



Original: **French**

No.: ICC-02/05-01/20
Date: 3 December 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR**

v. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB")

PUBLIC DOCUMENT

Application for Leave to Appeal Decision ICC-02/05-01/20-216

Source: Mr Cyril Laucci, Lead Counsel

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Julian Nicholls, Senior Trial Lawyer

Counsel for the Defence

Mr Cyril Laucci, Lead Counsel

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta, Principal Counsel
Ms Marie O'Leary, Counsel

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Marc Dubuisson, Director, Division
of Judicial Services

BACKGROUND TO THE REQUEST

1. By a Request dated 20 November 2020, the Defence moved the Honourable Pre-Trial Chamber II to order the disclosure to the Defence, or the reclassification, of certain documents in the case record pertaining to allegations of corruption made in June 2016 by Mr David Nyekorach-Matsanga against various staff and former staff of the Office of the Prosecutor (“OTP”), and in particular the Honourable Silvia Fernández de Gurmendi, former Court judge and President (“Request”).¹
2. The Office of the Prosecutor (“OTP”) objected to the Request on 30 November 2020 (“Response”).²
3. On 3 December 2020, the Honourable Judge Salvatore Rosario Aitala, acting as Single Judge (“Honourable Single Judge”), rejected the Request (“Impugned Decision”).³
4. The Defence hereby seeks leave (“Application for Leave to Appeal”) of the Honourable Single Judge to appeal the Impugned Decision under article 82(1)(d) of the Court’s Statute (“Statute”).

PRELIMINARY REMARK

5. As a preliminary matter to the present Application for Leave to Appeal, the Defence draws attention with the greatest concern to paragraph 7 of the Impugned Decision, at which the Honourable Single Judge ascribes to it a “vague insinuation about corruption inside the Office of the Prosecutor”.⁴ The fact that the Honourable Single Judge imputes such insinuations to the Defence is an indication of his, to say the least, hasty and/or biased reading of the Request, in which the Defence made it clear – distinctly and to preclude any possible ambiguity – that it was refraining from expressing the slightest opinion on the credibility of the allegations advanced by Mr David Nyekorach-Matsanga against members and former members of the

¹ [ICC-02/05-01/20-208-Red.](#)

² ICC-02/05-01/20-215. The Response, originally registered as “Confidential”, was made public on 1 December 2020.

³ ICC-02/05-01/20-216.

⁴ ICC-02/05-01/20-216, para. 7.

OTP, and in particular the Honourable Silvia Fernández de Gurmendi.⁵ The Defence has already demonstrated the utmost reverence for the noble office of the honourable judges of the Court.⁶ This utmost respect extends *a fortiori* to the Honourable Silvia Fernández de Gurmendi, former Court judge and President. It also extends to the staff and former staff of the OTP. The Defence is particularly well placed to be familiar with and respect the principle of the presumption of innocence. Pursuant to this fundamental principle, the fact that allegations can be made against a person – irrespective of his or her status – is not a sound basis on which to formulate any opinion whatsoever on that person’s guilt. This principle applies, of course, to the Honourable Silvia Fernández de Gurmendi, whose illustrious functions for the Court underscore high moral character, impartiality and integrity in accordance with article 36(3)(a) of the Statute.

6. The Defence therefore vehemently and unequivocally refutes the Honourable Single Judge’s assertion that it made insinuations of corruption against the Honourable Silvia Fernández de Gurmendi.

7. This assertion is devoid of foundation. It is an affront to the Defence, to its unreserved respect for the office of the honourable judges of the Court, *a fortiori* its former President, and to its commitment to the fundamental principle of the presumption of innocence. It also does no justice to the Honourable Silvia Fernández de Gurmendi insofar as it intimates that the Defence could have lent credence to the allegations against her. After having been unjustly accused of and cautioned against supposed “tactics”⁷ and repeatedly prevented from exercising its prerogatives under the Court’s statutory framework,⁸ the Defence deplores that its respect for the fundamental principle of the presumption of innocence with regard to someone as eminent as the Honourable Silvia Fernández de Gurmendi is now being called into question.

⁵ [ICC-02/05-01/20-208-Red](#), para. 1.

⁶ [ICC-02/05-01/20-189](#), para. 15.

⁷ [ICC-02/05-01/20-186](#), para. 8.

