

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-02/05-01/20**

Date: **24 August 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. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN***

Public Document

Application for Leave to Appeal against Three Decisions

Source: Mr Cyril Laucci, Lead Counsel

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Legal Representatives of Applicants

Unrepresented Victims

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**Victims Participation and Reparations
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Other

BACKGROUND TO THE APPLICATION

1. On 15 June 2020, at the first appearance hearing, the Honourable Single Judge delivered two oral decisions: the first, to have the charges read out in their entirety at the hearing, despite Mr Ali Muhammad Ali Abd-Al-Rahman's waiver of his right for them to be read out ("First Impugned Decision");¹ and the second rejecting Mr Ali Muhammad Ali Abd-Al-Rahman's request to be able to observe a minute of silence for the victims ("Second Impugned Decision").² Duty Counsel requested at the hearing that the reasons for those two decisions be provided at a later date on the ground that they appeared to violate the presumption of innocence to which Mr Ali Muhammad Ali Abd-Al-Rahman is entitled under article 66 of the Rome Statute ("Statute").³

2. On 18 June 2020, the Defence filed a Request for the written reasoning for the First and Second Impugned Decisions ("Request").⁴ At paragraph 6, the Request cited the holding of the Honourable Appeals Chamber that "the reasons for a decision should be comprehensible from the decision itself".⁵ At paragraph 8 of the Request, it was also emphasized that the First Impugned Decision ran counter to the established practice of the Honourable Pre-Trial Chamber in other cases, such as at the first appearance hearings of the suspects in case ICC-01/14-01/18 (French version of the transcript ICC-01/14-01/18-T-001 FRA, p. 6, lines 2-7; French version of the transcript ICC-01/14-01/18-T-002 FRA, p. 4, lines 25-28 to p. 5, lines 1-2) and that the reasons for such a departure from that practice should therefore be clarified. It was moreover argued at paragraph 9 of the Request that it was vital that the reasons for the Second Impugned Decision be provided in order to dispel the appearance that the decision violated the presumption of innocence to which Mr Ali Muhammad Ali Abd-Al-Rahman is entitled under article 66 of the Statute.

¹ [ICC-02/05-01/20-T-001 FRA](#): Transcript of hearing, 15 June 2018, p. 6, lines 23-24.

² [ICC-02/05-01/20-T-001 FRA](#): Transcript of hearing, 15 June 2018, p. 21, lines 22-16.

³ [ICC-02/05-01/20-T-001 FRA](#): Transcript of hearing, 15 June 2018, p. 22, lines 1-6.

⁴ [ICC-02/05-01/20-2](#): "Requête aux fins d'exposé écrit des motifs de deux décisions orales rendues lors de l'audience de comparution initiale", 18 June 2020.

⁵ [ICC-01/04-01/06-774](#): "Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'" (OA 6), 14 December 2006, paras. 33-34.

3. The Office of the Prosecutor (OTP) did not file a response to the Request.
4. On 18 August 2020, the Honourable Single Judge issued his “Decision on the Defence Request to Provide Written Reasoning for two oral Decisions” (“Third Impugned Decision”).⁶ The Third Impugned Decision dismisses *in limine* the Request on the ground that the Defence did not file an appeal against the First and Second Impugned Decisions and they are now *res judicata*.⁷ The Honourable Single Judge moreover makes a number of “remarks” for the sake of the “public’s understanding”.⁸
5. While it is the Defence’s understanding that the remarks made at paragraphs 10-14 of the Third Impugned Decision are not meant to constitute the reasons for the First and Second Impugned Decisions, the Defence considers it relevant to summarize the salient points thereof. In the Third Impugned Decision, it is explained that the request to be provided with the reasons for the First Impugned Decision is in contradiction with Lead Counsel’s acceptance, at the first appearance hearing, of the decision to have the charges read out;⁹ that the obligation to provide reasoning for decisions does not apply to all the issues;¹⁰ and that the principle of publicity of the proceedings allows the charges to be read out at the first appearance hearing, even where the suspect objects, without further reasoning being required.¹¹ It is also stated that the Second Impugned Decision is among the “self-evident” decisions for which reasoning need not be provided, and that the request to observe a minute of silence exceeded the suspect’s prerogatives and impinged on the Chamber’s authority to determine the conduct of the hearing.¹²

⁶ ICC-02/05-01/20-118: “Decision on the Defence Request to Provide Written Reasoning for two oral Decisions” (French version not available), 18 August 2020.

⁷ ICC-02/05-01/20-118: *op. cit.*, para. 8.

⁸ ICC-02/05-01/20-118: *op. cit.*, para. 9.

⁹ ICC-02/05-01/20-118: *op. cit.*, para. 10.

