

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **7 April 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

**Prosecution’s Consolidated Response to the Defence Requests to Exclude
Witnesses P-0903 (ICC-02/05-01/20-659-Red) and P-0990 (ICC-02/05-01/20-661-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
Ms Nazhat Shameem Khan
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

Introduction

1. The Defence requests to exclude Prosecution witnesses P-0903¹ and P-0990² from testifying should be dismissed. They are wrong in principle. While there is no legal obligation under rule 64(1) for the Trial Chamber to determine such challenges at this stage, let alone to carry out the kind of assessment implied by the Defence, the Prosecution nonetheless agrees that the Chamber can and should rule on this matter now. In doing so, it should confirm that the Prosecution is entitled to continue its investigation after the confirmation of charges, and that it acted properly in this case. The Chamber will exercise such control as may be necessary over the witnesses' testimony, in the ordinary course of its functions.

Classification

2. This response is filed confidentially in accord with the status of the P-0990 Request, for which as yet no public redacted version has been filed. As soon as the Defence files a public redacted version, the Prosecution requests that this response is re-classified as public.

Submissions

3. Neither the P-0903 nor the P-0990 Request properly states the applicable law. As the following paragraphs show, they misinterpret both the content of rule 64(1) and the case-law upon which they rely, with regard to the conduct of the Prosecution's investigation. They fail to show any legal support for their view that, as a matter of law, "there is a cut-off date" from which the Prosecution may no longer identify witnesses to be called at trial,³ other than those deadlines set by the Trial Chamber in the course of its functions—with which the Prosecution fully complied. There is no basis to suggest that, in this regard, each witness "must be looked at on its own

¹ ICC-02/05-01/20-659-Red ("P-0903 Request").

² ICC-02/05-01/20-661-Conf ("P-0990 Request").

³ ICC-02/05-01/20-T-026-CONF-ENG ET, p. 90:10-11. *See also* P-0903 Request, para. 4.

merits".⁴ As such, absent any legal basis for the relief sought, both Requests should be dismissed.

A. Rule 64(1) does not require a case-by-case advance determination on the admissibility of the evidence of each witness

4. The Defence asserts that rule 64(1) "provides that a determination on the admissibility of evidence shall be made 'at the time when the evidence is submitted to a Chamber'" and that "[a] preliminary blanket determination [...] must not prevent a case-by-case determination on each individual piece of evidence [...] pursuant to [r]ule 64(1)".⁵

5. Yet this is simply not what rule 64(1) states. Rather, it reads materially (emphasis added):

An issue relating to relevance or admissibility *must be raised* at the time when the evidence is submitted to a Chamber. [...]

6. Nothing in this provision, nor in rule 64(2), speaks to when the Chamber must *decide* such issues. Indeed, with respect to the submission of documents into evidence, the Chamber has already clearly stated that it will generally not make a "prior ruling on the admissibility of the evidence" but rather will "defer to the judgment" such matters—unless it chooses to exercise its discretion otherwise or the legal framework of the Court so requires.⁶ Similar principles may properly be applied to the calling of witnesses.

7. Since the Chamber is not even obliged to issue a determination on the admissibility of evidence at the time it is submitted, it follows that the Defence cannot claim the necessity of an advance case-by-case determination on this basis—and that, in all other respects, this is simply a bare assertion.⁷ The Defence does not even attempt to suggest that the matters raised in the Requests are similar in nature to the scope of rules 63(3), 71, or 72—matters which the Chamber has stated may be appropriate for

⁴ ICC-02/05-01/20-T-026-CONF-ENG ET, p. 90:15.

⁵ P-0903 Request, para. 7.

⁶ See ICC-02/05-01/20-478 ("Directions on the Conduct of Proceedings"), paras. 25-30.

⁷ *Contra* P-0903 Request, para. 9.

such determinations.⁸ Nor does it show any rational basis to apprehend that the Chamber's habitual control of the testimony of witnesses is insufficient or inappropriate in this case.

8. While the Prosecution agrees that a ruling by the Chamber would now be appropriate in order to address the legal misconception that has arisen, this remains entirely a matter of its discretion, within the context of the general duty to ensure the fair and expeditious conduct of the proceedings.

