



Original: English

**No. ICC-02/05-01/20
Date: 18 August 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 redacted version of the
Decision on the Prosecution's application to add a witness and related evidence
to its List of Witnesses and List of Evidence**

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

The Office of the Prosecutor

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**Unrepresented Applicants for
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States Representatives

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**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL HISTORY

1. On 8 September 2021, Trial Chamber I (the ‘Chamber’) set the commencement date of trial and corresponding deadlines thereto, including the deadline to disclose all evidence it intends to rely on at trial, and provide a list of witnesses (the ‘LoW’) and list of evidence (the ‘LoE’) by 5 January 2022.¹
2. On 24 December 2021, the Chamber partially granted the Prosecution’s first application pursuant to Regulation 35 of the Regulation of the Court (the ‘Regulations’) (the ‘First Decision’).²
3. On 5 January 2022, the Prosecution filed its LoW and LoE.³
4. On 11 April 2022, the Chamber issued a decision authorising the second, third and fourth Prosecution’s applications pursuant to Regulation 35 of the Regulations (the ‘Second Decision’).⁴
5. On 2 May 2022, the Chamber issued a further decision authorising a fifth Prosecution’s application pursuant to Regulation 35 of the Regulations (the ‘Third Decision’).⁵
6. On 12 July 2022, the Prosecution filed its sixth application pursuant to Regulation 25 of the Regulations in respect of P-1034 (the ‘Application’).⁶
7. On 18 July 2022, the Defence filed its response, opposing the Application (the ‘Response’).⁷

¹ Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

² Decision on the Prosecution’s request for an extension of time limit to disclose and add items to its list of evidence and list of witnesses, ICC-02/05-01/20-545-Conf.

³ Prosecution’s submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551 + Conf-Exp-Anxs 1 and 2 & Conf-Anx3 and Conf-Anx1-Red & Conf-Anx2-Red.

⁴ Decision on the Prosecution’s applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, ICC-02/05-01/20-668-Conf. A public redacted version was notified on that same date, ICC-02/05-01/20-668-Red.

⁵ Decision on the Prosecution’s fifth application seeking the authorisation to add two witnesses pursuant to Regulation 35, ICC-02/05-01/20-681-Conf. A public redacted version was notified on 10 May 2022, ICC-02/05-01/20-681-Red.

⁶ Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1034, ICC-02/05-01/20-713-Conf. A public redacted version was notified on 18 July 2022, ICC-02/05-01/20-713-Red.

⁷ Defence response to Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1034, ICC-02/05-01/20-713-Conf, ICC-

8. On the same date, the Common Legal Representative of Victims (the ‘CLR V’) filed its observations in support of the Application (the ‘CLR V Observations’).⁸

II. ANALYSIS

9. The Chamber incorporates by reference the general framework applicable to the assessment of a request for extension of a time limit pursuant to Regulation 35(2) of the Regulations.⁹

10. The history of the contact between the Prosecution and its proposed witness P-1034, as set out in the Application :

) The Prosecution became aware of his potentially relevant evidence on [REDACTED] 2021, when they conducted a “screening” interview. Notes of the interview, attached to the Application, reveal not only his ability to cover the relevant events but also that he knew the accused.

) As a result of the *coup d’état* in Sudan in November 2021, the Prosecution was unable to reach P-1034.¹⁰ The Prosecution states that “[a]t this stage this lead was therefore deprioritised” (emphasis added).¹¹ No further reasons are provided for the decision to allow other matters to take precedence over pursuing re-establishment of contact with this witness.

) Only as a result of the testimony from P-0922, [REDACTED], did the Prosecution decide to resume activities to contact P-1034. Contact was achieved on [REDACTED] 2022, but owing to logistical problems, no statement could be commenced until [REDACTED] 2022.¹²

11. The Prosecution argues that, [REDACTED], P-1034 provides critical evidence regarding crimes allegedly committed in Bindisi and surrounding areas as well as the

02/05-01/20-714-Conf. A public redacted version was notified on 20 July 2022, ICC-02/05-01/20-714-Red.

