



Original: English

No. ICC-02/05-01/20

Date: 9 February 2021

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 the request for leave to appeal the Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing

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
Ms Paolina Massidda

**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**
Mr Philipp Ambach

Other

PRE-TRIAL CHAMBER II of the International Criminal Court (the ‘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’), rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the request for leave to appeal the Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing.

I. PROCEDURAL HISTORY

1. The Chamber recalls the general procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.¹
2. On 8 October 2020, the Registry, through the Victims Participation and Reparations Section (the ‘VPRS’), submitted a request to modify the standard application form for victim participation in the present case (the ‘VPRS Request’).²
3. On 4 November 2020, the Chamber granted the VPRS Request (the ‘Modified Application Form Decision’).³
4. On 8 November 2020, the Defence asked for leave to appeal the Modified Application Form Decision.⁴
5. On 17 November 2020, the VPRS submitted observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings (the ‘Registry Observations’).⁵
6. On 19 November 2020, the Defence issued its ‘Requête en vertu de la Règle 89-1 du Règlement de Procédure et de Preuve’, requesting the Chamber to dismiss the

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 [Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case](#), ICC-02/05-01/20-178-Conf. (notified on 9 October 2021, a public redacted version was filed on 2 November 2020 as ICC-02/05-01/20-178-Red).

³ [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.

⁴ [Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-198](#), 8 November 2020, ICC-02/05-01/20-201.

⁵ [Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings](#), 17 November 2020, ICC-02/05-01/20-203.

Registry Observations *in limine* or to reject the proposed procedure for victims participation.⁶

7. On 26 November 2020, the Prosecutor responded to the Registry Observations.⁷

8. On 8 January 2021, a legal representative of potential victims requested the Chamber to clarify the temporal and geographical scope of the charges and to be provided with guidance in terms of the modalities for legal representation, including access to documents in the case file (the ‘Request for Guidance’).⁸

9. On 12 January 2021, the Chamber issued a decision rejecting the Defence’s request for leave to appeal the Modified Application Form Decision.⁹

10. On 13 January 2021, the Defence responded to the Request for Guidance.¹⁰

11. On 18 January 2021, the Chamber issued its Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing, thereby (i) imparting the necessary instructions to the Registry and the parties to commence the victims’ admission and participation process in the case; (ii) rejecting the Defence Rule 89(1) Request; and (iii) appointing the Office of Public Counsel for Victims (the ‘OPCV’) as ‘common legal representative for the purposes of the confirmation proceedings’ (the ‘Decision’).¹¹

12. On 22 January 2021, the Defence filed a request for leave to appeal the Decision (the ‘Request’).¹²

⁶ [Requête en vertu de la Règle 89-1 du Règlement de Procédure et de Preuve](#), 19 November 2020, ICC-02/05-01/20-206.

⁷ [Prosecution's response to "Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings"](#), 26 November 2020, ICC-02/05-01/20-212.

⁸ [Request for Guidance on Modalities for Submissions relating to Applications for Victim Participation](#), ICC-02/05-01/20-251, (notified on 11 January 2021).

⁹ [Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198](#), 12 January 2021, ICC-02/05-01/20-254.

¹⁰ [Observations en Réponse à la Requête ICC-02/05-01/20-251](#), ICC-02/05-01/20-255.

¹¹ [Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing](#), 18 January 2021, ICC-02/05-01/20-259.

¹² [Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-259](#), 22 January 2021, ICC-02/05-01/20-264.

13. On 28 January 2021, the Office of Public Counsel for the Victims responded to the Request (the ‘OPCV Response’).¹³

14. On 5 February 2021, the Single Judge issued a Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance, in which the OPCV’s role was further specified and it was explained that this arrangement was temporary and limited to the period between the issuance of the Decision and the Chamber’s eventual decision on matters of legal representation. (the ‘Supplementary Decision’).¹⁴

II. SUBMISSIONS

15. In its Request, the Defence has formulated six issues (three ‘overarching’ and three ‘specific’ ones) it wishes to bring before the Appeals Chamber:

a. Overarching questions:

1. Is the limited, temporary and/or contingent nature of the violation of a suspect’s right sufficient to remove its illegality?¹⁵
2. Did the failure to consult the victims regarding the issues addressed in the Decision violate article 68(3) of the Statute?¹⁶
3. Did the Chamber violate articles 61(1) and 67(1)(c) of the Statute by failing to instruct the Registry to organise victims participation and representation within a reasonable time?¹⁷

b. Specific questions:

4. Does the A-B-C approach violate the right of the Defence to receive all victim applications pursuant to rule 89(1) of the Rules?¹⁸

¹³ [Common Legal Representative Response to the “Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-259”](#), 28 January 2021, ICC-02/05-01/20-270.

¹⁴ [Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance](#), 5 February 2021, ICC-02/05-01/20-277.

¹⁵ Request, paras 15-19.

¹⁶ Request, paras 20-23.

¹⁷ Request, paras 24-28.

¹⁸ Request, paras 29-33.

5. Did the Chamber err by entrusting the vetting of intermediaries to the VPRS?¹⁹

6. Did the Chamber err by appointing a Legal Representative who will not be able to contact victims in Sudan?²⁰

16. In its Response, the OPCV limited its submissions to questions 2, 4, and 5. In relation to these three issues, the OPCV contends that they do not fulfil the requirements for leave to appeal because the Defence either misconstrues or simply disagrees with the Decision, thereby failing to identify an appealable issue. The OPCV further argues that questions 2, 4, and 5 do not significantly affect the fair and expeditious conduct of the proceedings and that immediate resolution by the Appeals Chamber would not materially advance the proceedings. The OPCV also challenges the Defence's contention that the specific infringements of the victims' rights alleged in the Request prejudiced Mr Abd-Al-Rahman's own interests, arguing that such claims are speculative, ill-founded and devoid of any substance.

