

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/05-01/20**

Date: **28 August 2020**

PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)**

Public

Prosecution Response to Request for Leave to Appeal Three Decisions

Source: Office of the Prosecutor

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

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Introduction

1. Mr Abd-Al-Rahman seeks leave to appeal three decisions (“Application”),¹ namely the oral decision to proceed with the reading of the charges, notwithstanding the suspect’s waiver (“First Decision”);² the oral decision rejecting the suspect’s request that a minute of silence be observed in memory of the victims of the situation in Darfur (“Second Decision”);³ and the written “Decision on the Defence Request to provide reasoning for two oral decisions” (“Third Decision”).⁴
2. The Application should be dismissed. First, the First and the Second Decisions are *res judicata* and can no longer be appealed. Second, Mr Abd-Al-Rahman misunderstands the Third Decision and therefore fails to identify an appealable issues arising from it. Third, and in any event, the Application fails to meet the criteria for leave to appeal under article 82(1)(d) with respect to any of the three Decisions.
3. In addition, contrary to Mr Abd-Al-Rahman’s request,⁵ the Pre-Trial Chamber need not exercise its discretion, under rule 7(3), to decide on the Application *en banc*. Moreover, there is no basis to suggest that the Single Judge should recuse himself from deciding on the Application.

Submissions

4. Mr Abd-Al-Rahman argues that the three decisions “*posent ensemble les deux questions suivantes*”:

(i) l’obligation de motiver les décisions en vertu de l’Article 74-5 du Statut s’applique-t-elle à la totalité des décisions rendues par les Chambres préliminaires et de première instance, ou à certaines d’entre elles uniquement ? Dans le second cas, l’obligation de motiver s’applique-t-elle, en particulier, aux décisions pour lesquelles une Partie a expressément demandé recevoir communication des motifs ? et (ii) le délai pour interjeter appel d’une décision dont la communication des motifs est pendante commence-t-il à courir avant la communication des motifs ou son refus?
5. The Application should be dismissed for the reasons set out below.

¹ ICC-02/05-01/20-130 (“Application”).

² ICC-02/05-01/20-T-001-ENG, 6:16-24.

³ ICC-02/05-01/20-T-001-ENG, 22:4-12.

⁴ ICC-02/05-01/20-118.

⁵ Application, paras. 8-10.

(i) *The First and Second Decisions are res judicata and can no longer be appealed*

6. The First and Second Decisions are *res judicata*. Thus, the remedy of requesting leave to appeal against them is no longer available. The Single Judge held so expressly in the Third Decision.⁶ The Application seeking leave to appeal these two Decisions should therefore be dismissed *in limine*.

7. Mr Abd-Al-Rahman incorrectly argues that the terms for seeking leave to appeal the First and Second Decisions only run from the time of the notification of the Third Decision.⁷ The Third Decision does not rule on the merits of the First and Second Decisions, neither does it provide reasons for them.⁸ In fact, as acknowledged in the Application,⁹ the Single Judge expressly found that those two decisions were already *res judicata*.¹⁰ As held by Judge Pikis, “*res judicata* in its simplest form denotes that a cause of action determined on its merits or an issue incidental to the cause cannot be re-litigated by the same parties before a court of law. The parties are estopped from making the same cause or issues incidental thereto the subject of fresh litigation.”¹¹ By seeking leave to appeal the First and Second Decisions, Mr Abd-Al-Rahman inappropriately seeks to re-litigate final decisions. This course of action rejected and the Application should be dismissed *in limine* without further consideration.

(ii) *Mr Abd-Al-Rahman misunderstands the Third Decision and therefore fails to identify an appealable issues arising from it*

8. The Application with respect to the Third Decision should also be dismissed, because Mr Abd-Al-Rahman misunderstands the Third Decision.

9. The two Issues raised in the Application concern (i) the scope of the Chamber’s duty to provide reasoned decisions; and (ii) whether a deadline for seeking leave to appeal is linked to the provision of written reasons.¹² They are both predicated on the incorrect assumption that the Third Decision provided written reasons for the First and Second Decisions. However, having found that the First and Second Decisions were *res judicata*, the Single Judge in his Third Decision did not provide reasons for those two Decisions.¹³ Instead, he

⁶ Third Decision, paras. 7-8.

⁷ Application, para. 7.

⁸ *Contra*, ICC-02/11-01/15-1263, referred to in Application, fn. 14.

⁹ Application, para. 9.

¹⁰ Third Decision, paras. 7-8.

¹¹ ICC-01/04-01/06-568 OA3, 13 October 2006, para. 17. Diss. Op.

¹² Application, para. 14.

¹³ Third Decision, paras. 7-8.

merely made some “remarks [...] for the sake of the public’s understanding”.¹⁴ Mr Abd-Al-Rahman thus misunderstands the Third Decision. This has previously been considered a ground for dismissing an application for leave to appeal¹⁵ because the purported issues did not arise from the impugned decision. The same approach should be taken in this case.

(iii) *The Application fails to meet the criteria for leave to appeal with respect to any of the three Decisions*

10. In any event, the Application should be dismissed with respect to all Three Decisions, because it fails to meet the criteria for leave to appeal under article 82(1)(d).

11. Mr Abd-Al-Rahman submits that the two Issues arise from the Three Decisions *taken together*.¹⁶ He effectively identifies two general themes, which he alleges, are common to the Three Decisions. This approach falls short of demonstrating how the purported Issues arise from each individual Decision, or at least from one of them. Article 82(1)(d) requires a party seeking leave to appeal to demonstrate how a specific decision involves a “subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.¹⁷ As a result of Mr Abd-Al-Rahman’s failure to demonstrate how each Decision individually involves such an Issue, the Application should be dismissed.

