



Original: English

No. ICC-02/05-01/20

Date: 9 November 2020

PRE-TRIAL CHAMBER II

Before:

**Judge 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 Defence Request for Leave to Appeal the 'Decision on Defence Request for a Stay of Proceedings'

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
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

Mr Harry Tjonk

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court, in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, having regard to article 82(1)(d) of the Rome Statute (the 'Statute'), issues this Decision on Defence Request for Leave to Appeal the 'Decision on Defence Request for a Stay of Proceedings'.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. The Chamber recalls the procedural history of the case as set out in previous decisions.¹
2. On 16 September 2020, the Prosecutor submitted a request to postpone the confirmation hearing to 1 June 2021 (the 'Postponement Request').²
3. On 18 September 2020, the Defence requested, *inter alia*, authorisation to extend the page limit for its response to the Postponement Request (the 'Request to Extend Page Limit').³ On 23 September 2020, the Single Judge issued a decision, *inter alia*, rejecting the Request to Extend Page Limit.⁴
4. On 5 October 2020, the Defence submitted its response to the Postponement Request, asking that it be rejected (the 'Response to Postponement Request').⁵ On the same day, the Defence submitted a request for a stay of proceedings (the 'Request for Stay').⁶
5. On 16 October 2020, the Single Judge issued a decision in which, *inter alia*, (i) the Request for Stay was rejected, and (ii) noting that the Request for Stay and the

¹ 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.

² Corrected version of 'Prosecution's request to postpone the confirmation hearing', ICC-02/05-01/20-157-Conf-Exp-Corr (a confidential redacted version, ICC-02/05-01/20-157-Conf-Red-Corr, and a public redacted version, [ICC-02/05-01/20-157-Corr-Red](#), were notified on the same date).

³ Requête en vertu des normes 23bis-2, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red, [ICC-02/05-01/20-159-Conf](#).

⁴ Decision on the Defence's 'Requête en vertu des normes 23bis-2, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red', [ICC-02/05-01/20-164](#).

⁵ Observations en Réponse à la Requête ICC-02/05-01/20-157-Red, [ICC-02/05-01/20-173](#).

⁶ Requête aux fins d'arrêt ou de suspension temporaire des procédures, 5 October 2020, [ICC-02/05-01/20-174](#).

Response to Postponement Request related to substantially similar issues, the Defence was instructed to avoid submitting duplicative filings in the future (the ‘Decision’).⁷

6. On 22 October 2020, the Defence submitted a request seeking leave to appeal the Decision⁸ on two proposed issues: (i) whether, and to what extent, the request to postpone the confirmation hearing and the page limit for the Defence response thereto could impact upon the Defence’s ability to file a separate Request for Stay (the ‘First Issue’); and (ii) whether the Decision was correct in rejecting alternative requests when consideration was limited to the request for provisional release, and considering that the related matter of the suspect’s release was not addressed (the ‘Second Issue’). The Defence submits, *inter alia*, that the proposed issues meet the remaining criteria for leave to appeal.

7. On 26 October 2020, the Prosecutor submitted a response opposing the Request. The Prosecutor submits, *inter alia*, that the First Issue constitutes a mere disagreement with the Decision, and that in relation to the Second Issue, the Defence has misread or merely disagrees with the Decision (the ‘Response’).⁹ Assuming, for the sake of argument, that one or both proposed issues constitute appealable issues, the Prosecutor submits that neither of the remaining two cumulative criteria for an interlocutory appeal are met.

8. On 2 November 2020, the Chamber issued its Decision on the Postponement Request, determining, *inter alia*, that the confirmation hearing shall commence on 22 February 2021 (the ‘Decision on Postponement’).¹⁰

⁷ Decision on Defence Request for a Stay of Proceedings, [ICC-02/05-01/20-186](#).

⁸ Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-186, [ICC-02/05-01/20-189](#).

⁹ Prosecution’s Response to “*Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-186*”, [ICC-02/05-01/20-193](#).

¹⁰ Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines, [ICC-02/05-01/20-196](#).

II. APPLICABLE LAW AND ANALYSIS

Applicable Law

9. Mindful of the exceptional nature of the remedy of an interlocutory appeal, the Chamber notes that, for such leave to be granted, the following requirements must be met:

- a) The matter constitutes an appealable issue;
- b) The issue could significantly affect:
 - i) The fair and expeditious conduct of the proceedings; or
 - ii) The outcome of the trial; and
- c) In the opinion of the Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.¹¹

10. The above requirements are cumulative in nature, and therefore, each criterion must be met in order to obtain leave to appeal.¹² According to established jurisprudence, ‘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’.¹³ Further, an appealable issue must arise from the impugned decision, meaning that the issue identified must be a specific issue that was dealt with in, or emanates from, the impugned decision.¹⁴

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor “Application for Leave to Appeal the ‘Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, 18 September 2009, [ICC-01/05-01/08-532](#), para. 17. See also Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, [ICC-02/11-01/11-464](#), 31 July 2013, para. 8; Pre-Trial

Request

11. As a preliminary issue, the Chamber notes the Defence's explanation regarding its omission of the full case name in the cover page of certain submissions, as well as the Defence's commitment to using the full case name going forward.

