



Original: **English**

No.: **ICC-02/05-01/20**  
Date: **07 December 2020**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Tomoko Akane  
Judge Rosario Salvatore Aitala

**SITUATION OF DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.*  
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

**Public**  
**Prosecution’s Response to Defence Application for leave to Appeal**  
**Decision ICC-02/05-01/20-216**

**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 James Stewart  
Mr Julian Nicholls

**Counsel for the Defence**

Mr Cyril Laucci

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## Introduction

1. On 1 December 2020, the Single Judge rejected the Defence's request to access documents submitted by David Nyekorach Matsanga alleging corruption against several former and current ICC officials, and other related documents.<sup>1</sup> On 3 December 2020, the Defence sought leave to appeal the decision<sup>2</sup>. The Prosecution requests the Chamber to reject the Defence's request, as it fails to meet the test under article 82(1)(d) of Statute. The Issue does not arise from the Decision. In any event, it would not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial. Nor would the Appeals Chamber's intervention at this stage materially advance the proceedings.

## Submissions

2. The Defence's request is based on a misreading of the Decision. Accordingly, the Issue—whether the right of the Defence to receive disclosure under article 67(2) of the Statute is conditional on a demonstration of relevance by it, and if so what that standard is— does not arise from the Decision within the terms of article 82(1)(d).<sup>3</sup> In any event, the Issue does not fulfil the other requirements for leave to appeal.
3. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.<sup>4</sup> Accordingly, reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of article 82(1)(d).

---

<sup>1</sup> ICC-02/05-01/20-216 (“Decision”).

<sup>2</sup> ICC-02/05-01/20-217 (“Request”).

<sup>3</sup> Request, para. 17.

<sup>4</sup> ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

(a) The Issue does not arise from the Decision

4. The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.”<sup>5</sup>
5. The Issue identified, however, does not arise from the Decision. The Request misinterprets the findings and conclusions reached in the Decision.<sup>6</sup> At no point does the Decision remark on the Defence’s rights under article 67(2) of the Statute. Rather, it simply identifies that the Defence had not provided “any cogent argument” on why the requested documents “could reasonably be expected to contain information relevant to the defence of the suspect in the case at hand” such that access to them was necessary.<sup>7</sup> Moreover, contrary to the Defence’s suggestions,<sup>8</sup> the Chamber noted that the Prosecutor had the primary obligation to disclose potentially exonerating evidence.<sup>9</sup>
6. More importantly, the Defence conflates the general requirement to provide a founded basis to seek access to documents (which is what the Chamber’s finding is based on) with its own misinterpretation that the Single Judge had required it to disclose lines of defence.<sup>10</sup> The Decision merely determines that Defence has to provide a basis for seeking access to documents and that it

---

<sup>5</sup> ICC-01/04-168 OA3, para. 9. See also ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

<sup>6</sup> ICC-01/04-01/07-1732, para. 18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35.

<sup>7</sup> Decision, para. 7.

<sup>8</sup> Request, para. 16.

<sup>9</sup> Decision, para. 8.

<sup>10</sup> Request, paras. 15-16.

had failed to do so in this case.<sup>11</sup> The Decision did not ask the Defence to anticipate and disclose specific lines of defence.<sup>12</sup>

7. In addition, the Defence argues that the list of documents provided in its initial request was sufficient to demonstrate a basis for granting access.<sup>13</sup> contradicting the findings made, requiring the Defence to at least identify parts of the exhibits which were potentially tainted or could affect the defence of the suspect.<sup>14</sup> This, however, is a mere disagreement with the Decision.<sup>15</sup> That alone does not constitute an appealable issue.
8. The Defence also incorrectly suggests that the Decision set out a “unspecific” standard for disclosure requests made to the Prosecution,<sup>16</sup> when the Decision clearly set out the Prosecution’s obligations regarding disclosure.<sup>17</sup>
9. Furthermore, contrary to the Defence’s arguments, the Single Judge did not require the Defence to express its views on the credibility of the allegations of corruption made by David Nyekorach Matsanga.<sup>18</sup> This claim is based on a misunderstanding of the Decision.
10. For the reasons above, the Issue is misconceived and does not arise out of the impugned Decision. Accordingly, the Request should be dismissed.

(b) The Issue does not significantly affect the fair and expeditious conduct of the proceedings

11. The Defence fails to demonstrate that the Issue significantly affects the fair and expeditious conduct of the proceedings.<sup>19</sup>

---

<sup>11</sup> Decision, para. 7.

<sup>12</sup> ICC-01/09-01/11-1465, para. 12. ICC-0104-0106-1433, paras. 45-51.

<sup>13</sup> Request, para. 16.

<sup>14</sup> Decision, para. 7.

<sup>15</sup> ICC-01/04-168 OA3, para. 9; ICC-02/05-02/09-267, para.22; ICC-01/04-01/07-2035, para.25.

<sup>16</sup> Request, para. 16.

