



Original: English

No. ICC-02/05-01/20

Date: 12 May 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')

Public

Decision on Defence Request for Leave to Appeal Decision ICC-02/05-01/20-216

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of Victims

Ms Amal Clooney
Mr Nasser Mohamed Amin Abdalla

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Court’),¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, having regard to article 82(1)(d) of the Rome Statute (the ‘Statute’), rule 155 of the Rules of Procedure and Evidence (the ‘Rules’) and regulation 65 of the Regulations of the Court (the ‘Regulations’), issues this Decision on Defence Request for Leave to Appeal Decision ICC-02/05-01/20-216.

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute² and decided³ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’) for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004 (‘First Warrant’).⁴

2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the First Warrant pursuant to article 58(6) of the Statute,⁵ issuing a second warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, between on or about 5 to 7 March 2004 (‘Second Warrant’).⁶

¹Decision on the designation of a Single Judge, 9 June 2020, [ICC-02/05-01/07-80](#).

²Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, [ICC-02/05-56](#)).

³Decision on the Prosecution Application under Article 58(7) of the Statute, [ICC-02/05-01/07-1-Corr](#).

⁴Warrant of Arrest for Ali Kushayb, [ICC-02/05-01/07-3-Corr](#).

⁵Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”) by adding new crimes, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and [ICC-02/05-01/20-6-Red2](#)).

⁶Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, [ICC-02/05-01/07-74-Red](#)).

3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, as ordered by the Chamber,⁷ Mr Abd-Al-Rahman made his first appearance before the Single Judge.⁸

4. On 20 November 2020, the Defence filed its ‘Requête en vertu de l’Article 67-2 du Statut et/ou de la norme 23bis(3) du Règlement de la Cour’.⁹

5. On 30 November 2020, the Prosecutor responded to the Request, asking that it be rejected.¹⁰

6. On 1 December 2020, the Single Judge rejected the Request in its ‘Decision on the Defence Request for Reclassification or Disclosure of Certain Filings’ (the ‘Decision’).¹¹

7. On 3 December 2020, the Defence filed the ‘*Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-216*’ under article 82(1)(d) of the Statute (the ‘Request’).¹²

8. On 7 December 2020, the Prosecutor submitted its Response to the Defence Application for leave to Appeal Decision ICC-02/05-01/20-216 (the ‘Response’).¹³

II. SUBMISSIONS

A. Defence

9. The Defence requested leave to appeal the Decision under the provisions outlined in article 82(1)(d) of the Statute, and submitted the following issue:

⁷Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, 11 June 2020, [ICC-02/05-01/07-82](#).

⁸Transcript of hearing of Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#) (‘Initial Appearance’).

⁹Requête en vertu de l’Article 67-2 du Statut et/ou de la norme 23bis(3) du Règlement de la Cour, 20 November 2020, ICC-02/05-01/20-208-Conf. A public redacted version was filed on the same day under [ICC-02/05-01/20-208-Red](#).

¹⁰Prosecution’s response to “Requête en vertu de l’Article 67-2 du Statut et/ou de la norme 23bis(3) du Règlement de la Cour”, 20 November 2020, ICC-02/05-01/20-208-Conf, ICC-02/05-01/20-215-Conf.

¹¹Decision on the Defence Request for Reclassification or Disclosure for Certain Filings, 1 December 2020, [ICC-02/05-01/20-216](#).

¹²Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-216, 1 December 2020, [ICC-02/05-01/20-217](#).

¹³Prosecution’s Response to the Defence Application for Leave to Appeal Decision ICC-02/05-01/20-216, 7 December 2020, [ICC-02/05-01/20-223](#).

Whether the suspect's right to receive potentially exonerating evidence is conditional on the Defence showing the relevance of the items of evidence requested and, if this is the case, what then is the standard of proof for this to be established.¹⁴

10. According to the Defence, this issue arises from paragraph 7 of the Decision and constitutes a violation of the Defence's rights under article 67(2) of the Statute as well as a deviation from constant precedent.

11. The Defence submits that the right to exculpatory information is absolute, and that this conclusion is in keeping with the guarantee for a fair trial as found in the jurisprudence of this Court and other International Courts and Tribunals.¹⁵ Consequently, the Defence submits that the question raised is likely to impact on the question of fairness of the proceedings. It further argues that without this disclosure, the proceedings are likely to be more protracted since the Defence will have to call former ICC President Judge Silvia Fernandez de Gurmendi to testify during the confirmation hearing to verify aspects of information that the Defence requires.

12. The Defence submits that a decision by the Appeals Chamber will eliminate subsequent invalidation of preliminary procedures caused by undue limitations on the Defence regarding matters of disclosure. The Defence further submit that granting leave to appeal will benefit all cases coming before the Court.¹⁶

B. Prosecutor

13. The Prosecutor submits that the Defence has based its request for leave to appeal on a misreading of the Decision.¹⁷ Whether the right of the Defence to receive disclosure under Article 67(2) of the Statute is conditional on a demonstration of relevance by the Defence, and if so to what standard, does not arise from the Decision.