⁸ [ICC-02/05-01/20-101](#), para. 7; ICC-02/05-01/20-118, para. 8; [ICC-02/05-01/20-186](#).

8. To request the disclosure of information and documents pertaining to Mr Nyekorach-Matsanga's allegations against the Honourable Silvia Fernández de Gurmendi cannot imply, nor be construed as implying, the slightest value judgment on the weight to be given to these allegations. The information and documents are being requested to enable the Defence to assess several items of evidence disclosed by the OTP, listed in footnote 3 of the Request, in which the name of the Honourable Silvia Fernández de Gurmendi appears as having participated in the OTP's activities in Sudan. This request is warranted by a number of apparent irregularities in the information available to the Defence. These irregularities include but are not limited to:

- (i) the fact that the Honourable Silvia Fernández de Gurmendi was no longer part of the OTP staff on the date the items of evidence mentioning her name were produced;⁹
- (ii) the fact that the Honourable Silvia Fernández de Gurmendi apparently took part in the decision to entrust the investigation into the allegations of corruption against her to the Independent Oversight Mechanism ("IOM") even though she was directly implicated and should thus have abstained from participating in this decision;
- (iii) the fact that the investigation into the allegations of corruption, including corruptly influencing witnesses and/or accepting a bribe as an official of the Court in connection with her official duties, was entrusted to the IOM, even though these allegations fall within the ambit of articles 70(1)(c) and 70(1)(f) of the Statute and that section 30 of the operational mandate of the IOM adopted by the Assembly of States Parties clearly states that "[t]he IOM will not investigate offences under article 70 of the Rome Statute";¹⁰ and

⁹ [ICC-01/04-01/06-3154-AnxI](#), para. 4.

¹⁰ [ICC-ASP/12/Res.6](#), section 30.

- (iv) the fact that the IOM's investigation found that the allegations of corruption were based on forged documents, and that the perpetrator was not prosecuted even though his allegations directly targeted the Honourable Silvia Fernández de Gurmendi, President of the Court at that time, and had thereby risked tarnishing the Court's image.

9. These four irregularities – which persist – require the Defence to exercise diligence in order to obtain all the documents and information requested *qua* potentially exculpatory documents that may call into question the credibility of the evidence, listed in footnote 3 of the Request, on which the OTP chose to rely in the case at bar. That is what the Defence endeavoured to do by way of its Request under article 67(2) of the Statute. Its reasons, based on article 67(2) of the Statute, were therefore legitimate and did not allow for a conclusion that the Defence thus lent credence to the allegations of corruption against the Honourable Silvia Fernández de Gurmendi.

10. The Defence therefore prays the Honourable Single Judge, in the decision that he will render on the present Application for Leave to Appeal and irrespective of whether or not it is granted, to do justice to the Defence as it has never endorsed the allegations made by Mr Nyekorach-Matsanga against the Honourable Silvia Fernández de Gurmendi, on which it expressly stated at paragraph 1 of its Request¹¹ that it did not wish to opine. For the purposes of this clarification, the Defence asks that the present Application for Leave to Appeal be decided by the Honourable Single Judge, author of the Impugned Decision, in accordance with rule 7(2) of the Rules of Procedure and Evidence.

CLASSIFICATION

11. Pursuant to regulation 23 *bis*(2) of the Regulations of the Court (RoC), the present Application for Leave to Appeal is registered as “Public”, in concordance with the classification of the Impugned Decision.

¹¹ [ICC-02/05-01/20-208-Red](#), para. 1.

APPLICATION FOR LEAVE TO APPEAL

12. Lead Counsel hereby respectfully requests the Honourable Single Judge to grant leave to appeal the Impugned Decision under article 82(1)(d) of the Statute.

13. In accordance with article 82(1)(d) of the Statute, leave to appeal a decision may be granted provided that the two cumulative conditions laid down in that article are satisfied: (1) the impugned decision involves “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”; and (2) “in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”¹² Lead Counsel limits this Request to laying out the reasons for which he considers that those two criteria are satisfied, without developing the grounds of appeal he intends to submit to the Honourable Appeals Chamber should he be granted the leave requested.

