



Original: English

**No. ICC-02/05-01/20
Date: 23 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')***

Public

**Decision on the Defence's request for leave to appeal the Decision on the
Prosecution's second and third requests to introduce prior recorded testimonies
under Rule 68(3)**

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

The Office of the Prosecutor

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Counsel for the Defence

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Legal Representatives of Victims

Natalie von Wistinghausen
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Legal Representatives of Applicants

Unrepresented Victims

**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

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 8 February 2022, Trial Chamber I (the ‘Chamber’) issued its ‘Decision on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3)’ (the ‘Impugned Decision’).¹
2. On 11 February 2022, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).²
3. On 17 February 2022, 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 Defence identifies one issue: whether evidence obtained in the territory of non-State parties and in the absence of an agreement between those States and the Court authorising the exercise of its functions and powers in their territory pursuant to Article 4(2) of the Statute, is inadmissible (the ‘Issue’).⁵

¹ Decision on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-588-Conf. A public redacted version was notified on that same date, ICC-02/05-01/20-588-Red.

² Requête aux fins d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-588-Conf, ICC-02/05-01/20-593.

³ Prosecution’s response to “Requête aux fins d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-588-Conf”, ICC-02/05-01/20-599-Conf. A public redacted version was notified on 18 February 2022, ICC-02/05-01/20-599-Red.

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.

⁵ Request, ICC-02/05-01/20-593, para. 5. The issue is defined in French as follows: *Le rejet des soumissions de la Défense pose la question de la recevabilité des éléments de preuve collectés sur le territoire d’États non-Parties en l’absence de convention entre lesdits États et la Cour l’autorisant à exercer ses fonctions et pouvoirs sur leur territoire en vertu de l’Article 4(2) du Statut (« la Question »).*

6. The Defence submits that the Issue is distinct from the general issue determined previously by the Chamber or the Appeals Chamber,⁶ as it relates to witnesses P-0008, P-0044, P-0105 and P-0954.⁷

7. As regards the requirements under Article 82(1)(d) of the Statute, the Defence submits that, although the Issue relates to only four witness statements, it is likely to significantly affect the expeditiousness and fairness of the proceedings.⁸ The Defence submits that a determination from the Appeals Chamber would determine the admissibility of the majority of the evidence on which the Prosecution intends to rely at trial, which was collected either in Sudan or in non-State parties.⁹

8. The Defence thus argues that an immediate resolution by the Appeals Chamber is necessary in order to avoid going forward with at trial in which the majority of the evidence could be inadmissible. The Defence further submits it would be unfair to maintain the accused under detention in such a case.¹⁰ The Defence finally submits that an immediate resolution by the Appeals Chamber would be necessary in order to determine once and for all the issue of the lack of an agreement under Article 4(2) of the Statute.¹¹

9. In its Response, the Prosecution submits that the Issue is not appealable, as it is a mere question of disagreement or conflicting opinion with the Chamber's conclusions.¹²

10. The Prosecution further submits that the Issue does not affect the fair conduct of proceedings and the Request is purely speculative and advances arguments which have been previously rejected.¹³ The Prosecution finally submits that an immediate

⁶ Request, ICC-02/05-01/20-593, para. 6. The Defence refers to: Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf, and Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 1 November 2021, ICC-02/05-01/20-503.

⁷ Request, ICC-02/05-01/20-593, para. 9.

⁸ Request, ICC-02/05-01/20-593, para. 10.

⁹ Request, ICC-02/05-01/20-593, para. 11.

¹⁰ Request, ICC-02/05-01/20-593, para. 11.

¹¹ Request, ICC-02/05-01/20-593, para. 12.

¹² Response, ICC-02/05-01/20-599-Conf, para. 5.

¹³ Response, ICC-02/05-01/20-599-Conf, paras 6-7.

resolution would not materially advance the proceedings, as the Appeals Chamber has already confirmed the Court's jurisdiction to act in the territory of Sudan.¹⁴

11. In its Request, the Defence merely rehearses the arguments made before this Chamber and the Appeals Chamber, all of which have been rejected with full reasons being given for that rejection.¹⁵ Although in identifying the Issue the Defence submits that the Issue is distinct as it refers to the statements of specific witnesses, in the instant case P-0008, P-0044, P-0105 and P-0954;¹⁶ it then makes general submissions that merely repeat arguments already rejected by this Chamber. The assertions by the Defence that the principle established by the decisions of the Trial and the Appeals Chambers is inapplicable to named witnesses is devoid of merit. In particular, when attempting to satisfy the requirements under Article 82(1)(d) of the Statute, the Defence, is forced to submit that the resolution by the Appeals Chamber of the Issue could potentially declare inadmissible the majority of the evidence to be relied on by the Prosecution during trial.¹⁷ This, however, is not the issue arising from the Impugned Decision.

12. The Defence's assertions clearly do not arise out of the Impugned Decision but are an attempt to persuade the Appeals Chamber to reverse its original decision. The Defence fails to meet the requirements under Article 82(1)(d) of the Statute, particularly since, as noted by the Chamber in the Impugned Decision,¹⁸ as regards the witnesses concerned, no submissions were made on how the purportedly insufficient legal framework could affect the reliability or probative value of the statements or associated material, or how their introduction could affect the accused's right to a fair trial.

¹⁴ Response, ICC-02/05-01/20-599-Conf, para. 8.

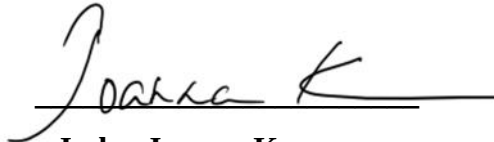
¹⁵ Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf (public redacted version notified on the same date: ICC-02/05-01/20-561-Red); Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 1 November 2021, ICC-02/05-01/20-503.

¹⁶ Request, ICC-02/05-01/20-593, para. 9.

¹⁷ Request, ICC-02/05-01/20-593, para. 11. The Defence states in French as follows: *Selon que l'Honorable Chambre d'Appel considèrera que les éléments de preuve visés sont recevables ou non et la portée limitée ou plus générale de ses conclusions, son jugement permettra de s'assurer de la recevabilité sous ce motif de la majorité des éléments de preuve sur la base desquels le Bureau du Procureur [...] entend s'appuyer pour le procès. [...] En tant que tels, ils ont pu faire l'objet en toute légalité, au regard des lois nationales concernées, de toutes les captations et interférences possibles, dans la mesure où l'absence de statut légal de la Cour sur leur territoire la privait de toute autorité, tout privilège, toute immunité, tout moyen de les en protéger.*

¹⁸ Impugned Decision, ICC-02/05-01/20-588-Conf, para. 16.

13. Accordingly, the Chamber rejects the Request.


Judge Joanna Korner

Presiding Judge


Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

Dated this 23 February 2022

At The Hague, The Netherlands