



Original: English

No. ICC-02/05-01/20

Date: 13 August 2020

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 the 'Decision on the Defence request under article 115(b) of the Rome Statute'

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

PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the Defence Request for Leave to Appeal the ‘Decision on the Defence request under article 115(b) of the Rome Statute’.¹

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute² and decided³ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’)⁴ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas, in 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 Statute⁵ by issuing a second warrant of arrest against Mr Abd-Al-Rahman⁶ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas, in 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.

4. On 26 June 2020, the Defence submitted a request pursuant to article 115(b) of the Statute asking the Single Judge to (i) order the Registry or any other competent authority to: (a) submit a funding request to the United Nations (the ‘UN’) pursuant to article 115(b) of the Statute, for an amount not less than the total updated costs of the

¹ Demande d’autorisation d’interjeter appel de la ‘Decision on the Defence request under article 115(b) of the Rome Statute’ (ICC-02/05-01/20-101), ICC-02/05-01/20-105.

² 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).

³ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

⁴ Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

⁵ 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).

⁶ 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).

Court's activities carried out to date in relation to the Situation in Darfur, Sudan; and (b) immediately engage with the UN for the negotiation of separate arrangements on the matter, under article 13(1) of the Negotiated Relationship Agreement between the International Criminal Court and the UN (the 'ICC-UN Agreement'); (ii) order the Registry to submit regular reports to Pre-Trial Chamber II and the Defence of Mr Abd-Al-Rahman on any progress made with regard to the financing of Court activities in the present case by the UN, the progress on the negotiations of the separate arrangements on financial matters pursuant to Article 13(1) of the ICC-UN Agreement, the authorisation of such expenditure by the UN, and the payment of any financial contribution to the Court's activities; and (iii) in the alternative, and in case the Single Judge would be of the view that such Request falls within the competence of the Presidency pursuant to Article 38(3) of the Statute, refer the Request to the Presidency for its consideration.

5. On 23 July 2020, the Single Judge issued the 'Decision on the Defence request under article 115(b) of the Rome Statute', rejecting the Request in its entirety. The Single Judge found, *inter alia*, that (i) the Defence 'has no legal standing to either evaluate or provide recommendations regarding the Court's financial management'; (ii) the Assembly of States Parties, not the Chamber, is 'responsible for considering and deciding on the Court's budget'; and (iii) the Single Judge lacks the authority to refer the request to the Presidency.⁷

6. On 27 July 2020, the Defence submitted a request for leave to appeal the Decision (the 'Request for Leave to Appeal' or the 'Request').⁸

7. The Prosecutor did not respond to the Request.

II. SUBMISSIONS

8. The Defence submits that the Decision materially affects the fair and expeditious conduct of the proceedings, to the extent that it impacts the Court's ability to ensure a fair trial '*dans le respect des conditions financières suffisantes et conformes à ce qu'a prévu le Statut pour que soit assurée la bonne conduite des*

⁷ Paras 7-8.

⁸ Demande d'autorisation d'interjeter appel de la 'Decision on the Defence request under article 115(b) of the Rome Statute' (ICC-02/05-01/20-101), ICC-02/05-01/20-105.

procédures judiciaires de façon impartiale et indépendante’ and that the immediate resolution of the issue by the Appeals Chamber would allow the procedure to continue effectively, preserving the integrity of the proceedings and neutralising the risk of being found invalid at a subsequent stage due to violation of articles 4-1, 40-1, 42-1, 66-1, 67 et 115-b of the Statute (‘mistrial’). Accordingly, it requests leave to appeal the Decision on the following issue:

- a. Whether the suspect’s right to benefit from adequate financial conditions, in accordance with the statutory framework governing the proceedings in the case, would require the United Nations to honour the obligation relating to its contribution to the budget of the Court’ (the ‘Issue’).⁹

III. ANALYSIS

9. Pursuant to rule 7(3) of the Rules, and in light of the fact that the Issue transcends the scope of the efficient management of these proceedings, the Chamber finds it appropriate to adjudicate the Request as a full Chamber.

