



Original: English

No.: ICC-02/05-01/20
Date: 26 October 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

**Prosecution’s Response to “*Demande d’autorisation d’interjeter appel de la
Décision ICC-02/05-01/20-186*”**

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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**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Prosecution opposes the Defence's request for leave to appeal¹ the Single Judge's decision on the stay of proceedings² because neither issue raised for certification is appealable within the meaning of article 82(1)(d) of the Rome Statute.

2. The proposed issues do not constitute appealable issues because they misread the Impugned Decision, are premised on a mere disagreement with it, or otherwise do not arise from it. Furthermore, the Request does not meet the remaining cumulative criteria for interlocutory appeal under article 82(1)(d).

II. SUBMISSIONS

The proposed issues do not constitute appealable issues

3. The Defence seeks leave to appeal the Impugned Decision in relation to "at least" two issues proposed for certification.³ The first issue concerns the correlation between the Prosecution's pending request for confirmation postponement⁴ and the Defence's request for a temporary or permanent stay of proceedings in light of the Defence's right to file submissions.⁵ The second issue concerns the alleged rejection of the two alternative requests in the Request for Stay without entertaining the Defence's arguments concerning permanent stay of proceedings and Mr Abd-Al-Rahman's release.

4. In both instances, the Defence either disagrees with the Impugned Decision or misreads it, failing to demonstrate the existence of an appealable issue genuinely arising from it.

i. First issue

5. With respect to the first proposed issue, the Defence merely disagree with the Single Judge's otherwise correct evaluation that the "content of the Request for Stay

¹ ICC-02/05-01/20-189 ("Request").

² ICC-02/04-01/15-186 ("Impugned Decision").

³ Request, para. 19.

⁴ ICC-02/05-01/20-157-Conf-Exp-Corr ("Postponement Request").

⁵ ICC-02/05-01/20-174 ("Request for Stay").

relates substantially to issues raised in the Postponement Request” and that the Defence should have respected the procedural rules.⁶ The Defence attempts to artificially distinguish between its response to the Postponement Request and its Request for Stay, both of which respond to identical issues. An unfettered right to submit multiple applications concerning the same issue does not exist under the Court’s legal framework.

6. The Defence also misreads the Impugned Decision because the Single Judge did not reject the Request for Stay on the sole grounds of duplicative litigation.⁷ Having cautioned the Defence for circumventing the page limit, the Single Judge then turned to the analysis of the merits of the Request for Stay, which he found to be lacking.⁸ In the end, the Single Judge’s caution in relation to the page limit was not determinative for his decision to deny the Request for Stay.⁹

7. There is no basis for the Defence’s claims that the Single Judges was biased against it.¹⁰ Sweeping and abstract claims alleging bias are insufficient and should not be entertained.¹¹ Here, the Single Judge’s caution to the Defence “against submitting duplicative filings in the future”¹² cannot be a basis for it to allege bias. The Single Judge was merely exercising his functions and powers under the Court’s legal framework.

8. At no point did the Single Judge limit the Defence’s rights to conduct Mr Abd-Al-Rahman’s defence. The Defence simply chose the wrong vehicle to do so. Even if the Single Judge had chosen to dismiss the Request for Stay *in limine*, rather than addressing it on merits as he did, no bias would have been shown. The Defence’s arguments alleging bias are wholly unfounded and should be dismissed.

⁶ Impugned Decision, para. 8.

⁷ Request, para. 15.

⁸ Impugned Decision, paras. 9-11.

⁹ See also ICC-02/11-01/15-1023, para. 14.

¹⁰ Request, paras. 13-14.

¹¹ *Hadžihasanović and Kubura* Appeal Judgement, para. 83; *Ntagerura et al.* Appeal Judgement, para. 135.

¹² Impugned Decision, para. 8.

ii. Second issue

9. With respect to the second proposed issue, the Single Judge was correct to base his ruling on the grounds discussed in the Impugned Decision. The Defence has failed to identify any provision under the Court's legal framework that would require the Single Judge to entertain each and every argument raised by a Party. Indeed, Chambers and Single Judges retain discretion under the Rome Statute to address the core issues and disregard alternative, peripheral, irrelevant or mischaracterised arguments. The Appeals Chamber has held concerning judicial decisions:

The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.¹³

10. In this case, the Single Judge has indicated with clarity the basis for rejecting the Request for Stay. In the Impugned Decision, he has pointed out that a decision on the Postponement Request "has not been yet been issued", that the Chamber shall "ensure the overall fairness and expeditiousness of proceedings bearing in mind the competing interests at stake", and that the Request and the response to the Postponement Request contradict each other.¹⁴ The Defence misreads or merely disagrees with the Impugned Decision.

11. In sum, none of the proposed issues qualify as appealable issues within the meaning of article 82(1)(d) of the Statute. Given that article 82(1)(d) criteria are cumulative, and that failure to fulfill one of the criteria is fatal to an application for leave to appeal,¹⁵ the Request should be rejected on that basis alone.

¹³ ICC-01/04-01/06-773; ICC-01/04-01/06-774.

¹⁴ Impugned Decision, paras. 9-11.

¹⁵ ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

The remaining article 82(1)(d) criteria are not met

12. Assuming, for the sake of argument, that one or both of the proposed issues constitute appealable issues within the meaning of article 82(1)(d), neither of the remaining two cumulative criteria for an interlocutory appeal are met.

13. First, the issues proposed for certification would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. The Appeals Chamber has ruled that proceedings can be stayed “where the breaches of the rights of the accused are such as to make it impossible for [him] to make [his] defence within the framework of his rights.”¹⁶ There is no indication that it would be impossible to conduct the defence, in particular that the proceedings would last an excessive time. In fact, the Defence has based its arguments regarding resources and cooperation on mischaracterised grounds.¹⁷ The Defence’s claims are speculative, baseless, or otherwise premature.¹⁸ Thus, the proposed issues have little to no bearing on the fair and expeditious conduct of the proceedings or the outcome of the trial against Mr Abd-Al-Rahman.

14. Second, an immediate resolution of the issues proposed for certification by the Appeals Chamber would not “materially advance the proceedings” in the case. On the one hand, the Pre-Trial Chamber has yet to issue its decision on the Postponement Request, but has indicated that it would do so in due course.¹⁹ On the other hand, the Appeals Chamber has confirmed the Pre-Trial Chamber’s decision not to grant interim release.²⁰

15. Permitting interlocutory appeal proceedings concerning the two proposed issues without waiting for the Pre-Trial Chamber’s decision concerning the request to postpone the confirmation hearing would only further duplicate and delay the proceedings.

¹⁶ ICC-01/04-01/06-772, para. 39; ICC-01/04-01/06-844, para. 10.

¹⁷ Impugned Decision, para. 5; ICC-02/05-01/20-184, paras. 5-7.

¹⁸ Impugned Decision, paras. 9, 11.

¹⁹ Impugned Decision, para. 10.

²⁰ ICC-02/05-01/20-177.

III. CONCLUSION

16. For the foregoing reasons, the Pre-Trial Chamber should reject the Request.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart
Deputy Prosecutor

Dated this 26th day of October 2020

At The Hague, the Netherlands