



Original: English

**No. ICC-02/05-01/20
Date: 8 March 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

**Decision on Defence's request for leave to appeal the decision on the
admissibility of a video**

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

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Section**

Other

I. Procedural background

1. On 17 February 2023, Trial Chamber I (the ‘Chamber’) issued a decision on the admissibility of video (DAR-OTP-0216-0119) (the ‘video’),¹ rejecting the Defence’s objections to the admissibility of the video and recognising its admission into evidence (the ‘Impugned Decision’).²
2. On 27 February 2023, the Defence requested leave to appeal the Impugned Decision (the ‘Request’).³
3. On 3 March 2023, the Prosecution filed its response to the Request (the ‘Response’).⁴

II. Submissions

4. The Defence raises two preliminary matters. First, it notes that in a recent decision,⁵ the Chamber appears to expect the Defence to submit, in its request for leave to appeal, arguments on the merits which it expects to develop before the Appeals Chamber.⁶ The Defence requests clarification on this point, in case it has misinterpreted the Chamber’s decision;⁷ Second, the Defence requests that the Chamber refrain from reformulating the issues as identified in the Request.⁸
5. In respect of the substantive grounds, the Defence requests leave to appeal the Impugned Decision on the following two issues:

¹ Decision on the admissibility of video (DAR-OTP-0216-0119) and records of telephone calls (DAR-OTP-0216-0127, DAR-OTP-0216-0128), ICC-02/05-01/20-876.

² Impugned Decision, ICC-02/05-01/20-876, para. 63.

³ Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-876, ICC-02/05-01/20-883.

⁴ Prosecution’s response to “Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-876”, 24 February 2023, ICC-02/05-01/20-883, 3 March 2023, ICC-02/05-01/20-890.

⁵ Decision on the Defence’s request for leave to appeal two decisions requesting cooperation from the Government of Sudan, 16 February 2023, ICC-02/05-01/20-875-Conf, para. 27, *referring to* Decision on the Defence’s request for leave to appeal the Decision on the Defence’s second request pursuant to Article 87(5)(b), 29 November 2022, ICC-02/05-01/20-820-Conf, paras 18-19.

⁶ Request, ICC-02/05-01/20-883, para. 5.

⁷ Request, ICC-02/05-01/20-883, para. 5.

⁸ Request, ICC-02/05-01/20-883, para. 6.

La Chambre a-t-elle erré en fait et en droit en concluant, aux paragraphes 48 et 51-52 de sa Décision, que l'Article 55-2 du Statut ne s'appliquait pas dans les circonstances dans lesquelles la Vidéo a été obtenue ? (the 'First Issue');⁹

La Chambre a-t-elle erré en droit, au paragraphe 47 de sa Décision, dans la définition de la charge de la preuve pesant au procès sur le Bureau du Procureur en vertu de l'Article 66-2 du Statut ? (the 'Second Issue').¹⁰

6. Regarding the First Issue, the Defence contests the Chamber's finding of fact that, P-1049 (the Prosecution's investigator) did not ask P-0869 (the intermediary) for the video,¹¹ and the Chamber's finding on the law that, '[...] *l'Article 55-2 du Statut n'était pas applicable entre le BdP et l'intermédiaire P-0869, dont avait résulté la production de la Vidéo*'.¹²

7. Regarding the Second Issue, the Defence — based on the Prosecution's burden of proof under Article 66(2) of the Statute — contests the Chamber's rejection of the argument that, at the time of the events (*i.e.*, December 2019 to March 2020), the Prosecution should have known that the allegation that 'Ali Kushayb' is the same person as 'Ali Muhammad Ali Abd-Al-Rahman' would be disputed in this case.¹³

8. The Defence submits that the two issues directly and significantly affect the fairness of the proceedings and the outcome of the trial, and their immediate resolution by the Appeals Chamber will significantly advance the proceedings.¹⁴

9. The Prosecution, in its response, states that, the Chamber's recent decision on request for leave to appeal,¹⁵ contrary to what is claimed by Defence, did not set out

⁹ Request, ICC-02/05-01/20-883, para. 7. The Chamber has unofficially translated the First Issue as follows: Did the Chamber make an error of fact and law when it concluded, in paragraphs 48 and 51-52 of its Decision, that Article 55(2) of the Statute does not apply to the circumstances in which the Video was obtained?