10. The Chamber recalls that, pursuant to article 82(1)(d) of the Statute, the following requirements must be met for a request for leave to appeal to be granted:

- i) The matter is an ‘appealable issue’;¹⁰
- ii) The issue at hand would significantly affect:
 - a. The fair and expeditious conduct of the proceedings, or
 - b. The outcome of the trial; and
- iii) In the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. The Chamber also recalls that that, for the purposes of determining a request for leave to appeal, the requirements set forth in article 82(1)(d) of the Statute are the sole

⁹ Translation by the Chamber. The issue as formulated in French in the Request reads as follows: *si ‘le droit de Mr Ali Muhammad Ali Abd-Al-Rahman à ce que la Cour bénéficie de conditions financières adéquates et conformes à ce que prévoit le Statut pour la gestion de son affaire nécessiterait le paiement par l’Organisation des Nations Unies de la contribution demandée’.*

¹⁰ Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeals, 13 July 2006, ICC-01/04-168, para. 9.

parameters of relevance and arguments relating to the merits or substance of the appeal are irrelevant.

12. At the outset, the Chamber notes that the Request fails to spell out clearly and precisely the issue upon which leave to appeal is sought. Paragraph 8 of the Request simply refers to article 82(1)(d) of the Statute; paragraphs 9 and 10 merely reiterate the requirements of article 82(1)(d), stating that they would be satisfied in respect of a ‘question’, which is however not detailed; paragraph 11 states that the Decision raises the fundamental issue of Mr Al Rahman’s right to a fair trial ‘*dans le respect des conditions financières suffisantes et conformes à ce qu’a prévu le Statut pour que soit assurée la bonne conduite des procédures judiciaires de façon impartiale et indépendante*’; it is only in paragraph 12 that the Request seems to attempt to identify an issue, by stating that, should the Appeals Chamber find that Mr Abd-Al-Rahman’s right to have the Court benefit from financial conditions which are adequate and in compliance with the Statute requires the payment of the relevant contributions by the United Nations, the fair and independent nature of the entirety of the proceedings carried out in the absence of such financial support would be materially affected and subject to be found invalid.¹¹

13. As a preliminary remark, the Chamber notes that it is Counsel’s responsibility to precisely identify and formulate the issue on which leave to appeal is sought when submitting a request under article 82(1)(d) of the Statute; failing to do so might result in having the Request dismissed *in limine*. Moreover, the Chamber notes that the Issue as emerging from the Request is entirely based on a mischaracterisation of the Decision. The Decision did not address, even less challenge, the issue of the ‘financial conditions’ relating to the proceedings and/or their impact on the position of the suspect; neither did it discuss their adequacy, or the financial obligations States and other entities may have *vis-à-vis* the Court as a matter of international law: the

¹¹ The original French reads as follows: ‘*Dans l’hypothèse où, comme le soumettait le Conseil Principal dans sa Requête en vertu de l’Article 115-b, le droit de Mr Ali Muhammad Ali Abd-Al-Rahman à ce que la Cour bénéficie de conditions financières adéquates et conformes à ce que prévoit le Statut pour la gestion de son affaire nécessiterait le paiement par l’Organisation des Nations Unies de la contribution demandée, l’intégralité des procédures conduites à son encontre sans l’appui d’un tel financement s’en trouveraient substantiellement affectées quant à leur caractère équitable et indépendant et encourraient le risque d’être invalidées*’.

proposition that the Court needs funding in order to perform its role, and that this funding must be provided in accordance with the obligations deriving from the Statute in accordance with international law, is beyond controversy. The crucial point made by the Decision was rather that the Defence has no legal standing to either evaluate or provide recommendations regarding the Court's financial management; this because, regardless of how adequate or appropriate financial conditions or arrangements relating to the Court are, the judiciary 'cannot play any role in the budgetary process, let alone in the negotiation of any financial agreements'; accordingly, it found there to be 'no legal basis for the Chamber to engage in the financial matters of the Court'. In light of the statutory texts and the nature of the criminal proceedings, the Decision was thus centred on the finding that this Chamber is not the appropriate venue where this kind of matter can be raised or otherwise debated.

14. Since the Issue arises from a mischaracterisation of the Decision, it does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute. It is therefore unnecessary for the Chamber to determine whether the additional cumulative requirements of article 82(1)(d) are met.

**FOR THESE REASONS, THE CHAMBER HEREBY
REJECTS** the Request for Leave to Appeal.

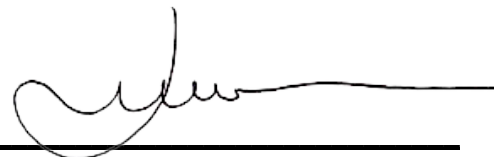
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Thursday, 13 August 2020

At The Hague, The Netherlands