12. In addition, the Application should be dismissed because it fails to comply with its burden to properly articulate, on an issue-by-issue basis, how *each* Issue satisfies the relevant criteria under article 82(1)(d). Rather, Mr Abd-Al-Rahman argues in general terms that the Issues affect the fair and expeditious conduct of the proceedings and that their immediate resolution by the Appeals Chamber may materially advance the proceedings because they concern the right to a reasoned decision.¹⁸ Trial Chamber III in the *Bemba* case previously held that “[i]n [...] circumstances [where] the Defence fails to provide reasons as to how *each* Issue satisfies the relevant criteria, the Chamber is entitled to dismiss [the request] *in limine*.”¹⁹ Moreover, it is irrelevant for granting leave to appeal that the issue for which leave

¹⁴ Third Decision, para. 9.

¹⁵ ICC-01/09-02/11-406, para. 46; ICC-01/04-01/07-15, para. 15; ICC-01/04-01/07-1732, paras. 15,17-18; ICC-01/04-01/10-487, paras. 32-33; ICC-01/04-01/07-1088, paras. 33-35; ICC-01/04-535, paras. 26-29; ICC-01/04-01/10-106, p. 6.

¹⁶ Application, para. 14: “*Les trois Décisions don’t appel posent ensemble les deux questions suivantes [...]*”.

¹⁷ ICC-01/04-168 OA3, paras. 9. ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7.

¹⁸ Application, para. 15.

¹⁹ ICC-01/05-01/08-3382, para. 12 (emphasis added).

is sought is of general interest or that it may arise in future pre-trial or trial proceedings²⁰ or that it may have a potential impact on the jurisprudence of this Court.²¹ For an issue to be granted leave to appeal, the applicant must show that the issues arising from the appealed decision meet the cumulative criteria under article 82(1)(d). The Application does not make such showing and it should therefore be dismissed.

(iv) *The Pre-Trial Chamber need not exercise its discretion, under rule 7(3), to decide on the Application en banc*

13. Mr Abd-Al-Rahman's request that the Application be decided by the full Chamber pursuant to its discretion under article 7(3),²² should be dismissed.

14. Article 57(2) of the Statute provides that a single judge of the Pre-Trial Chamber may exercise any of the functions provided in the Statute, other than those in articles 15, 18, 19, 54(2), 61(7), or 72, or unless a majority of the Pre-Trial Chamber or any provision of the Rules otherwise provides. Correspondingly, rule 7(3) provides that the Pre-Trial Chamber, either of its own motion or at the request of a party, may decide that the functions of the Single Judge should be exercised by the full Pre-Trial Chamber (*en banc*).

15. In this case, contrary to the Application, the Pre-Trial Chamber need not exercise its discretion under rule 7(3) to decide the current matter. It suffices for the Single Judge to rule on the Application, consistent with the constant practice of the Court by which the original decision-maker will generally hear and rule upon applications under article 82(1)(d) with respect to their own decision.²³ Since the Three Decisions do not entail the exercise of any function reserved to the full Pre-Trial Chamber, nothing in the Application can do so either. Nor is the Single Judge prevented from ruling on the Application simply because Mr Abd-Al-Rahman improperly seeks to re-litigate matters that are *res judicata*.²⁴

²⁰ 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; ICC-01/05-01/08-980, para.16.

²¹ ICC-01/05-01/08-980, para. 16.

²² Application, paras. 8-9.

²³ This has been the constant practice of the Court under article 82(1)(d), consistent with the approach generally adopted by other international criminal tribunals. While some *ad hoc* tribunals initially adopted a different approach, this model was soon rejected. For example, the most recent formulation of rule 73(B) of the ICTY Rules of Procedure and Evidence provides for the grant of leave to appeal interlocutory decisions by the Trial Chamber (the only first-instance chamber of the ICTY), and is thus materially similar to article 82(1)(d) of the Statute of this Court. This formulation was introduced on 23 April 2002, and replaced a system by which an ICTY Trial Chamber could self-certify on some limited matters (former rule 73(C)), or otherwise leave was required from a bench of the ICTY Appeals Chamber (former rule 73(D)).

²⁴ *Contra* Application, para. 9.

(v) ***There is no basis to suggest that the Single Judge should recuse himself from deciding on the Application***

16. Mr Abd-Al-Rahman is wrong to suggest that the Single Judge should seek to recuse himself from the Pre-Trial Chamber for the purpose of resolving the present matter, under article 41(1) of the Statute.²⁵ Nothing in the three Decisions suggests that he would be unable to properly discharge his functions as a Judge, in accordance with his obligations under the Statute, in ruling on a request for certification of that decision under article 82(1)(d) of the Statute.

17. In particular, contrary to Mr Abd-Al-Rahman's view,²⁶ whether an interlocutory decision is final is not a matter of judicial interpretation. It is strictly governed by the time limit provided for in rule 155(1) the Rules of Procedure and Evidence. The Single Judge has therefore not "pre-determined" that that the First and Second Decisions were *res judicata*,²⁷ but made a finding to that effect in the Third Decision.²⁸ If Mr Abd-Al-Rahman's reasoning was endorsed, it would mean that all Pre-Trial and Trial Chambers should recuse themselves from ruling on an application for leave to appeal under article 82(1)(d), since they had already "pre-determined" the issue for which a party seeks leave to appeal.

Conclusion

18. For all the reasons set out above, the Application should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 28th day of August 2020

At The Hague, The Netherlands

²⁵ *Contra* Application, para. 10.

²⁶ Application, para. 9.

²⁷ *Contra* Application, para. 10.

²⁸ Third Decision, para. 8.