

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-02/05-01/20
Date: 22 November 2021

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'interjeter appel de la
décision orale de rejet la Requête ICC-02/05-01/20-505", 17 November 2021,
ICC-02/05-01/20-519-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. On 12 November 2021, in an oral decision during the second status conference, Trial Chamber I (the “Chamber”) denied the Defence’s request to deem all witness statements submitted by the Prosecution in the present case as inadmissible for an alleged violation of the Court’s Information Protection Policy.¹ On 18 November 2021, the Defence sought leave to appeal the oral decision (the “Application”).² The Application should be dismissed as the issue raised for certification is not appealable and/or does not meet the requirements of article 82(1)(d) of Rome Statute.

II. CLASSIFICATION

2. This filing is classified as confidential in accordance with regulation 23bis(2) of the Regulations of the Court since it responds to a submission filed as confidential. However, there appears to be no reason either for the Application or for this response to be confidential. The Prosecution requests that both filings be reclassified as public.

III. SUBMISSIONS

3. Mr Abd-Al-Rahman seeks leave to appeal the oral decision issued by the Chamber during the second status conference. The Defence frames the issue for certification as whether the sanction for any violation of the Court’s Information Protection Policy³ depends on the Defence proving that this violation materially resulted in concrete interference with witnesses or an increased risk that such interference occurs.⁴

¹ *Abd-Al-Rahman (“Ali Kushayb”)*, Transcripts of the second status conference, 12 November 2021, TC I, ICC-02/05-01/20-T-017-CONF-ENG, lines 9-25, page 47 and lines 1-21, page 48.

² *Abd-Al-Rahman (“Ali Kushayb”)*, *Requête aux fins d’autorisation d’interjeter appel de la décision orale de rejet la Requête ICC-02/05-01/20-505*, 18 November 2021, Defence, ICC-02/05-01/20-519 (the “Application”).

³ Administrative Instruction ICC/AI/2007/001, dated 19 June 2007.

⁴ Application, para. 9.

4. First, the identified issue is not appealable. Interlocutory appeals should not be regarded as the norm and should be limited to a “few, strictly defined exceptions.”⁵ As the Appeals Chamber has stressed, “[o]nly an ‘issue’ may form the subject-matter” of an appeal under article 82(1)(d)⁶—which, accordingly, is not a means to challenge the entirety of a decision, to express dissatisfaction with its reasoning, or to pursue abstract or academic questions. Article 82(1)(d) does not permit a party simply to seek a different decision or ‘second opinion’ in preference to that rendered at first instance.

5. The issue, as presented in the Application, constitutes “merely a question over which there is disagreement or conflicting opinion.”⁷ The Defence simply disagrees with the Chamber’s conclusion that no interference with the witnesses or risk of interference was demonstrated and, therefore, the Defence’s request for exclusion of evidence is unfounded. As such, the issue is not appealable, as has been previously determined by Pre-Trial Chamber II.⁸

6. Second, the Defence mischaracterises the Chamber’s decision. The Defence claims that the Chamber failed to find that the Court’s Information Protection Policy was violated simply because it disagreed with the Defence’s suggested consequence for such finding, that is, the exclusion from evidence of all witnesses’ statements collected by the Office of the Prosecutor.⁹ Nonetheless, the Chamber did address the

⁵ *Bemba*, Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, TC III, ICC-01/05-01/08-1169, para. 25.

⁶ *Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, Appeals, ICC-01/04-168 OA3, para. 9.

⁷ *Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, Appeals, ICC-01/04-168 OA3, para. 9; *Bemba*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute...”, 18 September 2009, PTC II, ICC-01/05-01/08-532, para.17; *Abu Garda*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”, 23 April 2010, PTC I, ICC-02/05-02/09-267, para.22; *Lubanga*, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber’s “Decision on Disclosure Issues, ...”, 16 December 2008, TC I, ICC-01/04-01/06-1557, para. 30.

⁸ *Abd-Al-Rahman* (“*Ali Kushayb*”), Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (“*Ali Kushayb*”), 09 July 2021, PTC II, ICC-02/05-01/20-433, para. 18.

⁹ Application, para. 9.

Defence's other argument - whether the lack of marking would encourage a person interested in interfering with the witness in doing so¹⁰.

7. Third, the issue does not affect the fair conduct of proceedings as the "[a]pplicant cannot speculate in the abstract that the Decision causes a prejudice to the rights of the Accused in order to invoke that the fairness of the proceedings are affected."¹¹ As found by the Chamber,¹² no prejudice arises for the Defence from the alleged violation of the Court's Information Protection Policy and, therefore, the Defence's complaint is purely speculative.¹³

8. Finally, the immediate resolution of the issue will not significantly advance proceedings. The Defence itself does not insist on the Appeals Chamber imposing any procedural sanctions for the alleged violation.¹⁴ Furthermore, the Defence's assertion that it intends to re-litigate the same issue is an irrelevant factor, and does not have a bearing on the disposition of the Application.¹⁵

¹⁰ *Abd-Al-Rahman ("Ali Kushayb")*, Transcripts of the second status conference, 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG, lines 19-23, page 47; lines 19-20, page 48.

¹¹ *Situatio in the DRC*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, Appeals, ICC-01/04-168 OA3, para. 10; *Kenyatta*, Decision on the "Prosecution's Application for leave to Appeal the 'Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and ..., 11 May 2011, PTC II, ICC-01/09-02/11-88, paras. 23-27; *Bemba*, Decision on the "Prosecution's Request for Leave to Appeal the Trial Chamber's Oral Ruling...", 28 January 2010, TC III, ICC-01/05-01/08-680, para. 36.

¹² *Abd-Al-Rahman ("Ali Kushayb")*, Transcripts of the second status conference, 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG, lines 2-20, page. 48.

¹³ *Katanga*, Decision on the "Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility", 11 March 2010, TC II, ICC-01/04-01/07-1958, para. 20. *Ongwen*, Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, PTC II, ICC-02/04-01/15-150, para. 22.

¹⁴ Application, para. 10.

¹⁵ *Lubanga*, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, ...", 16 December 2008, TC I, ICC-01/04-01/06-1557, para. 25; *Kony and Otti*, Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58, 21 August 2005, PTC II, ICC-02/04-01/05-20, para. 21; *Bemba*, Decision on the prosecution and defence applications for leave to appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 26 January 2011, TC III, ICC-01/05-01/08-1169, para. 25.

IV. RELIEF REQUESTED

9. For the foregoing reasons, the Chamber should dismiss the Application in its entirety.



Karim A. A. Khan QC

Prosecutor

Dated this 22nd day of November 2021

At The Hague, The Netherlands