B. The Prosecution is not obliged to justify calling witnesses identified after the confirmation of charges, provided it complies with the deadlines set by the Chamber

9. The Defence concedes the general principle that "the Prosecutor is not barred, under the legal framework of the Court, from continuing [his] investigation post confirmation of charges when needed for [his] case and for the principal goal of determining the truth".⁹ This has been authoritatively confirmed by the Appeals Chamber in *Lubanga*—overturning a ruling that post-confirmation investigation was only permissible in "exceptional circumstances"¹⁰—which stated that:

[T]he Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth.¹¹

10. If further confirmation of this self-evident principle were required, it is only necessary to consider the potential need—for example—for the Prosecution to carry out investigations in response to issues arising at trial, such as from Defence witnesses. Likewise, the Appeals Chamber acknowledged that continued investigation may be appropriate and necessary due to external circumstances outside the Court's control, which may "result[] in more compelling evidence becoming available for the first time after the confirmation hearing".¹² As the Prosecution has previously noted, the

⁸ See Directions on the Conduct of Proceedings, para. 29 (fn. 6).

⁹ P-0903 Request, para. 4 (quoting ICC-01/09-01/11-859 ("Ruto and Sang Pre-Trial Decision"), para. 34).

¹⁰ See ICC-01/04-01/06-568 OA3 ("*Lubanga* Investigation Appeal Judgment"), paras. 45, 49, 57, 74.

¹¹ *Lubanga* Investigation Appeal Judgment, para. 52.

¹² *Lubanga* Investigation Appeal Judgment, para. 52.

evolving situation in Sudan, as well as the incidence of the global COVID-19 pandemic, may well be considered such circumstances.

11. Faced with this authority, the Defence thus relies instead on the *dictum* of a pre-trial judge in *Ruto and Sang* that the exercise of the Prosecutor's investigative discretion should in general be "diligent and professional".¹³ The Prosecution agrees, and considers that nothing in this case suggests anything to the contrary. It has met every deadline asked of it with regard to P-0903 and P-0990, nor is there any question of inadequate notice or unfair surprise. Nothing in the Statute nor the Rules requires the Prosecution to rely on the same evidence at trial as at the confirmation hearing.¹⁴

12. Nor does the Prosecution's general duty of diligence and professionalism impose any particular hurdle for the calling of witnesses, or require the Chamber to enter into such questions merely on the basis that a witness was identified by the Prosecution after the confirmation of charges. The Defence fails to identify any provision of the Statute or Rules, or any decision of the Court, which would establish such an obligation.

13. Specifically, the Defence cites only two decisions of the Court which it considers to support its claim—but when examined more closely neither of them actually does so.

14. First, the Defence refers to a decision in *Yekatom and Ngaïssona*, which it considers to be instructive in assessing "the Prosecution's diligence".¹⁵ Yet this is beside the point. While it is true that the Pre-Trial Chamber in that case declined to grant the Prosecution's request for the addition of further charges, pursuant to article 61(9) of the Statute, it made no finding that the Prosecution was not entirely within its rights to have continued investigating for that purpose—as indeed the *Lubanga* Appeals Chamber had specifically confirmed.¹⁶ Moreover, that decision turned on the

¹³ P-0903 Request, para. 4.

¹⁴ ICC-01/09-02/11-728 ("*Kenyatta* Decision"), para. 105.

¹⁵ P-0903 Request, para. 5 (citing ICC-01/14-01/18-538 ("*Yekatom and Ngaïssona* Amendment of Charges Decision", para. 18).

¹⁶ *Lubanga* Investigation Appeal Judgment, paras. 51-52.

mandatory exercise of an express discretion granted to the Pre-Trial Chamber under article 61(9), having regard to its duties under article 67(1)¹⁷—by contrast, in this case, no such discretion is engaged.

15. Second, the Defence refers to a decision in *Gicheru*, which it considers to introduce a distinction between the Prosecution's "right to continue investigating post confirmation *and even to undertake new investigative steps*" and any entitlement "to complete all investigations that were commenced before the start of the trial."¹⁸ The Defence recognises that this observation was made in the context of a Prosecution request to extend a deadline¹⁹—but, as such, this means that it is inapposite to the current case, where the Prosecution has met all applicable deadlines. It also overlooks the express recognition by the *Gicheru* Trial Chamber of the general principles set out by the Appeals Chamber in *Lubanga*.²⁰

Conclusion

16. For all the reasons above, the Chamber should dismiss the P-0903 and P-0990 Requests in their entirety.



Karim A. A. Khan QC
Prosecutor

Dated this 7th day of April 2022
At The Hague, The Netherlands

¹⁷ See e.g. *Yekatom and Ngaiïssona* Amendment of Charges Decision, para. 19.

¹⁸ P-0903 Request, para. 6 (citing ICC-01/09-01/20-218-Red ("*Gicheru* Extension Decision"), paras. 9-10, emphasis added).

¹⁹ P-0903 Request, para. 6.

²⁰ See *Gicheru* Extension Decision, para. 8.