¹⁰ ICC-02/05-01/20-118: *op. cit.*, para. 12.

¹¹ ICC-02/05-01/20-118: *op. cit.*, para. 13.

¹² ICC-02/05-01/20-118: *op. cit.*, para. 14.

ADMISSIBILITY

6. This application for leave to appeal is filed within the time limit set by rule 155(1) of the Rules of Procedure and Evidence (“Rules”) of five days from notification of the Third Impugned Decision. It is therefore admissible *ratione temporis* as concerns the seeking of leave to appeal against the Third Impugned Decision.

7. As for the First and Second Impugned Decisions, the present application for leave to appeal is also admissible *ratione temporis* insofar as the time limit for seeking leave to appeal under rule 155(1) of the Rules began to run only as of the notification of the Third Impugned Decision refusing to provide reasons for those decisions. Contrary to what is stated in the Third Impugned Decision, the time limit to appeal against the First and Second Impugned Decisions could not have expired by the day the Third Impugned Decision was issued, since that time limit had not even begun to run. Rule 155(1) of the Rules provides that the time limit to file an application for leave to appeal a decision is “within five days of being notified of that decision”. But in order for a party to be notified of a decision, it has to have received all the components thereof. Where the reasons for a decision are not notified along with the decision itself but at a later date – as in the case at hand – the time limit for filing an appeal can start running only as of that later date at which the reasons are given. Thus, in the case of *Gbagbo and Blé Goudé*, the Honourable Trial Chamber I delivered an oral decision on 15 January 2019 acquitting the two accused, without providing the reasons for the acquittals, and stated: “The deadline for appealing the present decision will start running at the moment the parties are notified of the full reasons for it.”¹³ The reasons for the acquittals were notified on 16 July 2019¹⁴ and the OTP’s Notice of Appeal was filed on 16 September 2019,¹⁵ after an extension of time

¹³ [ICC-02/11-01/15-T-232-ENG](#): “Judgment”, 15 January 2019, p. 4, lines 10-11.

¹⁴ [ICC-02/11-01/15-1263](#): “Reasons for oral decision of 15 January on the ‘*Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté soit ordonnée*’, and on the Blé Goudé Defence no case to answer motion”, 16 July 2019.

¹⁵ [ICC-02/11-01/15-1270-Corr](#): “Corrected version of ‘Prosecution Notice of Appeal’, 16 September 2019, ICC-02/11-01/15-1270”, 17 September 2019.

requested on 16 July 2019.¹⁶ Likewise, the time limit for appealing the First and Second Impugned Decisions of 15 June 2020 could not have begun to run before the notification – or rather the refusal to give notification – of those reasons, which occurred on 18 August 2020, and those two decisions had not become final on the day that the Third Impugned Decision was issued. Leave to appeal against these two decisions is thus sought within the time limit prescribed by rule 155(1) of the Rules.

SUBMISSION OF THE REQUEST TO THE FULL HONOURABLE PRE-TRIAL CHAMBER II

8. In accordance with rule 7(3) of the Rules, the Defence moves that the present Request be adjudicated by the full Honourable Pre-Trial Chamber II instead of the Honourable Single Judge sitting alone.

9. It should be recalled that the Honourable Single Judge's reason for dismissing *in limine* the Request was that the Defence had not appealed against the First and Second Impugned Decisions within the prescribed time limits and that they were therefore now *res judicata*.¹⁷ Having so ruled in the Third Impugned Decision, the Honourable Single Judge cannot now deliberate on the present application for leave to appeal insofar as he has already pronounced on the merits of the application as regards the First and Second Impugned Decisions. Neither can the Honourable Single Judge deliberate on the application for leave to appeal against the Third Impugned Decision insofar as that decision, which notifies – or rather refuses to notify – the reasons for the First and Second Impugned Decisions, is an integral part of those two decisions, which the Honourable Single Judge has already held to be final and no longer appealable by the Defence. The Defence therefore prays the other two Honourable Judges of Pre-Trial Chamber II to rule *en banc* on the present Application for Leave to Appeal.

10. The Defence moreover turns anew to the Honourable Single Judge, in his wisdom, to exercise his prerogative pursuant to article 41(1) of the Statute for the

¹⁶ [ICC-02/11-01/15-1264](#): "Prosecution's urgent request for extension of time limits under rule 150(1) and regulation 58(1)" (French version not available), 16 July 2019.

¹⁷ ICC-02/05-01/20-118: *op. cit.*, para. 8.

specific purposes of this Application for Leave to Appeal since he has held that at least two of the three Impugned Decisions were *res judicata* and no longer appealable, and since the Third Impugned Decision constitutes an integral part of the first two. The Honourable Single Judge cannot, thus, then take part in the deliberations on this Application for Leave to Appeal, the merits of which he has already pronounced on in the negative without receiving or hearing the arguments of the Defence. He is therefore invited to recuse himself from the deliberations on the present Application.