ISSUE RAISED BY THE IMPUGNED DECISION

14. The Defence has duly taken note of the information at paragraph 9 of the Impugned Decision, according to which the documents sought are not in the record of either the case at bar or of the situation, and their reclassification is not within the remit of the Honourable Pre-Trial Chamber II. The Defence had therefore mistakenly inferred from the relation between Mr Nyekorach-Matsanga’s allegations and the situation in Darfur that the documents sought must have been entered into the record of this situation and/or of one and/or another of the cases pertaining thereto. The Impugned Decision could have been limited to this response only and would not have been the subject of this Application for Leave to Appeal.

15. Instead, the Impugned Decision also makes a determination at its paragraph 7 on the analysis of the relevance for the Defence of the information sought and considers that

¹² [ICC-01/04/168](#), para. 8.

the Defence provides no cogent argument showing that any of the categories of documents could reasonably be expected to contain information relevant to the defence of the suspect in the case at hand. The Defence's claim that they might cast doubt on the credibility of a number of video recordings of meetings between members of the Office of the Prosecutor and representatives of the Sudanese authorities that took place in 2007 is entirely speculative and unsubstantiated. The Defence was expected at the very least to identify which parts of the exhibits in question could potentially be tainted by the supposed illegal or unethical conduct of some members of the Office of the Prosecutor and would have had to explain how these videos could affect the defence of the suspect.¹³

16. This paragraph of the Impugned Decision suggests that, by seeking the disclosure of evidence in the OTP's possession, the Defence bears the burden of proving – according to some unspecified standard of proof – that the evidence requested is relevant to its strategy. This aspect of the Impugned Decision runs counter to the Court's settled case law, which has established that the Defence has "absolute entitlement"¹⁴ to the disclosure of evidence that is potentially exculpatory and/or may affect the credibility of prosecution evidence. The Honourable Appeals Chamber has made clear that the right of the Defence to receive potentially exculpatory evidence under article 67(2) of the Statute was not contingent upon the Defence's prior revelation of its intended line of defence; that the OTP must assess the extent of its duty under article 67(2) of the Statute on the basis of "its best understanding of the defence case" and that the "timely provision by the Defence of the parameters of the information that it considers to be of an exonerating nature or its proposed lines of defence" must necessarily be taken into account by the OTP when identifying the documents to disclose under article 67(2) of the Statute.¹⁵ At paragraph 6 of its Request, the Defence had revealed its line of defence in relation to the information and documents sought by indicating that they were "[TRANSLATION] necessary to analyse the documents mentioned at paragraph 3 [...] and their possible implications in the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman". The link with the credibility of the evidence¹⁶ listed in footnote 3 of the Request was

¹³ ICC-02/05-01/20-216, para. 7.

¹⁴ [ICC-01/04-01/06-1311-Anx2](#), para. 94.

¹⁵ [ICC-01/04-01/06-1433 OA11](#), para. 36.

¹⁶ [ICC-01/04-01/06-649](#), p. 3; [ICC-01/04-01/06-1311-Anx2](#), para. 94.

sufficiently explained at its paragraph 3 by the fact that the name of the Honourable Silvia Fernández de Gurmendi appeared therein. The Defence had no need to specify which sections of that evidence were concerned insofar as it had explained its wish to verify the credibility of those documents in their entirety. The fact that the documents requested were not in the record of the case had no bearing on the OTP's duty to disclose them under article 67(2) of the Statute.¹⁷ The Defence should not have had anything further to say,¹⁸ let alone demonstrate the relevance of the documents requested to its defence strategy any more than it already had.

17. By rejecting the Request on that ground, the Impugned Decision therefore raises the issue of the Defence's right, under article 67(2) of the Statute, to request and receive documents and information in the OTP's possession that it considers potentially exculpatory and relevant to its strategy, without having to demonstrate their relevance. The issue that the Defence intends to submit to the Honourable Appeals Chamber for its consideration is as follows: "Is the right of the Defence under article 67(2) of the Statute to receive evidence that is potentially exculpatory and/or may affect the credibility of prosecution evidence contingent upon the Defence's demonstration of the relevance of the information and documents sought and, if so, what is the standard of proof that this demonstration must meet?"

VERIFICATION OF THE CRITERIA OF ARTICLE 82(1)(D) OF THE STATUTE

18. The issue raised at paragraph 17 above would significantly affect the fair and expeditious conduct of the proceedings in the case at bar.

