

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/05-01/20
Date: 18 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

**Public Redacted Version of “Prosecution’s response to ‘Requête aux fins
d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-588-Conf’”,
17 February 2022, ICC-02/05-01/20-599-Conf**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan QC

Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen

Mr Nasser Mohamed Amin Abdalla

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. INTRODUCTION

1. On 8 February 2022, Trial Chamber I (“Chamber”) ruled on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3)¹ (“Decision”). On 11 February 2022, the Defence sought leave to appeal the Decision² (“Application”). 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 the Rome Statute (“Statute”), as it reflects a mere disagreement with the Decision and does not affect the fair and expeditious conduct of the proceedings.

II. CLASSIFICATION

2. Even though the Application is public, this filing is classified as confidential, in accordance with regulation 23bis(2) of the Regulations of the Court, since it refers to information that is redacted in the public version of the Decision. A public redacted version will be filed.

III. SUBMISSIONS

3. Mr Abd-Al-Rahman seeks leave to appeal the Decision in relation to a single issue proposed for certification: whether evidence collected by the Prosecution in the territory of non-State Parties – [REDACTED]³ and Sudan – in the absence of an agreement pursuant to article 4(2) of the Statute, is admissible.⁴

4. In the Decision, the Chamber held that (i) a cooperation agreement can be qualified as such regardless of whether it refers to article 4(2) of the Statute;⁵ (ii) the statutory framework allows the Court to enter into *ad hoc* arrangements with non-State Parties, which, as confirmed by the Registry, was the case in relation to [REDACTED];⁶ (iii) the Court’s jurisdiction to act in the territory of Sudan was already confirmed by the Appeals Chamber;⁷ and lastly (iv) even if, *arguendo*, the legal framework in place

¹ [REDACTED] (“Decision”).

² [ICC-02/05-01/20-593](#) (“Application”).

³ [REDACTED].

⁴ [Application](#), paras. 4-5.

⁵ Decision, para. 13.

⁶ Decision, para. 13.

⁷ Decision, para. 14.

for interviews in [REDACTED] or Sudan was deemed “insufficient”, the Defence had made no submissions to suggest that this would affect the reliability or probative value of the impugned witnesses’ statements and their associated material or that the introduction of their testimonies would in any way affect the accused’s right to a fair trial.⁸

5. Firstly, the identified issue is not appealable, as it constitutes “merely a question over which there is disagreement or conflicting opinion.”⁹ The Defence simply disagrees with the Chamber’s conclusions set out in paragraph four above regarding the existence of appropriate legal framework to allow for the Court’s activities in both Sudan and [REDACTED] at the relevant time, regardless of express mention to article 4(2) of the Statute. As such, the Application only repeats an issue already resolved by the Chamber, without demonstrating that the alleged issue amounts to an appealable issue within the meaning of article 82(1)(d).¹⁰

6. Second, and in any event, 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, there was no violation of the statutory framework by the Court’s activities in either [REDACTED] or Sudan at

⁸ Decision, para. 13.

⁹ *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 on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 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, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, TC I, [ICC-01/04-01/06-1557](#), para. 30.

¹⁰ Decision, paras. 9-17.

¹¹ *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. 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 Establishing a Calendar for Disclosure' (ICC-01/09-02/11)", 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 Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009", 28 January 2010, TC III, [ICC-01/05-01/08-680](#), para. 36; *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.

the time of the witnesses' interviews and, even if that was the case, no prejudice was demonstrated by the Defence to allow for any intervention.¹² Therefore, the Defence's complaint is purely speculative.

7. Third, the issue also does not affect the expeditious conduct of the proceedings. The issue related to the Court's ability to conduct activities in the territory of Sudan has been litigated by the Defence before.¹³ As determined by the Appeal's Chamber, "[i]t is prejudicial to the expeditiousness of proceedings to advance arguments which have been previously rejected".¹⁴

8. Fourth, immediate resolution of the issue by the Appeals Chamber would not materially advance the proceedings. As noted in the Decision in relation to Defence's suggestion of an absence of a legal framework for the Court to operate or investigate in Sudan, the Court's jurisdiction to act in the territory of Sudan as of 31 March 2005, has been confirmed by the Appeals Chamber.¹⁵ Contrary to the Defence assertions,¹⁶ the Defence has not established that the issue proposed for certification is materially different to the jurisdictional issue that has already been disposed of by the Appeals Chamber.

9. The Defence's assertion that it intends to re-litigate the same issue¹⁷ is an irrelevant factor, and does not have a bearing on the disposition of the Application.¹⁸

¹² Decision, para. 16.

¹³ Decision on Defence submissions on cooperation with Sudan, [ICC-02/05-01/20-561-Red](#), paras. 17-18. *See also*, Confirmation decision ([ICC-02/05-01/20-433-Corr](#), paras. 17-18), in which the Pre-Trial Chamber II rejected the Defence's leave to appeal its decision on several procedural measures, including Sudan's obligation to cooperate with the Court and the legality of the Court's activities in the territory of Sudan ([ICC-02/05-01/20-413](#)).

¹⁴ *Ruto & Sang* Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-01/11-44)", 2 May 2011, PTC II, [ICC-01/09-01/11-74](#), para 35.

¹⁵ Decision, para. 14. Judgement on the jurisdictional challenge, [ICC-02/05-01/20-503](#), paras. 75, 77-80.

¹⁶ [Application](#), para. 8.

¹⁷ [Application](#), para. 12.

¹⁸ *Lubanga* Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, TC I, [ICC-01/04-01/06-1557](#), para. 25; *Kony & 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. CONCLUSION

10. For the foregoing reasons, the Defence fails to demonstrate that the issue proposed for certification meets the criteria in article 82(1)(d) of the Statute and, therefore, the Chamber should dismiss the Application in its entirety.



Karim A. A. Khan QC
Prosecutor

Dated this 18th day of February 2022

At The Hague, The Netherlands