<sup>17</sup> Decision, para. 8.

<sup>18</sup> Request, paras. 5-10.

<sup>19</sup> ICC-01/04-168 OA3, para. 11. The Appeals Chamber has ruled that “[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part

12. While the Defence argues that the Decision prevents it from exercising its absolute right to receive potentially exculpatory evidence,<sup>20</sup> it fails to articulate how the Defence suffered prejudice.<sup>21</sup> The Decision did not address this specific issue.
13. Moreover, the Defence's arguments alleging unfairness are speculative.<sup>22</sup> They are based solely on the alleged mention of Judge Fernandez's name on some documents, without any further context. As the Defence itself acknowledges, it needs more information to determine the relevance of such documents to the case, which is not readily apparent.<sup>23</sup> It is therefore premature to argue unfairness.
14. Likewise, submissions claiming a hypothetical impact on the fairness/expeditiousness of proceedings<sup>24</sup> do not to support a request for leave to appeal, nor is it sufficient to provide unsubstantiated arguments<sup>25</sup> or a purely general complaint<sup>26</sup>.
15. Further, regarding the expedition of the proceedings, the Defence argues that in the absence of such documents it would have no other choice than to summon Judge Fernandez to appear as a witness at the confirmation hearing, which, in its view, would delay the proceedings.<sup>27</sup> This claim is hypothetical. It is unclear why such an extreme measure would be required (especially when the Defence is yet to establish a basis for access to the documents), and assumes, without foundation, that such a request would be granted.

---

of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights".

<sup>20</sup> Request, para. 19.

<sup>21</sup> ICC-01/05-01/08-2925, para 34.

<sup>22</sup> Request, para. 19. *See* ICC-01/09-02/11-211 paras. 33 and 39; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

<sup>23</sup> Request, para. 20.

<sup>24</sup> ICC-01/04-01/07-1958, para. 20. *See also*: ICC-02/04-01/05-367, paras. 21-22.

<sup>25</sup> ICC-01/09-01/11-1154, para 26.

<sup>26</sup> ICC-01/04-01/06-2463, para. 31.

<sup>27</sup> Request, para. 20.

16. In this context, the Prosecution notes that the Decision rejecting the Defence's request allowed the expeditious conduct of the proceedings, since it ensured that resources and time should not be diverted on unsubstantiated claims. Further prolonging this litigation on appeal would delay, not expedite, the proceedings.

(d) The Issue does not significantly affect the outcome of the trial<sup>28</sup>

17. The Defence does not concretely argue or establish that the Issue also affects the outcome of the trial. While the Defence argues that a clarification of the Issue by the Appeals Chamber will assist other Chambers of this Court in general,<sup>29</sup> this is irrelevant to the question of granting leave to appeal. It is irrelevant for granting leave to appeal that the issue for which leave is sought is of general interest or that it may arise in future pre-trial or trial proceedings<sup>30</sup> or that it may have a potential impact on the jurisprudence of this Court.<sup>31</sup> The Defence has failed to establish a tangible effect on the outcome of the trial.<sup>32</sup>

(e) An immediate resolution of the Issue will not materially advance the proceedings<sup>33</sup>

18. The Defence fails to show that the Appeals Chamber's intervention, at this stage, is necessary to materially advance the proceedings. Nor is such intervention required to correct the Defence's misreading of the Decision. Contrary to the Defence's speculation,<sup>34</sup> the Decision did not limit the

<sup>28</sup> ICC-02/04-112, para. 17; ICC-01/04-01/06-1417, paras. 17-18; ICC-01/04-01/06-1473, paras. 21-22.

<sup>29</sup> Request, para. 22.

<sup>30</sup> ICC-01/04-01/06-1557, para.25; ICC-02/04-01/05-20, para. 21, ICC-01/04-135-tEN, para. 21; ICC-01/04-01/06-1191, para.11; ICC-01/05-01/08-1169, para.25.

<sup>31</sup> ICC-01/05-01/08-980, para.16.

<sup>32</sup> ICC-01/04-01/07-1958, para. 20; ICC-01/09-02/11-406, paras. 42-43.

<sup>33</sup> This requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "move forward" by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings." See ICC-01/04-168, paras. 14-15,18.

<sup>34</sup> Request, paras. 21-22.

Defence's right to disclosure. Further clarification on this point is unnecessary. Moreover, the Defence's request for appellate intervention at this stage is premature. It has not exhausted other avenues to access this information, assuming that there is some basis shown for why such access is needed.

19. Thus, a resolution of this Issue by the Appeals Chamber at this stage is not likely to assist the proceedings to "move forward".<sup>35</sup> It will only cause an unnecessary delay in the proceedings .

### **Relief sought**

20. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber rejects the Defence's Application.



---

James Stewart,  
Deputy Prosecutor

Dated this 7<sup>th</sup> day of December 2020

At The Hague, The Netherlands

---

<sup>35</sup> ICC-01/04-168, paras. 14-15,18.