

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/20

Date: 2 February 2022

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

**Observations on Defence “Requête aux fins d’autorisation d’interjeter appel
de la décision ICC-02/05-01/20-561-Conf”**

Source: The Common Legal Representatives of Victims

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

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I. Introduction

1. The Common Legal Representatives of Victims ("CLRV") files these limited observations on the Defence of Mr Abd-Al-Rahman's ("Defence") "Requête aux fins d'autorisation d'interjeter appel de la décision ICC-02/05-01/20-561-Conf".¹
2. In the CLRV's respectful submission, the Request should be dismissed for failure to satisfy the cumulative criteria for grant of leave to appeal a Chamber's decision under Article 82(1)(d) of the Rome Statute ("Statute").
3. The CLRV also notes that it does not share the views expressed in the Request that the safety and security of the victims in the present case are placed in jeopardy by the purported issues identified in the Request.
4. This filing is submitted confidentially, as it addresses a filing so classified.²

II. Procedural History

5. The relevant procedural history in respect of the Request is set out in Trial Chamber I's "Decision on Defence submissions on cooperation with Sudan",³ against which the Request has been filed.

III. Applicable Law

6. Article 82(1) of the Statute provides in relevant part that: *"Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."*

¹ 28 January 2022, ICC-02/05-01/20-566-Conf ("Request") ; public redacted version [ICC-02/05-01/20-566-Red](#).

² Regulation 23 bis (2) of the Regulations of the Court.

³ 21 January 2022, ICC-02/05-01/20-561-Conf ("Decision") ; public redacted version [ICC-02/05-01/20-561-Red](#), paras 1-15.

IV. Submissions

7. In the view of the CLRV, the seven questions articulated in the Request constitute mere disagreements with or a misunderstanding of the Decision's findings and determinations, or otherwise do not properly identify an alleged error in the Decision. These questions accordingly do not qualify as appealable issues under the framework of Article 82(1)(d) of the Statute.⁴
8. In light of this, and for sake of brevity and efficiency, the CLRV will only engage with the additional elements of the Article 82(1)(d) test where the CLRV considers it will be of assistance to the Trial Chamber.
9. In respect of the first question identified in the Request,⁵ namely, whether the Decision failed to provide a reasoned decision, the Defence position is without merit. The Decision is clear, detailed, cogently reasoned and engages with the core of the Defence's arguments spread across various written filings and oral submissions; it is not necessary for a decision to recall or specifically address the entirety of the minutia of a party or participant's submissions.
10. As regards Question 2, and even presuming that the question constitutes an appealable issue,⁶ the Request fails to articulate how any of Mr Abd-Al-Rahman's enumerated fair trial rights under Article 67(1) of the Statute would be *significantly* imperilled in the event the Decision erred in respect of the question of whether the right to a fair trial under Article 67(1) *also* includes respect for other provisions of the Statute.⁷ While the Request asserts that such an error is naturally likely to have an appreciable effect on the fair conduct of the proceedings,⁸ the Request does not demonstrate how, if all of the fundamental rights listed in Article 67(1) are adequately respected, an insufficiently fair trial could result.

⁴ See 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, [ICC-01/04-168](#) OA 3, 13 July 2006, para. 9.

⁵ Request, p. 3.

⁶ See para. 7 *supra*.

⁷ Request, para. 5.

⁸ *Id.*, para. 6.

Further, the Request's submissions under Question 2 are speculative, as there is nothing in the factual record suggesting any concrete violation of Articles 64(2), 64(6)(e) or 68(1) of the Statute.⁹

11. Question 3 of the Request does not constitute an appealable issue.¹⁰ The Request does not identify with sufficient specificity the alleged error committed at paragraph 23 of the Decision. Question 3 poses the matter of whether the Cooperation Agreement of 10 May 2021¹¹ fulfils the criteria of Article 4(2) of the Statute, but does not specifically take issue with the analysis and conclusions contained at paragraphs 22 and 23 of the Decision. These paragraphs address the Defence's argument that the text of a special agreement reached between the Court and a State must include reference to Article 4(2) of the Statute. The Chamber rejected this position, and held that the existence of a special agreement may be ascertained from its purpose, scope and contents, which the Chamber determined were satisfied for the Cooperation Agreement. Question 3, as articulated in the Request, does not identify or allege any particular errors with these findings of the Decision, and thus does not constitute an appealable issue.

12. Question 4 raises the purported issue of whether the Cooperation Agreement must be registered with the UN to be valid.¹² The Chamber answered this question in the negative.¹³ The Request's submissions in support of Question 4 are problematic and confirm that the question does not qualify as an appealable issue. First, the Request complains that paragraph 25 of the Decision contains grounds that were not raised in the underlying oral or written proceedings.¹⁴ The Chamber is not restricted to the parties and participants submissions when determining an application. It is a party or participant's responsibility to raise all relevant arguments in its application to the Chamber; failure to do so does not preclude a Chamber from addressing such matters in its decision, nor does such

⁹ Request, para. 5.

¹⁰ *Id.*, para. 7.

¹¹ See ICC-02/05-01/20-481-Conf-AnxA ("Cooperation Agreement").

¹² *Id.*, para. 8.

¹³ Decision, para. 25.