⁸ Observations on behalf of Victims on the “Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material of P-1034, ICC-02/05-01/20-716-Conf. A public redacted version was notified on 20 July 2022, ICC-02/05-01/20-716-Red.

⁹ First Decision, ICC-02/05-01/20-545-Conf, para. 3.

¹⁰ Application, ICC-02/05-01/20-713-Conf, paras 4-10.

¹¹ Application, ICC-02/05-01/20-713-Conf, para. 13.

¹² Application, ICC-02/05-01/20-713-Conf, paras 4-10.

individual criminal responsibility of the accused. The Prosecution submits that having known the accused [REDACTED], P-1034 provides detailed information related to his identification.¹³ These arguments are supported by the CLRV.¹⁴

12. The Defence argues that the Prosecution has failed to provide a full explanation of the reason for the delay when submitting the Application. It argues that the Prosecution cannot use Regulation 35 of the Regulations to reactivate leads that were wilfully de-prioritised ('left dormant' for seven months').¹⁵ The Defence further contends that the Application is misleading, when it claims that the testimony of P-0922 placed renewed focus on P-1034, as the Prosecution already had specific information in its possession since [REDACTED] 2021, when P-0922 was interviewed.¹⁶ The Defence also submits that the claim that the delay is justified by the COVID-19 pandemic is without merit, as the Prosecution clearly indicates it decided to deprioritise the lead.¹⁷ The Defence further submits that the addition of a new witness negatively affects the fair trial rights of the accused, particularly as the Prosecution case is over three months old and the trial is progressing apace.¹⁸ Lastly, the Defence argues that the addition of P-1034, in reaction to information the Prosecution submits was revealed during the cross-examination of P-0922, would be in breach of the Defence's right to cross-examine witnesses.¹⁹

13. There are good reasons, both as matter of law and practicality, for the setting of deadlines for disclosure of evidence on which the Prosecution intends to rely. As set out in the *Ntaganda* case,²⁰ the Application must be analysed bearing in mind the interests of justice and the determination of the truth. The Chamber must also bear in mind the need to balance these interests with the obligation to ensure the fairness of the proceedings. In doing so, the Chamber may consider several factors, including, *inter alia*, the time elapsed since the original deadline; the stage of the proceedings; the

¹³ Application, ICC-02/05-01/20-713-Conf, paras 3, 15-17.

¹⁴ CLRV Observations, ICC-02/05-01/20-716-Conf, paras 11-12.

¹⁵ Response, ICC-02/05-01/20-714-Conf, para. 9.

¹⁶ Response, ICC-02/05-01/20-714-Conf, para. 10.

¹⁷ Response, ICC-02/05-01/20-714-Conf, para. 11.

¹⁸ Response, ICC-02/05-01/20-714-Conf, paras 13-15.

¹⁹ Response, ICC-02/05-01/20-714-Conf, para. 16.

²⁰ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551 (hereinafter: the '*Ntaganda* Decision'), 19 January 2017, ICC-01/04-02/06-1733, para. 6.

reasons provided for not seeking the addition of evidence at an earlier stage; the evidence already before the Chamber; and the relevance and significance of the evidence to be added, including whether the new evidence would bring to light a previously unknown fact.²¹

14. The Chamber accepts in this case that there were problems caused to the investigation by the Prosecution before trial, by the nature of political events in the Sudan and extended COVID-19 restrictions. It further accepts that the nature of a case may change as the trial develops, in particular as issues become clearer and/or **new** evidence comes to light, which relates to core issues in the case and which will assist the Chamber in its determination of the truth. Such factors, militate in favour of the admission of the evidence, unless it can be shown that it will prejudice the accused's right to a fair trial.

15. However, the late addition of such evidence should be the exception rather than the rule. Therefore, it is incumbent upon the Prosecution to provide compelling reasons for the late addition of such evidence after the expiration of the deadline (in the present case on 5 January 2022).

