



Original: English

**No. ICC-02/05-01/20
Date: 2 December 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')***

Public

**Decision on the Defence's requests for leave to appeal the oral decisions on the
inadmissibility of evidence and victims' participation**

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

The Office of the Prosecutor

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Legal Representatives of Victims

Natalie von Wistinghausen
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**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Philipp Ambach

Other

1. On 22 October 2021, the Defence filed a request opposing the continued use of unsigned victims' participation forms and the 'ABC' approach adopted in the present case (the 'Defence's Victims' Participation Request').¹
2. On 2 November 2021, the Defence filed a request for the exclusion of witness statements that violate the rules of protection of confidentiality of information (the 'Defence's Request for Exclusion of Witness Statements').²
3. On 5 November 2021, the Common Legal Representatives of Victims (the 'CLRVs') responded to the Defence's Victims' Participation Request.³
4. On 12 November 2021, a second status conference was held, during which the parties and participants made further oral submissions on the aforesaid Defence requests.⁴
5. On that same day, Trial Chamber I (the 'Chamber') ruled orally on both Defence requests. In respect of the Defence's Request for Exclusion of Witness Statements, the Chamber endorsed Pre-Trial Chamber II's reasoning and rejected the Defence's request in its entirety (the 'First Impugned Decision').⁵ The Chamber also rejected the Defence's Victims Participation Request (the 'Second Impugned Decision').⁶
6. On 17 November 2021, the Defence filed a request for leave to appeal the First Impugned Decision (the 'First Request for Leave to Appeal').⁷

¹ Requête relative au processus d'admission des victimes à participer à la procédure, ICC-02/05-01/20-497.

² Requête en vertu de la Règle 64-1 du Règlement de Procédure et de Preuve, ICC-02/05-01/20-505.

³ Response to the Defence's Requête relative au processus d'admission des victimes à participer à la procédure, ICC-02/05-01/20-509.

⁴ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG.

⁵ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 47, line 9 to p. 48 line 21.

⁶ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 44, line 18 to p. 47, line 8.

⁷ Requête aux fins d'autorisation d'interjeter appel de la décision orale de rejet la Requête ICC-02/05-01/20-505, ICC-02/05-01/20-519-Conf (hereinafter: 'First Request for Leave to Appeal'). A public redacted version was filed that same day, ICC-02/05-01/20-519-Red.

7. On 18 November 2021, the Defence filed a request for leave to appeal the Second Impugned Decision (the ‘Second Request for Leave to Appeal’).⁸

8. On 22 November 2021, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the First Request for Leave to Appeal.⁹ The response was filed as confidential in accordance with Regulation 23bis(2) of the Regulations of the Court, but, as suggested by the Prosecution,¹⁰ the Chamber is satisfied that it can be reclassified as public.

9. The Prosecution did not file a response to the Second Request for Leave to Appeal. The CLRVs did not file a response to either request.

10. Article 82(1)(d) of the Rome Statute (the ‘Statute’) sets forth the following requirements for granting leave to appeal:

- a) The matter constitutes, singly or collectively, an “appealable issue”;
- b) The(se) issue(s) could significantly affect:
 - 1. The fair and expeditious conduct of the proceedings, or
 - 2. The outcome of the trial; and
- c) In the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. Article 82(1)(d) of the Statute mandates that leave to appeal should only be granted on an exceptional basis; chambers must therefore be vigilant in determining which issues truly require immediate determination.¹¹

12. The requirements under Article 82(1)(d) of the Statute are cumulative and therefore failure to satisfy one of the criteria will result in the rejection of a request for

⁸ Requête aux fins d’autorisation d’interjeter appel de la décision orale de rejet la Requête ICC-02/05-01/20-497, ICC-02/05-01/20-520.

⁹ 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, ICC-02/05-01/20-521-Conf (hereinafter: ‘Prosecution’s Response’).

¹⁰ Prosecutor’s Response, ICC-02/05-01/20-521-Conf, para. 2.

¹¹ Decision on requests for reconsideration, leave to appeal the confirmation decision and related matters (ICC-02/05-01/20-438-Conf, ICC-02/05-01/20-448, ICC-02/05-01/20-457, ICC-02/05-01/20-465, ICC-02/05-01/20-466-Conf), 15 November 2021, ICC-02/05-01/20-517, para. 19, *as first defined* in Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paras 12-13.

leave to appeal.¹² General legal principles make it clear that there is no prescribed order in which the requirements must be considered.

13. An issue is an identifiable subject or topic requiring a decision for its resolution, which in turn must be essential for the determination of matters arising in the judicial cause under examination.¹³

14. The Chamber emphasises that the fact that an issue is of general interest or that it could affect future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal.¹⁴

First Request for Leave to Appeal

15. In its First Request for Leave to Appeal, the issue¹⁵ which the Defence wants to submit to the Appeals Chamber is:

*‘la sanction de la violation constatée de la Politique de Confidentialité par le BdP requerrait-elle que la Défense apporte la preuve qu’il en résultait des interférences avec les témoins ou l’aggravation du risque de telles interférences ?’.*¹⁶

16. The Defence argues that this issue is likely to significantly affect the fairness of the proceedings because protecting the confidentiality of witness statements is central to fair trial guarantees.¹⁷ The Defence further submits that the immediate resolution of the issue by the Appeals Chamber will advance the proceedings to the extent that, whatever its determination, it will settle once and for all, the issue of the consequences

¹² 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 (hereinafter: ‘*Yekatom and Ngaïssona* Decision on leave to appeal’).