¹⁴ Request, para. 8.

reference and reliance by a Chamber constitute, by itself, an appealable error. Second, the Request misunderstands the Chamber's determinations at paragraph 25 of the Decision, and asserts that the Decision limits its analysis and findings to a purported obligation on the Court to register international agreements, to which it is a party, with the UN. The Decision addresses both the Court *and* Sudan's purported registration obligations. Specifically, the Decision held that "there is no obligation to register agreements concluded between the Court and States with the UN Secretariat", following from the Decision's analysis of the Vienna Convention on the Law of Treaties (1969), Charter of the UN, and Article 14 of the Negotiated Relationship Agreement between the Court and the UN. The Decision's finding of "no obligation" refers to both the Court *and* States that have reached an agreement with the Court. Third, and connected to the noted misunderstanding, the Request asserts that the Decision failed to take into consideration the Defence's arguments as to Sudan's registration obligations arising from Article 102(1) of the UN Charter and Article 81(1) of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 21 March 1986 ("Second Vienna Convention"), to which Sudan is a signatory. As previously submitted,¹⁵ a Decision need not specifically refer to each and every discrete argument raised by a party or participant. Further, as explained above, the Chamber's analysis of Article 102(1) of the UN Charter encompassed both the purported registration obligation of the Court *and* that of States. Lastly, in respect of the Second Vienna Convention, the Request neglects to explain how the Decision would have erred by failing to consider a convention that the Defence acknowledges is both not in force and which Sudan has not ratified.¹⁶ For all of the above reasons, Question 4 does not constitute an appealable issue under Article 82(1)(d) of the Statute.

13. Under Question 5, the Request raises the matter of whether the Cooperation Agreement is properly comparable to other technical agreements concluded by

¹⁵ See para. 9 *supra*.

¹⁶ ICC-02/05-01/20-485-Red, fn. 42.

the Court. This purported issue does not satisfy the test for leave to appeal as, *inter alia*, the Request fails to demonstrate how its “immediate resolution by the Appeals Chamber may materially advance the proceedings”. The first two sentences of paragraph 26 of the Decision contain the operative findings of the Chamber,¹⁷ whereas Question 5 arises only from the third and final sentence of the paragraph.¹⁸ Even presuming the Appeals Chamber accepts the Defence position,¹⁹ this could not alter the Decision’s primary determination that the Defence failed to provide any legal basis for its claim that the confidential classification of the Cooperation Agreement impacts its status as an international convention. As a resolution of Question 6 in the Defence’s favour would not advance or otherwise impact the proceedings, the purported issue does not satisfy the requirements of Article 82(1)(d) of the Statute.

14. Under Question 6, the Request proposes the following issue:- is the Decision compatible with the Chamber’s responsibilities under Articles 64(2), 64(6)(e) and 68(1) of the Statute. While this purported issue is framed as an alleged error of law, the submissions in support of Question 6²⁰ reveal it is instead a mere disagreement with the Decision’s factual determination that no evidence has been placed before the Chamber calling into question the validity of the Sudanese authorities’ confirmation of the decriminalisation of cooperation with the Court under Sudanese law.²¹ The Request’s additional submissions in respect of reports of arrest, torture and executions carried out under the previous regime in Sudan against persons alleged to have cooperated with the Court (and dating no more recently than March 2014),²² while concerning in and of themselves, are irrelevant to the current status of Sudanese criminal law. Question 6, accordingly, does not

¹⁷ Decision, para. 26 (“The Chamber also finds that the Defence provides no legal basis for its assertion that the mere confidential classification of the Cooperation Agreement in any way alters its status as an international convention. It is not submitted by the Defence that either of the signatories are denying the legal validity of, or are refusing to implement, the Cooperation Agreement.”).

¹⁸ *Id.*, para. 26 (“As a matter of practicality, the Court often concludes confidential cooperation agreements with States on varied matters, such as witness protection.”).

¹⁹ Request, para. 9.

²⁰ *Id.*, para. 10.

²¹ Decision, para. 40.

²² Request, fns 12, 13.

constitute an appealable issue pursuant to Article 82(1)(d) of the Statute.

15. Question 7 of the Request identifies the following purported issue:- do the Chamber's powers under Article 64(2) and 64(6)(e) of the Statute allow the Chamber to suspend the Court's field activities in Sudan if necessary. The Decision answered in the negative in respect of its statutory power to order such a blanket suspension of Court-related activities.²³ The Request's submissions in support of Question 7 are speculative and built on a false premise.
16. Question 7 commences under an artificial construct that presumes the Chamber can only address the safety and security of witnesses and victims in the context of trial proceedings through the monumental step of ordering the cessation of all ICC-related field activities in Sudan.²⁴ This is not so. In the event concrete and specific issues of safety and security arise in the context of Darfur field operations that a party or participant is unable to resolve themselves or with the assistance of the Registry, a party or participant may raise the matter with the Chamber to seek specific relief. Additionally, the ultimate relief the Defence appears to seek under Question 7 – effectively a cessation of the proceedings – may be pursued, as a matter of law, via other procedural avenues that are well established in the Court's jurisprudence (and within a Chamber's powers), such as a temporary suspension of the proceedings. The Request accordingly fails to demonstrate that Question 7 involves an issue the resolution of which would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
17. As a final matter, the CLRV observes that the Request makes repeated reference to potential risks to the safety and security of victims in the proceedings in support of its submissions.²⁵ For sake of clarity, the CLRV advises that while it certainly harbours serious concerns for the safety and security of its clients arising from the present proceedings, it does not share the Defence's view that such risks

²³ Decision, para. 51.

²⁴ *Id.*, para. 12.

²⁵ Request, paras 4, 7, 10, 11, 12, 13.

arise from the issues and matters identified in the Request.

Respectfully submitted,



Natalie v. Wistinghausen



Nasser Mohamed Amin Abdalla

Common Legal Representatives of Victims

Dated this 2nd of February 2022

At The Hague, the Netherlands