



Original: English

No. ICC-02/05-01/20

Date: 18 August 2020

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 the Defence Request to provide written reasoning for two oral decisions

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 James Stewart

Counsel for Mr Abd-Al-Rahman
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**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
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,¹ issues this Decision on the Defence request to provide written reasoning for two oral decisions issued during the hearing for the first appearance of the suspect (the ‘Defence Request’ or the ‘Request’).²

I. Procedural history

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Rome Statute (the ‘Statute’)³ and decided⁴ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’)⁵ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas (Darfur, Sudan) between August 2003 and March 2004.
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the first warrant of arrest pursuant to article 58(6) of the Statute⁶ by issuing a second warrant of arrest against Mr Abd-Al-Rahman⁷ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas (Darfur, Sudan) between on or about 5 to 7 March 2004.
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court.

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

² *‘Requête aux fins d’exposé écrit des motifs de deux décisions orales rendues lors de l’audience de comparution initiale’*, 18 June 2020, ICC-02/05-01/20-2.

³ Prosecutor’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).

⁴ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

⁵ Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

⁶ Prosecution’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).

⁷ Second 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).

4. On 12 June 2020, the Chamber decided to sever the case against Mr Abd-Al-Rahman from the case of *The Prosecutor v. Ahmad Muhammad Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”).⁸

5. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge.⁹ During the hearing, the Single Judge adopted a number of procedural oral decisions, including (i) a decision to proceed with the reading of the charges, notwithstanding the suspect’s waiver (the ‘First Oral Decision’);¹⁰ and (ii) a decision rejecting the suspect’s suggestion that a minute of silence be observed in memory of the victims of the situation in Darfur (the ‘Second Oral Decision’).¹¹

6. On 18 June 2020, the Defence submitted the Request.

II. Determinations of the Single Judge

7. The Single Judge notes that a party not satisfied about a particular decision (whether as to its outcome, its content and other features) has the option to request leave to appeal it, pursuant to article 82(1)(d) of the Statute, within five days of the date when that decision has been issued.

8. Since Counsel opted not to proceed with a request under article 82(1)(d) within the relevant time limit, that procedural avenue is now foreclosed. Both the First and the Second Oral Decisions are now *res judicata* and the Request must be dismissed *in limine*.

9. Nevertheless, for the sake of the public’s understanding, the Single Judge considers it necessary to make the following remarks in order to provide a full picture of the facts underlying the Request.

10. As to the First Oral Decision, the Single Judge recalls having indicated, at the hearing and immediately upon Counsel’s submission to the effect that the suspect would waive his right to have the charges read to him, his view that ‘the charges should be appropriately read anyway’; upon this remark, Counsel’s reaction was to

⁸ Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87.

⁹ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001.

¹⁰ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, page 6, lines 16- 24.

¹¹ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, page 22, lines 4-12.

state as follows: ‘*Et il en sera donc fait selon votre volonté*. Thank you’,¹² without any further comment or qualification. Counsel’s decision to request ‘reasoning’ on this matter is therefore *per se* surprising, since contradictory to his own position at the hearing.

11. Be it as it may, the Single Judge does not think it necessary to engage in lengthy discussions about the rationale underlying his view: beside and beyond the right of the suspect, the principle of publicity of the proceedings requires that the public is aware and precisely informed of the subject matter of criminal proceedings, all the more so in matters involving international crimes for which the Court has jurisdiction, and this interest cannot be trumped in order to ‘*gagner du temps*’,¹³ which is how Counsel illustrated the suspect’s position.

12. While the right to written reasoning is certainly critical in respect of those decisions which have an impact on the rights of the suspect or accused (indeed, the Statute does establish an obligation to provide reasoning for certain type of decisions), it is beyond controversy that the specific features and extent of the reasoning vary depending both on the type of decision at stake and the overall circumstances of the case. Furthermore, even in respect of written decisions having a direct impact on the rights of the suspect or accused, the obligation to provide reasoning does not apply to all the issues.

13. This is all the more true in respect of oral decisions of a strictly procedural and operational nature, which exclusively relate to the conduct of the proceedings and the effect of which does not exceed the boundaries of the hearing during which they are adopted, such as the one at stake: it is not only appropriate but also necessary that the reasoning, even when present (which may not even be the case for decisions on self-evident matters), be limited to what is strictly necessary, failing which one would run the risk of jeopardising their ultimate objective, which is to allow proceedings to run smoothly and efficiently. Accordingly, the Single Judge reiterates his view that the principle of the publicity of the proceedings allows the charges to be read during the

¹² Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-FRA, page 6, line 25.

¹³ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-FRA, page 6, line 21.

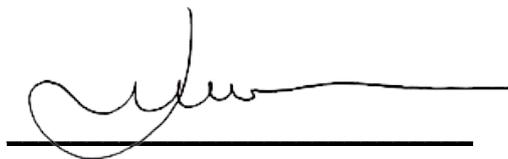
first appearance, irrespective of whether the suspect may or may not wish those charges to be read, and that no further reasoning is needed.

14. Similar considerations apply to the Defence request to provide written reasons for the Second Oral Decision. The Single Judge recalls noting at the hearing that, while ‘understand[ing] the purpose of the request’ that a minute of silence be held, the courtroom was ‘not the place’ to submit this type of requests, adding that ‘[w]e will all do this individually and at the International Criminal Court we do this very often, we always think about the victims’. The subject matter of this request also belongs to the self-evident issues for which no obligation for specific and extensive reasoning in support of its rejection is given: hearings before a Chamber are governed by strict rules as regards what topics can be addressed, by whom, at what stage and in what form; deciding, or even proposing, a minute of silence not only falls outside the object and purpose of the hearing for the first appearance (as recalled in detail at the hearing itself),¹⁴ but, more broadly, exceeds the prerogatives of the suspect and impinges upon the Chamber’s power and duty (whether through its Presiding Judge or a Single Judge) to determine how the hearing is to be conducted, no matter how worthy or otherwise important the reflection might be.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

DISMISSES the Defence Request.

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



Judge Rosario Salvatore Aitala
Single Judge

Dated this Tuesday, 18 August 2020

At The Hague, The Netherlands

¹⁴ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, page 4, lines 13-25.