¹³ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734, para. 13, referring to Appeals Chamber, *Situation in the Democratic Republic of the Congo*, 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, ICC-01/04-168 OA3, para. 9.

¹⁴ *Yekatom and Ngaïssona* Decision on leave to appeal, ICC-01/14-01/18-525, para. 20.

¹⁵ First Request for Leave to Appeal, ICC-02/05-01/20-519-Conf, para. 9.

¹⁶ For the purpose of the present decision, the Chamber provides an unofficial translation of the issue: “did the sanction for the OTP’s breach of the Information Protection Policy require the Defence to prove that it had resulted in the interference with witnesses or increased the risk of such interference?”.

¹⁷ First Request for Leave to Appeal, ICC-02/05-01/20-519-Conf, para. 10.

of the Prosecution's breach of the Court's Information Protection Policy¹⁸ and avoid the issue becoming the subject of renewed debate at trial for each witness whose statements have not been properly marked.¹⁹

17. In its Response, the Prosecution submits that the Defence's request should be dismissed as the issue raised is not appealable and the Defence mischaracterises the Chamber's oral decision. Moreover, the issue does not affect the fair conduct of proceedings and the immediate resolution of the issue will not significantly advance proceedings; therefore the requirements of Article 82(1)(d) of the Statute are not met.²⁰

18. The Chamber finds that the Defence has mischaracterised the First Impugned Decision. The Chamber did not place a burden on the Defence to prove interference with the witnesses or the risk of interference, but merely requested the Defence to clarify the factual basis for alleging such interference.²¹ As such, the issue identified by the Defence does not arise out of the First Impugned Decision. The First Request for Leave to Appeal is therefore rejected.

Second Request for Leave to Appeal

19. In its Second Request for Leave to Appeal, the Defence seeks leave to appeal the Second Impugned Decision on two issues:

- a. The legality of the use of an application form that is not signed by the applicant.
- b. The legality of the exception made to the principle of transmitting all victims' participation forms to the parties pursuant to Rule 89(1) of the Rules of Procedure and Evidence (the 'Rules'), given the limited number of applications received and the need to ensure the protection of victims under Article 68(1) of the Statute, as defined by the Appeals Chamber.²²

¹⁸ Administrative Instruction ICC/AI/2007/001, dated 19 June 2007.

¹⁹ First Request for Leave to Appeal, ICC-02/05-01/20-519-Conf, para. 11.

²⁰ Prosecution's Response, ICC-02/05-01/20-521-Conf, paras 4-8.

²¹ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 41, line 24 to p. 42, line 11.

²² Second Request for Leave to Appeal, ICC-02/05-01/20-520, paras 3-4, *referring to* Appeals Chamber, *The Prosecutor v. Mahamat Said Abdel Kani*, Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled "Decision establishing the principles applicable to victims' applications for participation", 14 September 2021, ICC-01/14-01/21-171 OA2, paras 49-67.

20. The Defence contends that both issues are of such a nature as to affect the fair conduct of the proceedings. The Defence further avers that the immediate resolution of both issues by the Appeals Chamber will advance the proceedings in that, regardless of the outcome, it will definitively resolve the issues of the legality of the use of unsigned application forms and the legality of the procedure of admission of participating victims and will thus definitively rule out the risk of a subsequent annulment of these procedures.²³

21. The Chamber is satisfied that the Defence has failed to identify a specific factual and/or legal error with regards to the two issues it formulated, which the Chamber recalls is a prerequisite for the identification of an appealable issue.²⁴ The Chamber finds that there is no requirement in the Court's legal texts that mandates the signature of victims' application forms, therefore the issue does not have any impact on the fairness and expeditiousness of the proceedings or the outcome of the trial. Moreover, the Chamber finds that, with regard to the second issue, the Defence merely disagrees with the Chamber's oral ruling, which was not based on the number of applications received but on the nature and scope of the charges in the present case.²⁵ The Second Request for Leave to Appeal is therefore rejected.

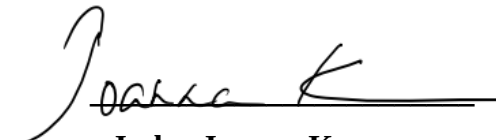
22. For these reasons, the Chamber:

- i. rejects the First and Second Requests for Leave to Appeal, and
- ii. instructs the Registry to reclassify filing ICC-02/05-01/20-521-Conf as public.

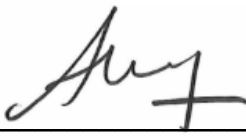
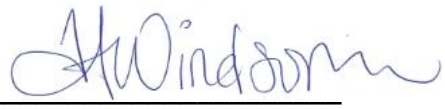
²³ Second Request for Leave to Appeal, ICC-02/05-01/20-520, paras 6-10.

²⁴ Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the 'Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire I « on three applications for leave to appeal » (ICC-02/11-01/11-307) et plus précisément de la décision de refus d'autoriser la défense à interjeter appel de la « Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court » (ICC-02/11-01/11-286-Conf), 7 February 2013, ICC-02/11-01/11-389, para. 28. *See also* Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on three applications for leave to appeal, 29 November 2012, ICC-02/11-01/11-307, para. 70.

²⁵ Transcript of hearing, 12 November 2021, ICC-02/05-01/20-T-017-Red-ENG, p. 46 lines 15 to 23.


Judge Joanna Korner

Presiding Judge


Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

Dated this 2nd day of December 2021

At The Hague, The Netherlands