¹⁰ Request, ICC-02/05-01/20-883, para. 7. The Chamber has unofficially translated the Second Issue as follows: Did the Chamber make an error of law, in paragraph 47 of its Decision, in the definition of the burden of proof of the Prosecution pursuant to Article 66(2) of the Statute?

¹¹ Request, ICC-02/05-01/20-883, paras 8-10, *referring to* Impugned Decision, ICC-02/05-01/20-876, paras 25, 45, 46.

¹² Request, ICC-02/05-01/20-883, para. 11, *referring to* Impugned Decision, ICC-02/05-01/20-876, paras 48, 51-52. The Chamber has unofficially translated the quoted French sentence as follows: [...] Article 55(2) of the Statute was not applicable between the OTP and intermediary P-0869, which resulted in the production of the Video.

¹³ Request, ICC-02/05-01/20-883, para. 12, *referring to* Impugned Decision, ICC-02/05-01/20-876, para. 47.

¹⁴ Request, ICC-02/05-01/20-883, para. 13-14.

¹⁵ Decision on the Defence's request for leave to appeal two decisions requesting cooperation from the Government of Sudan, 16 February 2023, ICC-02/05-01/20-875-Conf, para. 27, *referring to* Decision on

‘new conditions’ for seeking leave to appeal, and that the Chamber correctly stated that a request for leave to appeal should demonstrate an error of law, fact, or procedure made by the Chamber in its exercise of discretion in issuing the impugned decision.¹⁶

10. The Prosecution submits that neither of the issues raised by the Defence amount to an appealable issue under Article 82(1)(d) of the Statute.¹⁷ It submits that, for the First Issue, the Defence fails to identify any factual or legal error on part of the Chamber, and that the Defence’s allegations are mere disagreements with the Chamber’s findings on P-1049’s evidence, applicability of Article 55(2) of the Statute, and prevalent factual circumstances during the events in question (*i.e.*, December 2019 to March 2020).¹⁸

11. In respect of the Second Issue, the Prosecution submits that the Defence neither raises an appealable issue nor does the issue raised emanate from the Impugned Decision; the Defence merely disagrees with the Chamber’s factual — not legal — finding on the prevalent factual circumstances during the events in question (*i.e.*, December 2019 to March 2020) and fails to articulate how any alleged legal error arises from the Impugned Decision.¹⁹

12. The Prosecution further submits that the issues do not significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial, and do not require immediate resolution by the Appeals Chamber to materially advance the proceedings.²⁰

the Defence’s request for leave to appeal the Decision on the Defence’s second request pursuant to Article 87(5)(b), 29 November 2022, ICC-02/05-01/20-820-Conf, paras 18-19.

¹⁶ Response, ICC-02/05-01/20-890, para. 5.

¹⁷ Response, ICC-02/05-01/20-890, paras 6-7.

¹⁸ Response, ICC-02/05-01/20-890, paras 8-16.

¹⁹ Response, ICC-02/05-01/20-890, paras 17-19.

²⁰ Response, ICC-02/05-01/20-890, paras 20-27.

III. Analysis

13. The Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,²¹ and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Statute in relation to its Request.

14. The Chamber notes that, in its decision of 16 February 2023, it explained the test, as set out by the Appeals Chamber, for seeking leave to appeal a decision in which the Chamber has exercised its discretion.²² This decision dealt with issues of cooperation and finding of non-compliance. According to the Appeals Chamber, a chamber has the discretion whether or not to make a finding of non-compliance.²³ Such a discretionary finding can only be appealed if the party seeking leave to appeal demonstrates an error of law, fact, or procedure made by the Chamber in exercising its discretion.²⁴ In its previous decisions, the Chamber explained the requirement for seeking leave to appeal such discretionary decisions. Therefore, the Chamber was not seeking arguments on the merits expected to be raised before the Appeals Chamber.

²¹ 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.

²² Decision on the Defence's request for leave to appeal two decisions requesting cooperation from the Government of Sudan, 16 February 2023, ICC-02/05-01/20-875-Conf, para. 27, *referring to* Decision on the Defence's request for leave to appeal the Decision on the Defence's second request pursuant to Article 87(5)(b), 29 November 2022, ICC-02/05-01/20-820-Conf, paras 18-19.

