



Original: English

No. ICC-02/05-01/20

Date: 12 January 2021

PRE-TRIAL CHAMBER II

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala**

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 Decision ICC-02/05-01/20-198

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 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**
Mr Xavier-Jean Keïta, Lead Counsel
Ms Marie O’Leary, Counsel

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Mr Philipp Ambach

Other
Mr Marc Dubuisson, Director of Legal
Services

PRE-TRIAL CHAMBER II of the International Criminal Court, 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 the Decision ICC-02/05-01/20-198’*.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. The Chamber recalls the procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.¹

2. On 4 November 2020, the Single Judge issued the Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation (the *‘Decision’*), granting the Registry’s request (the *‘Registry’s Request’*) to modify the standard application form in the present case and use a wholly electronic victim application form, replacing the signature box on it with a solemn undertaking text box.² The Single Judge also rejected the Defence’s request, submitted in its Response,³ that the form posted on the Court’s website for the present case be removed pending its approval, and that the Defence be consulted regarding this form, on the basis that the form had been approved by the Presidency in October 2017 and that the Defence has had the opportunity to provide its observations on the Registry’s Request.⁴

3. On 9 November 2020, the Defence submitted a *‘Request for Leave to Appeal Decision ICC-02/05-01/20-198’* (the *‘Request’*).⁵ The Request raises two proposed issues for appeal:

- a) The (lack of) authority of the Chamber to authorise the use of an amended victims participation form (*‘First Issue’*);⁶ and

¹ See, for example, Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute, 18 August 2020, [ICC-02/05-01/20-117](#), paras 1-4.

² Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation, 4 November 2020, [ICC-02/05-01/20-198](#).

³ Réponse à la requête ICC-02/05-01/20-178, 12 October 2020, [ICC-02/05-01/20-182-Red](#).

⁴ Decision, [ICC-02/05-01/20-198](#), para. 7.

⁵ Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-198, 9 November 2020, [ICC-02/05-01/20-201](#) (*‘Leave to Appeal’*).

⁶ Leave to Appeal, [ICC-02/05-01/20-201](#), para. 17: « la compétence de l’Honorable Chambre Préliminaire – ou celle de son Honorable Juge Unique – pour autoriser l’emploi d’un formulaire de demande de participation de victimes modifié, par rapport au formulaire standard approuvé par la Présidence, pour les besoins de la présente affaire ».

- b) The need for victim participation forms to be signed by the applicant or to have the applicant's thumbprint applied ('Second Issue').⁷

4. The Defence claims that a determination on these issues by the Appeals Chamber will eliminate the risk of an eventual invalidation of the form used in the requests for participation that are not signed by the victims, and that granting the leave to appeal would allow the Appeals Chamber to clarify the meaning and extent of rule 102 of the Rules.⁸

II. ANALYSIS

5. The Chamber recalls that for leave to appeal to be granted pursuant to article 82(1)(d) of the Statute, the matter at hand must constitute an appealable issue that could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and in the opinion of the Chamber, the immediate resolution of the matter by the Appeals Chamber could materially advance the proceedings.⁹ The above requirements are cumulative in nature and therefore each criterion must be met in order to obtain leave to appeal.¹⁰ Further, the jurisprudence set outs that 'an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.¹¹

6. The Defence has argued that leave to appeal should be granted because a future Chamber may invalidate the amended victim application form, which would in turn impact the fairness of the proceedings and lead to delays. These arguments rely on the premise that (a) the case will proceed to trial, and (b) that a future Chamber *may* invalidate the victim application forms that have been submitted. As these arguments are based on the mere possibility that certain events may come to pass in the future, it cannot be assumed that the two issues identified by the Defence would significantly

⁷ Leave to Appeal, [ICC-02/05-01/20-201](#), para. 2: « *la nécessité de soumettre les formulaires de demandes de participation à la signature ou l'empreinte digitale des victimes demanderesses et/ou des personnes agissant en leur nom* ».

⁸ Request, [ICC-02/05-01/20-201](#), para. 28.

⁹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), paras 9-14.

¹⁰ *See, for example*, Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'", 24 July 2015, [ICC-01/05-01/08-3273](#), para. 8.

¹¹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/14-168](#), para. 9.

affect the fair and expeditious conduct of the *current* proceedings. This is a sufficient basis to reject the requested leave to appeal.

7. However, the Chamber notes that the Defence has also not demonstrated that an immediate resolution by the Appeals Chamber on the two issues it has identified has the potential to materially advance the proceedings. Materially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal.¹² Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, “will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process”.¹³ In the concerned matter, the Chamber’s opinion is that the intervention of the Appeals Chamber on the question of the alleged lack of authority of the Pre-Trial Chamber to allow minor amendments to the victims application form or to permit forms that have not been signed or thumb-printed would not advance the proceedings. On the contrary it would frustrate or substantially delay the ongoing efforts of collecting and processing victim application forms in time before the confirmation hearing. The Chamber recalls that in the current stage of the proceedings the admission of victims is only carried out in view of the confirmation hearing, without prejudice to the prerogatives of the Trial Chamber, should the case proceed to trial.

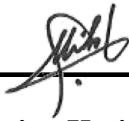
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Appeal.

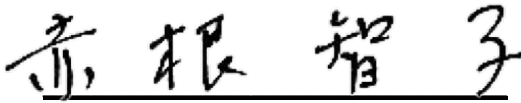
Done in both English and French, the English version being authoritative.

¹² Pre-Trial Chamber II, *Prosecutor v. Bemba Gombo et al.*, Joint decision on the applications for leave to appeal the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2015, [ICC-01/05-01/13-801](#), para. 17.

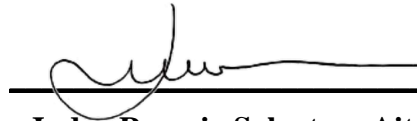
¹³ Appeals Chamber, *Situation in Democratic Republic of the Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 16.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Tuesday, 12 January 2021

At The Hague, The Netherlands