



Original: English

No. ICC-02/05-01/20

Date: 4 May 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

**Decision on the Defence request for leave to appeal the 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**

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
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 11 April 2022, the Chamber issued its ‘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’ (the ‘Decision’).¹
2. On 19 April 2022, the Defence filed a request for leave to appeal the Decision.²
3. On 25 April 2022, the Prosecution responded to the Request (the ‘Response’).³
4. The Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,⁴ and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Rome Statute (the ‘Statute’) in relation to its Request.
5. The Defence requests leave to appeal the Decision on the following issue:

The limits set by the Court’s case law, particularly that of the Appeals Chamber, to the continuation of Prosecution investigations after the confirmation of charges hearing, particularly in the absence of good reason for not completing them before that deadline and in view of the Prosecution’s uncontested negligence (the ‘Issue’).⁵
6. The Defence generally submits that the Issue significantly affects the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber would significantly advance the proceedings.⁶
7. The Defence fails to identify an appealable issue. Instead, it reiterates its previous general objections and submissions, making general and vague allegations that clearly fail to meet the criteria of Article 82(1)(d) of the Statute. Moreover, as noted by the

¹ Decision, ICC-02/05-01/20-668-Conf.

² Request, ICC-02/05-01/20-673-Conf.

³ Response, ICC-02/05-01/20-679-Conf.

⁴ Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. *See also* oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; Decision on the Defence’s request for leave to appeal the Decision on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3), 23 February 2022, ICC-02/05-01/20-605; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

⁵ Request, ICC-02/05-01/20-673-Conf, para. 2. The issue is identified as follow in French: *la question relative aux limites fixées par la jurisprudence constante de la Cour, particulièrement son Honorable Chambre d’Appel, à la continuation des enquêtes du BdP après l’ACdC, particulièrement en l’absence de motif valable pour ne pas les avoir compléter avant cette échéance et compte tenu des Négligences non disputées du BdP.*

⁶ Request, ICC-02/05-01/20-673-Conf, para. 4.

Prosecution, the Defence seeks to litigate a legal principle already determined by the Appeals Chamber, namely that in general, the Prosecution may continue investigations after the confirmation hearing.⁷

8. The Defence's submission that the Chamber did not rule on the '*négligence*' identified by the Defence and instead discussed the rhetorical question of whether there is a 'cut-off date' for the conduct of the Prosecution's investigations,⁸ misrepresents the Decision. The Decision did not ignore the Defence submissions, but addressed them bearing in mind the Appeals Chamber jurisprudence as well as its decision setting the commencement of trial on 5 April 2022, and the deadlines thereto.⁹

9. Likewise, the Defence's suggestion that the Decision makes the deadline of 5 January 2022 indefinitely extendable by virtue of Regulation 35 solely based on the travel restrictions linked to the Covid-19 epidemic and the coup d'état of 25 October 2021,¹⁰ is equally misguided. The Decision clearly states that the Chamber will evaluate an application under Regulation 35 Application 'bearing in mind the nature of the evidence for which an extension of time limit is sought, while giving due regard to the rights of the accused'.¹¹ For the same reasons, the Defence's argument that accepting the endless addition of new witnesses without restriction, violates Mr Abd-Al-Rahman's right to be tried within a reasonable time,¹² is devoid of merit.

10. The Defence asserts¹³ that as a result of the Chamber's ruling it is being deprived of the time necessary to prepare cross-examination. It provides as an example the testimony of witness P-0903. Whilst, for the purposes of this ruling, it is unnecessary to rehearse the actual sequence of events, it should be noted that at no stage did the Defence seek the remedy of an application to the Chamber that the testimony should be delayed.

⁷ Response, ICC-02/05-01/20-679-Conf, para. 7, referring to Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568 (OA3), paras. 49-56.

⁸ Request, ICC-02/05-01/20-673-Conf, para. 1.

⁹ Decision, ICC-02/05-01/20-668-Conf, para. 19.

¹⁰ Request, ICC-02/05-01/20-673-Conf, para. 1.

¹¹ Decision, ICC-02/05-01/20-668-Conf, para. 27.

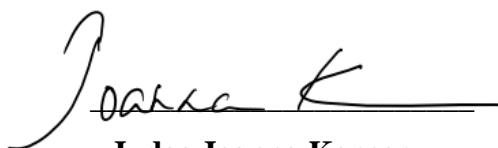
¹² Request, ICC-02/05-01/20-673-Conf, para. 7.

¹³ Request, ICC-02/05-01/20-673-Conf, para. 8.

11. Further, aside from the necessity of complying with the criteria applicable to seeking leave to appeal, the remedy for most of the complaints made by the Defence lies with the Chamber, namely an application for postponement of testimony, or at worst an application for recall of a witness, if there is late disclosure of relevant material or new information comes to light.

12. Lastly, the Chamber notes the Defence's suggestion that because it intends to re-litigate the Issue in an eventual appeal to the Article 74 judgment, the Chamber should grant leave to appeal at this juncture to save time and to prevent a circumstance where the witnesses in question appear without the parties knowing whether their evidence would ultimately be deemed admissible.¹⁴ As submitted by the Prosecution,¹⁵ this is an irrelevant factor as every motion must be dealt with on a case-by-case basis. The Chamber emphasises in this respect that parties seeking leave to appeal must abide by the criteria under Article 82(1)(d) of the Statute. Leave to appeal will not be granted by the party's notice that it will pursue further litigation at a later stage of the proceedings.

13. Accordingly, the Chamber rejects the Request.




Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 4 May 2022

At The Hague, The Netherlands

¹⁴ Request, ICC-02/05-01/20-673-Conf, para. 9.

¹⁵ Response, ICC-02/05-01/20-679-Conf, para. 13.