assertion, the Seventh Issue is not intrinsically linked to the protection of victims and witnesses.⁷⁹ There are numerous interrelated and shifting factors that form part of an assessment regarding victims and witness protection, and their safety is not exclusively dependent on the Chamber's ability to halt activities on the territory of Sudan. Moreover, the Defence fails to explain how the Seventh Issue has any impact on the Accused's fair trial rights.

36. In sum, none of the proposed Issues qualify as appealable issues within the meaning of article 82(1)(d) of the Statute. Given that article 82(1)(d) criteria are cumulative, and that failure to fulfil one of the criteria is fatal to an application for leave to appeal,⁸⁰ the Request should be rejected on that basis alone. Nonetheless, as demonstrated above, the proposed issues also fail to fulfil the cumulative criteria of article 82(1)(d), as they do not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and their immediate resolution by the Appeals Chamber would not materially advance the proceedings.

IV. CONCLUSION

37. For the foregoing reasons, the Chamber should reject the Request.



Karim A. A. Khan QC
Prosecutor

Dated this 2nd day of February 2022

At The Hague, the Netherlands

⁷⁸ *Contra* [Request](#), para. 13.

⁷⁹ *Contra* [Request](#), para. 13.

⁸⁰ *Bemba* Decision on Leave to Appeal Abuse of Process Decision, [ICC-01/05-01/08-3273](#), para. 8; *Gbagbo & Blé Goudé* Decision on Leave to Appeal Trial Commencement Order, [ICC-02/11-01/15-117](#), para. 26; *Gbagbo & Blé Goudé* Decision on Leave to Appeal Confidential Material Decision, [ICC-02/11-01/15-132](#), para. 5.