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

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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

**Public redacted version of "Prosecution's response to '*Requête aux fins de
reconsidération de la Décision ICC-02/05-01/20-561*'", 21 March 2022,
ICC-02/05-01/20-638**

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The Office of the Prosecutor

Mr Karim A. A. Khan QC
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 Nasser Mohamed Amin Abdalla

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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. INTRODUCTION

1. Trial Chamber I (“Chamber”) should reject the Defence’s *Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-561* (“Request”),¹ as it does not meet the legal requirements for reconsideration of the Chamber’s “Decision on Defence submissions on cooperation with Sudan” (“Decision”).²

II. CLASSIFICATION

2. This filing is classified as confidential in accordance with regulation 23*bis*(2) of the Regulations of the Court since it responds to a request of the same classification.

III. PROCEDURAL HISTORY

3. On 8 and 12 October 2021, the Defence submitted to the Chamber two applications requesting that all operations of the Court in the territory of the Republic of Sudan (“Sudan”) be suspended until an adequate legal framework is established.³ These applications were ultimately dismissed by the Chamber in its Decision as they were deemed contrary to the established jurisprudence of the Court⁴ and without legal basis.⁵ Additionally, the Chamber determined that it had no power to order the parties and participants to halt their activities in the territory of Sudan.⁶

4. On 7 March 2022, in compliance with the Chamber’s instructions, the Prosecution disclosed redacted versions of three investigator’s reports⁷ (“Three Reports”) detailing security concerns expressed by three witnesses, in support of the Prosecution’s in-court protective measures application.⁸ [REDACTED].⁹ [REDACTED].¹⁰

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ Decision, para. 18.

⁵ Decision, paras. 22, 24, 26, 29, 31, 35, 37, 39-41, 48.

⁶ Decision, para. 51.

⁷ DAR-OTP-0220-2371; DAR-OTP-0220-2374; DAR-OTP-0220-2376.

⁸ [REDACTED].

⁹ DAR-OTP-0220-2374; DAR-OTP-0220-2376.

¹⁰ DAR-OTP-0220-2371.

5. On 10 March 2022, the Defence submitted the Request. The Defence alleges, that the disclosure of the Three Reports constitutes new information that corroborates the Defence's concerns regarding (i) the continued criminalisation of cooperation with the Court in Sudan; and (ii) the inadequacy of the current legal framework to allow for cooperation with Sudan. For this reason, the Defence requests the Chamber to "suspend all activities of the Parties, Participants and the Registry in Sudan susceptible of exposing victims, witness or other persons" to risks.¹¹

IV. SUBMISSIONS

The Request does not meet the criteria for reconsideration

6. The Request fails to meet the test established by the Court to allow for the exceptional reconsideration of a decision. As previously established, reconsideration of a decision is an exceptional remedy that should only be granted where a clear error in reasoning has been demonstrated or if reconsideration is necessary to prevent an injustice.¹² A Chamber may also reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,¹³ or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.¹⁴

¹¹ [REDACTED].

¹² *Ntaganda* Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, [ICC-01/04-02/06-519](#), para. 12; *Ongwen* Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence, 20 June 2019, [ICC-02/04-01/15-1547](#), para. 7; *Ongwen* Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, [ICC-02/04-01/15-468](#), para. 4; *Ntaganda* Public redacted version of Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039, 10 December 2015, [ICC-01/04-02/06-1049-Red](#), para. 12; *Bemba* Judgment pursuant to Article 74 of the Statute, 21 March 2016, [ICC-01/05-01/08-3343](#), para. 30. See also [ICC-02/05-01/20-163](#), para. 12. [ICC-02/05-01/20-372](#), para. 17.

¹³ *Lubanga* Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 2 April 2011, [ICC-01/04-01/06-2705](#), paras 13-18; *Lubanga* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 13 December 2006, [ICC-01/04-01/06-772](#), paras 36-39.