19. The right to receive from the OTP information and documents in its possession which the Defence identifies as potentially exculpatory and/or that may affect the credibility of prosecution evidence, without having to provide proof thereof, constitutes an "absolute entitlement"¹⁹ for the Defence and an essential safeguard of the right to a fair trial, according to the case law of the Court,²⁰ other

¹⁷ [ICC-01/05-01/08-241](#), para. 16.

¹⁸ [ICC-01/04-01/06-102](#), para. 118.

¹⁹ [ICC-01/04-01/06-1311-Anx2](#), para. 94.

²⁰ [ICC-01/04-01/06-1401](#), para. 77; [ICC-01/04-01/07-621](#), para. 3.

international tribunals²¹ and the European Court of Human Rights (“ECtHR”).²² The items of evidence in which the name of the Honourable Silvia Fernández de Gurmendi appears and which the Defence wishes to assess in the light of the documents requested are, moreover, among the documents submitted as from 2007 in support of the issuance of the first warrant of arrest for Mr Ali Muhammad Ali Abd-Al-Rahman and which underpin the holistic approach prescribed by the Honourable Appeals Chamber in its judgment on the request for release.²³ The issue raised would thus directly and significantly affect the fairness of the trial.

20. If the documents and information sought are not disclosed, the Defence will have no other choice, in order to substantiate the points set out at paragraph 8 above, than to request that the Honourable Pre-Trial Chamber II call the Honourable Silvia Fernández de Gurmendi to appear at the confirmation of charges hearing, which could significantly prolong its duration. The issue raised would therefore likewise directly affect the expeditious conduct of the proceedings.

21. The judgment that the Honourable Appeals Chamber might render on the issue raised, if the issue is submitted to it, would materially advance the proceedings in the instant case by purging for the remainder thereof a possible cause of nullity of the pre-trial proceedings due to the unwarranted limitation imposed by the Impugned Decision on the Defence’s “absolute entitlement”²⁴ to request and receive evidence in the OTP’s possession that may affect the credibility of prosecution evidence, which is an essential safeguard of the right to a fair trial.²⁵ The judgment would thus also eliminate the risk of subsequently invalidating the pre-trial proceedings.

²¹ International Criminal Tribunal for the former Yugoslavia (“ICTY”), *Prosecutor v. Krstić*, IT-98-33-A, “Judgement”, 19 April 2004, para. 180; ICTY, *Prosecutor v. Orić*, IT-03-68-T, “Decision on Ongoing Complaints about Prosecutorial Non-compliance with Rule 68 of the Rules”, 13 December 2005, para. 20.

²² ECtHR, *Jespers v. Belgium*, no. 8403/78, Report of the European Commission of Human Rights, 14 December 1981, para. 58.

²³ [ICC-02/05-01/20-177](#) OA2, para. 35.

²⁴ [ICC-01/04-01/06-1311-Anx2](#), para. 94.

²⁵ [ICC-01/04-01/06-1401](#), para. 77; [ICC-01/04-01/07-621](#), para. 3.

22. The Honourable Appeals Chamber's judgment might likewise advance the proceedings in all cases before the Court by clarifying the scope of the Defence's right to receive evidence in the OTP's possession which it identifies as potentially exculpatory and/or that may affect the credibility of prosecution evidence, in accordance with article 67(2) of the Statute. Should the Honourable Appeals Chamber uphold the Impugned Decision, the Trial Chambers would then know that the burden of proof lies with the Defence to establish the potentially exculpatory nature of the documents and information whose disclosure is requested under article 67(2) of the Statute, and the applicable standard of proof will have been clarified by the judgment. Conversely, it would be made clear that the OTP has no discretion to object to the disclosure of documents and information in its possession which the Defence requests owing to their potentially exculpatory nature and/or to the fact that they may affect the credibility of prosecution evidence under article 67(2) of the Statute, save for reasons related to the protection of witnesses, victims and other persons at risk on account of the Court's activities. All proceedings before the Court would thus benefit from the judgment that the Honourable Appeals Chamber might render on the appeal for which the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman seeks leave of the Honourable Single Judge by way of this application pursuant to article 82(1)(d) of the Statute.

FOR THESE REASONS, LEAD COUNSEL PRAYS THE HONOURABLE SINGLE JUDGE TO GRANT the Defence leave to appeal the Impugned Decision on the basis of the issue set out at paragraph 17 above.

Done in both English and French, the French version being authoritative.

[signed]

Mr Cyril Laucci
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 3 December 2020

At The Hague, Netherlands