



Original: English

**No. ICC-02/05-01/20
Date: 10 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
Prosecution's bar table motion**

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

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**Unrepresented Applicants for
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The Office of Public Counsel for Victims

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Defence**

States Representatives

Amicus Curiae

REGISTRY

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Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 27 February 2023, Trial Chamber I (the ‘Chamber’) rendered its ‘Decision on the Prosecution’s bar table motion’ (the ‘Impugned Decision’).¹
2. On 2 March 2023, the Defence requested leave to appeal the Impugned Decision (the ‘Request’).²
3. On 6 March 2023, the Prosecution filed its response, opposing the Request (the ‘Response’).³
4. The Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,⁴ and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Rome Statute (the ‘Statute’) in relation to its Request.
5. The Chamber notes that the Defence limits its appeal to one particular aspect of the Impugned Decision,⁵ relating to the submission of the transcript of an alleged interview of Mr Abd-Al-Rahman by the Sudanese authorities in November 2006 and related documents.
6. The Defence formulates the following issue:

*La Chambre a-t-elle erré en droit en se fondant sur l’absence d’objection de la Défense à l’utilisation du Procès-Verbal à l’appui des déclarations liminaires du BdP pour rejeter ses objections à sa soumission en preuve par le biais de la Requête, en violation de la Règle 64-1 du RPP et de sa Décision sur la Conduite des Procédures?*⁶

¹ ICC-02/05-01/20-885-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-885-Red.

² Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-885, ICC-02/05-01/20-888.

³ Prosecution’s response to the “Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-885”, 2 March 2023, ICC-02/05-01/20-888, ICC-02/05-01/20-892.

⁴ 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.

⁵ Impugned Decision, ICC-02/05-01/20-885-Red, paras 45-48.

⁶ Request, ICC-02/05-01/20-888, para. 11. The Chamber has unofficially translated the issue as follows: Did the Chamber err in law by relying on the absence of a Defence objection to the use of the interview in support of the OTP’s opening statements to dismiss its objections to its submission into evidence, in violation of Rule 64(1) RPE and the Directions on the conduct of proceedings?

7. In formulating the issue, the Defence misinterprets the Impugned Decision. Specifically, the Defence erroneously submits that the Chamber rejected the Defence's objections to the submission of these items on the main ground that the Prosecution relied on it in its opening statements and that the Defence did not object to it at that time, whereas it did object to the use of a video of the accused.⁷ The Defence argues that the Chamber thus erred in law and deviated from the approach adopted in the Chamber's Directions on the conduct of proceedings.⁸

8. The Chamber finds that the issue does not arise from the Impugned Decision. The Chamber did not reject the Defence's objections. To the contrary, and in light of its Directions on the conduct of proceedings,⁹ the Chamber stated that it would take the Defence's objections regarding the reliability, relevance, probative value and potential prejudice into account at the judgement stage, pursuant to Article 74 of the Statute.¹⁰ As noted by the Prosecution,¹¹ the Chamber also ruled on the substance of the Defence's arguments that items related to the interview could have been submitted through witnesses.¹² Thus, although in the Impugned Decision the Chamber further noted, *obiter dicta*, that it would have been more appropriate for the Defence to raise its objections during the opening statements stage in the proceeding, this was not a determinative factor when authorising the formal submission of the evidence.¹³

9. Accordingly, the Defence has failed to identify an appealable issue. Noting the cumulative nature of the requirements under Article 82(1)(d) of the Statute,¹⁴ the Chamber hereby rejects the Defence's request for leave to appeal.

10. The Chamber notes that the Defence alternatively requests that if the submission of the interview is confirmed, the investigator's note DAR-OTP00001013 should also

⁷ Request, ICC-02/05-01/20-888, para. 6.

⁸ Request, ICC-02/05-01/20-888, paras 7-10, *referring to* the Directions on the conduct of proceedings, 4 October 2021, ICC-02/05-01/20-478, paras 27, 30-31 and 55-56 (hereinafter: 'Directions on the conduct of proceedings').

⁹ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 25.

¹⁰ Impugned Decision, ICC-02/05-01/20-885-Red, para. 48.

¹¹ Response, ICC-02/05-01/20-892, para. 6.

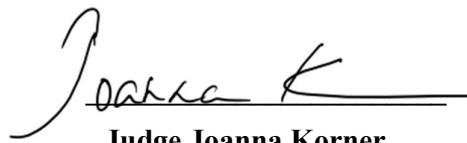
¹² Impugned Decision, ICC-02/05-01/20-885-Red, para. 48.

¹³ Impugned Decision, ICC-02/05-01/20-885-Red, para. 47.

¹⁴ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, para. 21.

be submitted into evidence, as this investigator's note is inseparable from the interview.¹⁵ The Chamber notes that the Prosecution case has formally closed on 28 February 2023.¹⁶ Moreover, the Defence will have the opportunity to request the formal submission of evidence, including the said item, during the presentation of its case. Therefore, the Chamber rejects the Defence's request to authorise the submission of investigator's note DAR-OTP00001013 at this point in time.

11. In conclusion, the Chamber rejects the Defence's Request in its entirety.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 10 March 2023

At The Hague, The Netherlands

¹⁵ Request, ICC-02/05-01/20-888, para. 15.

¹⁶ Notice of the conclusion of the Prosecution's presentation of evidence, 28 February 2023, ICC-02/05-01/20-887.