III. ANALYSIS

17. In order to grant a request for leave to appeal pursuant to article 82(1)(d) of the Statute, the Pre-Trial Chamber considers the following factors:

- a. Whether any of the questions raised, singly or collectively, constitute an "appealable issue";
- b. Whether any of the(se) issue(s) could significantly affect:
 1. the fair and expeditious conduct of the proceedings, or
 2. the outcome of the trial,
- c. Whether, in the opinion of the Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.²¹

¹⁹ Request, paras 34-35.

²⁰ Request, paras 36-39.

²¹ Pre-Trial Chamber II, *Prosecutor v. Yekatom and Ngaïssona*, [Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters'](#), 24 May 2019, ICC-01/14-01/18-206, para. 10; Pre-Trial Chamber II; *Prosecutor v. Ntaganda*, [Decision on the 'Requête](#)

18. Requirements (a), (b) and (c) above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.²² There is no prescribed order in which the requirements must be considered.

19. In relation to the sixth issue, the Chamber notes that, as explained in the Supplementary Decision, it does not arise from the Decision. The Chamber will therefore not consider it any further.

20. As regards the other issues, the Chamber has focused its analysis on the requirement that immediate resolution by the Appeals Chamber could materially advance the proceedings. In this regard, the Chamber recalls that "[t]he mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal."²³ Moreover, it is important to stress that the term "proceedings" in the second part of article 82(1)(d) of the Statute refers to the proceedings in their entirety.²⁴ Accordingly, it is insufficient that an appeal would be legitimate or even necessary at some stage (as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings).²⁵ Indeed, interlocutory appeals under Article 82(1)(d) of the Statute should be regarded

[de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014](#), 04 July 2014, ICC-01/04-02/06-322, para. 9; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, [Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008](#), 26 February 2008, ICC-01/04-01/06-1191, para. 9.

²² Pre-Trial Chamber II, *Prosecutor v. Yekatom and Ngaïssona*, [Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters'](#), 24 May 2019, ICC-01/14-01/18-206, para. 11; Pre-Trial Chamber I, *Situation in Democratic Republic of the Congo, Decision On The Prosecution's Application For Leave To Appeal The Chamber's Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6*, 31 March 2006, ICC-01/04-135-tEN, para. 28; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, [Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008](#), 26 February 2008, ICC-01/04-01/06-1191, para. 10.

²³ [Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198](#), 12 January 2021, ICC-02/05-01/20-254, para. 7; Pre-Trial Chamber II, *Prosecutor v. Joseph Kony et al.*, [Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58](#), 19 August 2008, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21.

²⁴ Appeals Chamber, *Situation in the Democratic Republic of 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. 17.

²⁵ Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, [Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008](#), 26 February 2008, ICC-01/04-01/06-1191, para. 12.

as exceptional and Chambers must be vigilant in determining which issues truly require immediate determination.²⁶

21. The Chamber has carefully considered the five remaining issues identified in the Request in light of the above and has concluded that none of them, either in isolation or in conjunction with each other, require immediate appellate attention. Indeed, the alleged errors defined in the Request raise questions of a general nature, the resolution of which is unlikely to affect the fairness of these proceedings, much less the outcome of the trial. The only issue identified in the Request that could have any potential practical impact on the current proceedings is whether the A-B-C approach violates the right of the Defence to receive all victim applications pursuant to rule 89(1) of the Rules (question 4). However, even if it were determined that the Chamber erred in this regard, this would not constitute a “setback to the proceedings that [has the potential to] cloud or unravel the judicial process.”²⁷ Indeed, the prejudice claimed by the Defence is entirely speculative and, even if it came to pass, could always be remedied relatively easily. The Chamber therefore rejects the Defence’s claim that this alleged error could somehow ‘invalidate’ the proceedings,²⁸ especially considering that the question as to whether the Defence is entitled to receive potentially exculpatory information from the victims has already been decided by the Appeals Chamber.²⁹

²⁶ Pre-Trial Chamber II; *Prosecutor v. Yekatom and Ngaïssona*, [Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’](#), 21 March 2019, ICC-01/14-01/18-154, para. 12; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, [Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008](#), 26 February 2008, ICC-01/04-01/06-1191, para. 13; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, [Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008](#), 26 February 2008, ICC-01/04-01/06-1191, para. 12.

²⁷ Appeals Chamber, *Situation in the Democratic Republic of 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.

²⁸ Request, para. 33.

²⁹ Appeals Chamber, *Prosecutor V. Germain Katanga and Mathieu Ngudjolo*, [Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’](#), 16 July 2010, ICC-01/04-01/07-2288, para. 87.

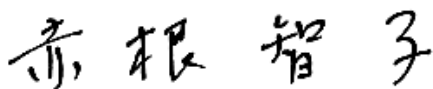
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

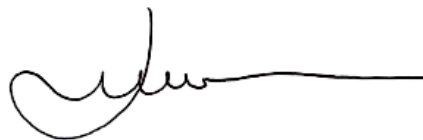
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Tuesday, 9 February 2021

At The Hague, The Netherlands