



Original: English

No. ICC-02/05-01/20

Date: 31 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 for Leave to Appeal Three 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, Prosecutor
Mr James Stewart
Mr Julian Nicholls

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 in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (*‘Ali Kushayb’*) (the *‘Abd-Al-Rahman case’*), having regard to Article 82(1)(d) of the Rome Statute (the *‘Statute’*) and Rule 155 of the Rules of Procedure and Evidence (the *‘Rules’*), issues this *‘Decision on the Defence Request for Leave to Appeal three Decisions’*.

1. The Single Judge recalls the procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.²
2. At the initial appearance for Mr Abd-Al-Rahman on 15 June 2020, the Single Judge issued a number of oral decisions, including (i) a decision to proceed with the reading of the charges, notwithstanding the suspect’s waiver (the *‘First Decision’*);³ and (ii) a decision rejecting the suspect’s request that a minute of silence be observed in memory of the victims of the situation in Darfur (the *‘Second Decision’*, and collectively, the *‘Oral Decisions’*).⁴
3. On 18 June 2020, the Defence submitted a request seeking written reasoning for the Oral Decisions (the *‘18 June 2020 Request’*).⁵
4. On 18 August 2020, the Single Judge issued a Decision dismissing *in limine* the 18 June 2020 Request (the *‘Third Decision’*).⁶ In the view of the Single Judge, the Oral Decisions were *res judicata*, as Counsel opted not to proceed with a request under article 82(1)(d) of the Statute within the relevant time limit, foreclosing that procedural avenue.⁷ Nevertheless, for the sake of the public’s understanding, the Single Judge made some remarks in order to provide a full picture of the facts underlying the 18 June 2020 Request.⁸

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

² *See, for example*, Decision on the Defence Request to provide written reasoning for two oral decisions, 18 August 2020, ICC-02/05-01/20-118, paras 1-4.

³ ICC-02/05-01/20-T-001-ENG, 6 :16-24.

⁴ ICC-02/05-01/20-T-001-ENG, 22 :4-12.

⁵ Requête aux fins d’exposé écrit des motifs de deux décisions orales rendues lors de l’audience de comparution initiale, ICC-02/05-01/20-2.

⁶ ICC-02/05-01/20-118.

⁷ ICC-02/05-01/20-118, para. 8.

⁸ ICC-02/05-01/20-118, paras 9-14.

5. On 28 August 2020, the Defence submitted a request for leave to appeal the First, Second, and Third Decisions (the ‘Request’)⁹, arguing that the three decisions collectively pose the following two questions:

- 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?*
- 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? (collectively, the ‘Issues’)*¹⁰

6. In the view of the Defence, a resolution of the Issues by the Appeals Chamber may significantly affect the fair and expeditious conduct of the proceedings, as it would clarify the scope of the Chamber’s obligation to provide reasoning for its decisions.¹¹ The Defence also submits that an immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings, as it would clarify once and for all the scope of the Chamber’s obligation to provide reasons for its decisions and its impact on the relevant deadlines.¹²

7. On 28 August 2020, the Prosecutor submitted its response (the ‘Response’),¹³ in which the Prosecutor argued that the First and Second Decisions are *res judicata*, and accordingly, that the remedy to request leave to appeal is no longer available.¹⁴ In the view of the Prosecutor, the Issues are ‘predicated on the incorrect assumption that the Third Decision provided written reasons for the First and Second Decisions’. However, the Prosecutor argues, in the Third Decision the Single Judge did not provide reasons for the Oral Decisions, but only made some remarks for the

⁹ Demande d’autorisation d’interjeter appel de trois décisions, ICC-02/05-01/20-130.

¹⁰ ICC-02/05-01/20-130, para. 14.

¹¹ ICC-02/05-01/20-130, paras 15-16

¹² ICC-02/05-01/20-130, para 16

¹³ Prosecution Response to Request for Leave to Appeal Three Decisions, ICC-02/05-01/20-139.

¹⁴ ICC-02/05-01/20-139, paras 6-7

understanding of the public. In this respect, the Prosecutor submits that the Defence has misunderstood the Third Decision.¹⁵

8. The Prosecutor also submits that the Request fails ‘to demonstrate how each Decision individually involves’ the Issues, and fails to comply with the requirement to ‘properly articulate, on an issue-by-issue basis, how *each* Issue satisfies the relevant criteria under article 82(1)(d)’.¹⁶

9. The Chamber recalls that pursuant to article 82(1)(d) of the Statute, either party may appeal ‘a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’.

10. Upon consideration of the arguments presented by the Defence, and having considered the criteria set out under article 82(1)(d) of the Statute, the Single Judge hereby grants the Request.

¹⁵ ICC-02/05-01/20-139, para. 9

¹⁶ ICC-02/05-01/20-139, paras 11-12.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request for Leave to Appeal.

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

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of loops and a long horizontal stroke extending to the right.

Judge Rosario Salvatore Aitala

Single Judge

Dated this Monday, 31 August 2020

At The Hague, The Netherlands