¹⁴ In *Bemba*, for instance, Trial Chamber III decided that it "will not revisit its previous decisions in the absence of new facts or circumstances that *may influence that decision*" (Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo", 2 September 2011, [ICC-01/05-01/08-1691](#), para 17, highlights added). See also *Katanga* Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108(1) of the Rome Statute"' (ICC-01/04-01/07-3821-Red), 26 June 2019, [ICC-01/04-01/07-3833](#), para 25; *Ruto & Sang* Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, [ICC-01/09-01/11-1813](#), para 19; *Kenyatta* Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, [ICC-01/09-02/11-863](#), para 11; *Ongwen* Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives, 26 March 2018, [ICC-02/04-01/15-1210](#), para. 6; *Ongwen* Decision on Defence Request for

7. None of the reasons presented in the Request satisfy these requirements. The Defence argues that the Three Reports disclosed on 7 March 2022 impact the legal grounds of the Decision, rendering it manifestly unsound. However, the Three Reports do not affect the outcome of the Decision.

8. The Three Reports do not affect the Chamber's assessments regarding the adequacy of legal framework for cooperation with Sudan or the non-criminalisation of cooperation with the Court in Sudan. Notwithstanding the security concerns expressed by the witnesses [REDACTED], this information remains insufficient to conclude that cooperating with the Court is prohibited or considered a criminal act in Sudanese law, especially when viewed in light of the facts that: (i) [REDACTED]; and (ii) Sudanese authorities have already expressly stated that such cooperation is not a criminal offense in Sudan.¹⁵

9. The legal framework assessed by the Chamber in its Decision remains valid and continues to allow the Court to access and conduct its activities in the territory of Sudan.

10. In addition, the Decision simply established that the Chamber could not prohibit the Court's activities in the territory of Sudan, as there was an adequate framework in place (including Resolution 1593 of the United Nations' Security Council and the Cooperation Agreement of 10 May 2021),¹⁶ and that the Chamber had no power to prohibit the parties and participants in the case from undertaking investigative measures and missions in Sudan.¹⁷ The Request did not provide any grounds to alter this finding.

11. The arguments presented in the Request, therefore, fail to provide compelling reasons justifying reconsideration of the Decision.

Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, [ICC-02/04-01/15-1259](#), paras. 12-13.

¹⁵ Registry's Second Report on the current status of cooperation with the Republic of Sudan, [ICC-02/05/01/20-496](#), para. 23.

¹⁶ Decision, para. 17.

¹⁷ [REDACTED].

Disclosure of the Three Reports

12. As instructed by the Chamber,¹⁸ the Prosecution provides its explanation regarding the timing of its disclosure of the Three Reports.

13. [REDACTED],¹⁹ [REDACTED]²⁰ [REDACTED].²¹ The Prosecution included this information in support of its application for in-court protective measures for its witnesses on 25 February 2022.²² [REDACTED],²³ the Prosecution immediately disclosed this information on 7 March 2022.

14. The information contained in the Three Reports pertains to highly sensitive, security-related matters concerning the Prosecution's witnesses.²⁴ In the Prosecution's assessment, it bears no connection to the events relevant to the charges, is of a purely personal and operational nature, and relates predominantly to the Prosecution's protection obligations under article 68(1) of the Rome Statute.²⁵

15. Furthermore, the Prosecution did not assess²⁶ this information to be *prima facie* material to the preparation of Defence warranting its disclosure, since, as explained above, it does not appear relevant to, nor does it affect, the issue of the framework guiding the cooperation of the Court with Sudan nor does it indicate that such cooperation is a criminal offence in Sudan.

¹⁸ [REDACTED].

¹⁹ DAR-OTP-0220-2376.

²⁰ DAR-OTP-0220-2371.

²¹ DAR-OTP-0220-2374.

²² [REDACTED].

²³ [REDACTED].

²⁴ *Al Hasan* Public redacted version of 'Decision on a Defence motion seeking disclosure of Biographical and Security Questionnaires conducted by Prosecution investigators with [REDACTED]', 29 April 2020, [ICC-01/12-01/18-777-Red](#), para. 16. Pre-Trial Chamber I also observed, in this regard, that the Prosecution's disclosure obligations have to be balanced with its obligations to protect victims and witnesses (*Al Hasan, Version publique expurgée Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve*, 30 Septembre 2019, [ICC-01/12-01/18-460-Red2](#), para. 79).

²⁵ *Katanga & Ngudjolo*, Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, 26 November 2008, [ICC-01/04-01/07-776](#), paras. 80, 98.

²⁶ *Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses", [ICC-01/04-02/06-1330](#), para. 23.

V. RELIEF REQUESTED

16. For the foregoing reasons, the Prosecution requests the Chamber to reject the Defence's Request.



Karim A. A. Khan QC
Prosecutor

Dated this 28th day of March 2022

At The Hague, The Netherlands