First Issue: Whether, and to what extent, the request to postpone the confirmation hearing and the page limit for the Defence response thereto could impact upon the Defence's ability to file a separate Request for Stay

12. The Defence argues that the resolution of this issue by the Appeals Chamber will answer the question of whether the Chamber may impose conditions and/or the timing for filing requests throughout the proceedings, and that if the Appeals Chamber were to find in its favour, the Pre-Trial Chamber would need to consider the Request for Stay on the merits. The Defence further submits that it should have been provided with an opportunity to justify its separate filings.

13. In claiming that the Request for Stay was not considered, the Defence has misread the Decision. The Defence overlooks the fact that, after instructing the Defence against duplicative filings, the Single Judge proceeded to consider the submissions of the parties before rejecting the Request for Stay on the merits. Accordingly, the Chamber finds that the First Issue does not arise from the Decision.

Second Issue: Whether the Decision was correct in rejecting alternative requests when consideration was limited to the request for provisional release, and considering that the related matter of the suspect's release was not addressed

14. As to the Second Issue, the Defence submits, *inter alia*, that it would affect the fair and expeditious conduct of the proceedings, as a resolution by the Appeals Chamber would clarify whether the Chamber is, in essence, able to pick and choose which requests of a party will be addressed in a decision.

15. The Chamber does not believe that the Second Issue constitutes an 'issue' arising from the Decision within the meaning of article 82(1)(d) of the Statute. The

Chamber II, *The Prosecutor v. Bosco Ntaganda*, Decision on the Defence Request for Leave to Appeal, [ICC-01/04-02/06-207](#), 13 January 2014, para. 11.

Chamber notes that in deciding upon the Request for Stay, the Single Judge considered in full the alternative requests of the Defence. As to the analysis contained in the Decision, the Chamber recalls the Appeals Chamber ruling that the ‘extent of the reasoning will depend on the circumstances of the case’, that the Chamber must indicate with sufficient clarity the basis of the decision, and that such reasoning ‘will not necessarily require reciting each and every factor that was before the respective Chamber’.¹⁵ The Chamber recalls that the Decision, *inter alia*, indicated as a basis for rejecting the Request for Stay, that (i) a decision on the Postponement Request had not yet been issued; (ii) the Chamber would ensure the overall fairness and expeditiousness of proceedings in ruling on the Postponement Request; and (iii) the Response to Postponement Request and the Request for Stay were contradictory in nature, seeing as the requested relief of a stay would itself result in a delay to the proceedings.¹⁶

16. In relation to the issue of the suspect’s potential release, the Chamber recalls once again¹⁷ that the matter of the suspect’s potential release had already been considered in full and decided upon in a separate decision,¹⁸ which was subsequently upheld by the Appeals Chamber.¹⁹ As such, the Defence has had the opportunity to present its views on this issue, and to have them considered by both the Pre-Trial Chamber and the Appeals Chamber. The mere fact that the Defence is not satisfied with the outcome does not establish an appealable issue.

17. Considering that the criteria for granting a request for leave to appeal are cumulative in nature, and having found that the First and Second Issues do not constitute appealable issues, the Chamber is not required to consider the remainder of the criteria under article 82(1)(d) of the Statute. The Chamber however notes that the proposed issues would not affect the fair and expeditious conduct of the proceedings,

¹⁵ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, [ICC-01/04-01/06-773](#), para. 20.

¹⁶ Decision on Defence Request for a Stay of Proceedings, [ICC-02/05-01/20-186](#), paras 9-10.

¹⁷ Decision on Defence Request for a Stay of Proceedings, [ICC-02/05-01/20-186](#), para. 11.

¹⁸ Decision on the Defence Request for Interim Release, 14 August 2020, [ICC-02/05-01/20-115](#).

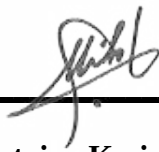
¹⁹ Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled ‘Decision on the Defence Request for Interim Release’, 8 October 2020, [ICC-02/05-01/20-177](#).

and an immediate resolution of the Appeals Chamber would not materially advance the proceedings, but would have the opposite effect. In this respect, the Chamber notes that in the Request for Stay, the Defence expressed concern that a postponement of the confirmation hearing would infringe upon Mr Abd-Al-Rahman's right to be tried without undue delay. The Chamber recalls its finding that if a stay of proceedings had been granted, the requested relief would have itself resulted in a delay to the proceedings, thus running contrary to the very interests of the suspect.²⁰

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request for Leave to Appeal.

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



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Monday, 9 November 2020

At The Hague, The Netherlands

²⁰ Decision on Defence Request for a Stay of Proceedings, [ICC-02/05-01/20-186](#), para. 10.