²³ *See* Appeals Chamber, *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 41 (the '*Kenyatta* Judgment on a finding of non-compliance'). *See also* Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397 (OA2), para. 183.

²⁴ Appeals Chamber, *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 22. *See also* Appeals Chamber, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 80; Appeals Chamber, *Prosecutor v. Abdallah Banda Abakaer Nourain*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest, 3 March 2015, ICC-02/05-03/09-632-Red (OA5), para. 30; Appeals Chamber, *Prosecutor v. Dominic Ongwen*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 17 June 2015, ICC-02/04-01/15-251 (OA3), para. 35.

15. Further, the Chamber notes that, contrary to the Defence's claim,²⁵ at no point in paragraph 46, nor any other part, of the Impugned Decision did the Chamber state that the Defence accepted that P-1049 did not request the intermediary for the video.²⁶

16. In respect of the First Issue, the Chamber accepts the Defence's submissions that legally and factually, it relates to the interpretation and scope of application of Article 55(2) of the Statute; consequently, affecting the fair conduct of the proceedings.²⁷ The Chamber also accepts the Defence's submission that the issue of admission of the video, as evidence of the link between the accused and the alias 'Ali Kushyab', affects the outcome of the trial.²⁸

17. The Chamber also accepts that the reasons which prompted the Chamber to decide on the admissibility of the video at this stage of the proceedings,²⁹ — that it 'will provide clarity and certainty for the parties and participants, particularly the Defence' — are also reasons in favour of immediate resolution of the First Issue by the Appeals Chamber, thus materially advancing the proceedings.³⁰ Therefore, the Chamber finds that the First Issue identified for appeal by the Defence fulfils the cumulative requirements under Article 82(1)(d) of the Statute.

18. In respect of the Second Issue, the Chamber finds that, as submitted by the Prosecution,³¹ the Defence misinterprets the Impugned Decision as relieving or excusing the Prosecution of its burden under Article 66(2) of the Statute to prove the link between the accused and the alias 'Ali Kushayb'.³²

19. In the Impugned Decision, the Chamber only made a factual finding that, at no stage, during or before the events in question (*i.e.*, December 2019 to March 2020), had there been any indication in the evidence obtained or in open-source material — nor could the Prosecution have known or been aware — that the allegation that 'Ali

²⁵ Request, ICC-02/05-01/20-883, para. 10.

²⁶ Impugned Decision, ICC-02/05-01/20-876, paras 45-46.

²⁷ See Request, ICC-02/05-01/20-883, para. 14.

²⁸ See Request, ICC-02/05-01/20-883, para. 15.

²⁹ Impugned Decision, ICC-02/05-01/20-876, paras 15-16.

³⁰ See Request, ICC-02/05-01/20-883, para. 16.

³¹ Response, ICC-02/05-01/20-890, para. 17.

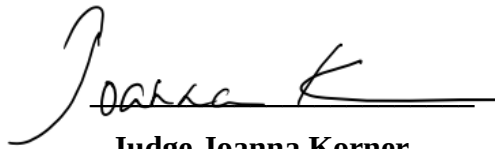
³² Request, ICC-02/05-01/20-883, para. 12.

Kushayb' is the same person as 'Ali Muhammad Ali Abd-Al-Rahman' would be disputed in this case.³³

20. The Chamber did not make any finding in the Impugned Decision regarding the Prosecution's burden under Article 66(2) of the Statute to prove the link between the accused and the alias 'Ali Kushayb'. Therefore, Chamber finds that, as submitted by the Prosecution, the Second Issue does not emanate from the Impugned Decision, and thus is not an appealable issue under Article 82(1)(d) of the Statute.³⁴

IV. Conclusion

21. For these reasons, the Chamber grants the Defence's request to appeal the First Issue identified in paragraph 5 above and rejects the Defence's request in respect of the Second Issue.

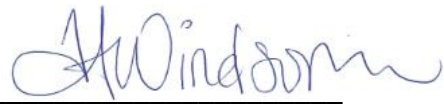


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 8 March 2023

At The Hague, The Netherlands

³³ Impugned Decision, ICC-02/05-01/20-876, paras 47.

³⁴ See Response, ICC-02/05-01/20-890, paras 17-19.