16. In respect of the proposed witness, the Chamber finds that:

- (i) The Prosecution was aware of the existence of the witness and the nature of the evidence he could give before the expiration of the deadline.
- (ii) The Prosecution took a deliberate decision not to pursue contact with the witness for reasons that are not properly explained.
- (iii) The fact that the Prosecution was able to contact the witness so quickly after the conclusion of the testimony of P-0922, tends to suggest that, had his evidence been considered to be of such importance, a statement could have been taken at an earlier stage.
- (iv) The assertion made in the Application,²² that the Prosecution did not realise the importance of P-1034 evidence ("renewed focus") until the cross-examination of P-0922, (in respect of the argument between the proposed

²¹ *Ntaganda* Decision, ICC-01/04-02/06-1733, para. 8.

²² Application, ICC-02/05-01/20-713-Conf, para. 10.

witness and Ali Kushayb), is unpersuasive for the reasons set out in the Response.²³ Further, the Chamber notes that the issue of the identification of the accused as “Ali Kushayb” is one which has been known to the Prosecution since the confirmation proceedings.

17. The Chamber rejects the Defence’s - blanket - assertions:

- (i) That the pace of trial makes the addition of **any** new evidence a breach of the fair trial rights of the accused. Whilst the trial may be proceeding efficiently and possibly at a greater pace than has hitherto been the case for trials at this court, there are nonetheless many months to go before the conclusion of the Prosecution case. Accordingly, decisions on such applications will be based on the appropriate criteria on a case-by-case basis.
- (ii) That no applications may be based on matters raised in cross-examination. The Defence argues that, by allowing the addition of such a witness, the Prosecution would be allowed to vary those parameters of its case to adapt to the outcome of the Defence’s cross-examination.²⁴ No reasoning is provided for this assertion, nor for the assertion that cross-examination “would be deprived of the essential of its purpose”.²⁵

18. It is standard trial procedure that if matters are raised in cross-examination upon which the Prosecution is able to call evidence before the close of its case, then it should do so, as rebuttal evidence as a general rule is admissible if it relates to a significant issue arising from evidence presented by the Defence, which was unforeseeable.²⁶ The Chamber however recalls that leave must be sought in order for the Prosecution to present rebuttal evidence.²⁷

²³ Response, ICC-02/05-01/20-714-Conf, para. 10.

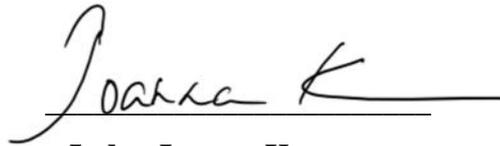
²⁴ Response, ICC-02/05-01/20-714-Conf, para. 16.

²⁵ Response, ICC-02/05-01/20-714-Conf, para. 16.

²⁶ For example, the Appeals Chamber in the International Criminal Tribunal for Former Yugoslavia (‘ICTY’) determined that rebuttal evidence may be admitted where it relates ‘to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated’. Contrarily, the Prosecution ‘cannot call additional evidence merely because its case has been met by certain evidence to contradict it’. *The Prosecutor v. Delalic et al (Celibici case)*, Judgment, 20 February 2001, IT-96-21-A, paras 273-275. See also Trial Chamber II, *The Prosecutor v. Mathieu Ngudjolo Chui and Germain Katanga*, Transcript of 24 November 2010, ICC-01/04-01/07-T-222-Red-ENG, pp. 76, line 3 *et seq.*

²⁷ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 20.

19. In respect of this Application, for the reasons set out above,²⁸ the Chamber is not persuaded that the Prosecution has provided sufficiently compelling reasons for the addition of the proposed witness and refuses the Application.

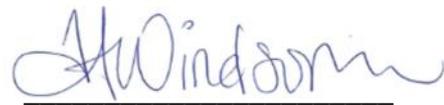


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 18 August 2022

At The Hague, The Netherlands

²⁸ See paragraph 16 above.