11. In addition, the Defence notes and finds regrettable that the Honourable Single Judge declined the opportunity offered to clarify the reasoning for – and thus to remedy – the apparent violation of the presumption of innocence that Mr Ali Muhammad Ali Abd-Al-Rahman must be afforded, which had been the basis for the Request.¹⁸ The Defence reserves the right to address the consequences of the Honourable Single Judge’s refusal to remedy an appearance of a violation of the presumption of innocence, in due course and via the appropriate procedural avenues, regardless of the present appeal or its outcome.

PURPOSE OF THE REQUEST

12. Lead Counsel hereby respectfully requests the Honourable Pre-Trial Chamber II to grant leave to appeal against the First, Second and Third Impugned Decisions under article 82(1)(d) of the Statute.

13. In accordance with article 82(1)(d) of the Statute, leave to appeal against a decision may be granted provided that the two cumulative conditions laid down in that article are satisfied: (1) the impugned decision involves “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”; and (2) “in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”¹⁹ Lead Counsel limits this Request to laying out the reasons for which

¹⁸ [ICC-02/05-01/20-T-001 FRA](#): Record of hearing, 15 June 2018, p. 22, lines 1-6; [ICC-02/05-01/20-2](#): *op. cit.*, paras. 8-9.

¹⁹ ICC-01/04/168: “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 (“Judgment of 13 July 2006”), para. 8, <https://www.legal-tools.org/doc/a60023/>.

he considers that those two criteria are satisfied, without developing the grounds of appeal he intends to submit to the Honourable Appeals Chamber should he be granted the leave requested.

14. The three Impugned Decisions taken together raise the following two issues: (i) does the obligation, pursuant to article 74(5) of the Statute, to provide reasons for decisions apply to all decisions rendered by Pre-Trial and Trial Chambers or to only some of them? In the latter scenario, does the obligation to provide reasons apply specifically to decisions for which a Party has expressly sought to receive notification of the reasons?; and (ii) does the time limit for filing an appeal against a decision, for which notification of the reasons is pending, start running before the notification of the reasons or the refusal to notify them occurs?

15. Resolution of these two issues by the Honourable Appeals Chamber would significantly affect the fair and expeditious conduct of the proceedings insofar as it would make plain, for the remainder of the proceedings, the law applicable to the provision of reasoning for decisions issued by the Honourable Chambers hearing the case as well as to the start of the time limits for appeal. Should the Honourable Appeals Chamber uphold the position of the Honourable Single Judge on these issues, the proceedings would be expedited insofar as reasoning would no longer need to be given for decisions that do not fall under such obligation. Conversely, were the Honourable Appeals Chamber to rule in favour of the Defence and invalidate the Impugned Decisions on those two points, the fairness of the proceedings would be considerably secured insofar as the obligation for the Honourable Chambers to issue reasons for their decisions – an essential safeguard of that fairness – would be applicable to all decisions for which a Party requests notification of the reasons. The fact that a Party can no longer be deprived of its right to appeal a decision whose reasoning it was legitimately awaiting, on the ground that the time limit for filing an appeal had expired during that waiting period – as with the First and Second Impugned Decisions in these proceedings – will be an additional factor in significantly securing the fair conduct of the proceedings.

16. The issue of providing reasoning for decisions handed down by the Honourable Chambers re-emerges regularly, virtually on a daily basis, throughout the entire course of proceedings. Thus, immediate resolution of this issue by the Honourable Appeals Chamber could materially advance the proceedings by delineating, once and for all, the scope of the obligation to provide reasoning for decisions and how that will affect time limits for appeal. If the Honourable Appeals Chamber were to rule in favour of the Defence, the proceedings before the Court would likewise be advanced considerably insofar as its judgment would bring a definitive end to any hint of arbitrary exercise of the Honourable Chambers' authority and would enshrine in the law of the Court the essential safeguard of the right to a fair trial that is the obligation to provide reasoning for decisions, as the European Court of Human Rights in particular has already recognized in its law.²⁰

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE FULL HONOURABLE PRE-TRIAL CHAMBER II TO GRANT the Defence leave to appeal the First, Second and Third Impugned Decisions on the basis of the two issues set out at paragraph 14 above.

[signed]

Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 24 August 2020

At The Hague, Netherlands

²⁰ ECtHR, 19 April 1994, [Van de Hurk v. Netherlands](#), Application no. 16034/90, para. 61; ECtHR, 16 December 1992, [Hadjianastassiou v. Greece](#), Application no.12945/87, para. 33.