14. The Prosecutor further submits that the issue raised by the Defence does not affect the fair and expeditious conduct of the proceedings. This is because the Defence has predicated its arguments in this regard on a series of hypotheses that, according to the

¹⁴ [Request](#), para. 17.

¹⁵ [Request](#), para. 19 referring to. *Jespers v Belgium*, App.No. 8403/78, (Report of the European Commission of Human Rights, 14 December, 1981) para. 58.

¹⁶ [Request](#), para 22.

¹⁷ [Response](#), para. 2.

Prosecutor, have no real impact on either questions of fairness of expeditiousness of the proceedings.

15. With regard to the argument that without disclosure of the requested documents, proceedings would not be expeditious because the Defence would have to call former ICC President Judge Silvia Fernandez de Gurmendi as a witness, the Prosecutor avers this is hypothetical, as the Defence has not established the basis on which such a request could be granted.¹⁸

16. The Prosecutor further submits that the Defence argument that the granting of leave may allow the Appeals Chamber to clarify a particular point of law is not sufficient to grant a request for leave. The Prosecutor points out that the Defence must establish a tangible effect for the outcome of the present proceedings and claims that the Defence has failed to do so.¹⁹

17. Finally, the Prosecutor argues that intervention by the Appeals Chamber will not advance the proceedings. On the contrary, according to the Prosecutor, resolution of the issue by the Appeals Chamber at this stage will only cause unnecessary delay in the proceedings and thus the Prosecutor asks that this request be dismissed.

III. ANALYSIS

18. As noted, the issue identified by the Defence is whether the suspect's right to receive potentially exonerating evidence is conditional on the Defence showing the relevance of the items of evidence requested and, if this is the case, what then is the standard of proof for this to be established.

19. The Single Judge agrees with the Prosecutor that this issue does not arise from the Decision. Indeed, the Defence's right under article 67(2) of the Statute is not subject to any preconditions. As stressed in the Decision, the primary obligation to disclose potentially exculpatory evidence rests firmly upon the Prosecutor.²⁰ In principle, there should be no need for Chambers to intervene in the disclosure process. Exceptionally, the Chamber may be involved when there are doubts as to whether particular items of

¹⁸ [Response](#), para. 15

¹⁹ [Response](#), para. 17.

²⁰ [Decision](#), para. 5.

evidence are subject to disclosure.²¹ This was not the case in the present instance. Indeed, based on the information available to the Chamber, the Defence did not first approach the Prosecutor in order to obtain the documents sought, but immediately petitioned the Chamber. As such, there was no disclosure dispute for the Chamber to resolve and the Decision simply referred the Defence to the Prosecutor.

20. However, the Defence had also asked the Chamber to reclassify certain documents, which the Defence believed were filed in the record of this and other situations and which were part of an internal investigation by the Internal Oversight Mechanism. It is to this part of the Request that paragraph 7 of the Decision speaks. Indeed, when making decisions on reclassification of documents for which grounds for maintaining confidentiality still exist, the Chamber must consider whether the requesting party has demonstrated a genuine need to have access to the documents in question that could justify the (partial) lifting of confidentiality. Similarly, when the Defence asks a Chamber to use its powers under article 57(3)(b) of the Statute to assist it in gathering evidence, it is incumbent upon the Defence to demonstrate that the information in question could be necessary for the preparation of the suspect's defence.²²

21. In any event, as noted by the Defence, paragraph 7 may have been superfluous, given the fact that the Chamber was unable to locate any documents pertaining to Mr Nyekorach Matsanga's complaints in the record of the Sudan situation and that the report of the Internal Oversight Mechanism was already in the Prosecutor's possession. At any rate, it did not impose any conditions on the Prosecutor's disclosure obligations. As noted in the Decision, the Defence is entitled to all potentially exonerating evidence in the Prosecutor's possession or control.²³ The Chamber in no way abrogated this entitlement in the Decision. If the Defence still believes that it requires access to information pertaining to the facts listed in paragraph 8 of the Request, it may address a corresponding request to the Prosecutor as a preliminary step. In case of doubt or

²¹ Article 67(2) of the Statute and rule 83 of the Rules.

²² Rule 116(1)(a) of the Rule. *See, e.g.,* Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo*, Order on the Application by the Defence for Mathieu Ngudjolo requesting the Chamber to obtain the recording of a statement made by Mr Ntumba Luaba to Radio France Internationale, 30 June 2011, [ICC-01/04-01/07-3045-tENG](#), para. 15.

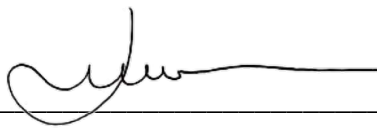
²³ [Decision](#), para. 8.

dispute about whether certain documents that are in possession of the Prosecutor are subject to disclosure, the Chamber will decide pursuant to rule 83 of the Rules.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Wednesday, 12 May 2021

At The Hague, The Netherlands