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No. ICC-02/05-01/20 OA5

Date: 18 December 2020

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-
RAHMAN ('ALI KUSHAYB')**

Public document

Judgment

**on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral
decisions of the Pre-Trial Chamber and the decision entitled 'Decision on the
Defence Request to provide written reasoning for two oral decisions'**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Cyril Laucci

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber of 15 June 2020 (ICC-02/05-01/20-T-001-ENG) and the decision entitled ‘Decision on the Defence Request to provide written reasoning for two oral decisions’ of 18 August 2020 (ICC-02/05-01/20-118),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision entitled ‘Decision on the Defence Request to provide written reasoning for two oral decisions’ of 18 August 2020 (ICC-02/05-01/20-118) is confirmed and the appeals against the two oral decisions of the Pre-Trial Chamber of 15 June 2020 (ICC-02/05-01/20-T-001-ENG) are dismissed as moot.

REASONS

I. KEY FINDINGS

1. Chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions. This duty is an element of the broader right to a fair trial, which applies as early as a person’s initial appearance before the Court. Whether the reasons given are ‘sufficient’, however, will depend invariably on the circumstances. There is no prescribed formula for what is or is not sufficient, and the extent to which the duty to provide reasons applies may vary according to the nature of the decision.

II. INTRODUCTION

2. During his initial appearance before the Court, Mr Abd-Al-Rahman made two requests of the Pre-Trial Chamber to modify the procedure for the hearing. The Pre-Trial Chamber denied both of the requests in oral decisions. Following the hearing, Mr Abd-Al-Rahman made a written request to the Pre-Trial Chamber to provide further reasons for its oral decisions. The Pre-Trial Chamber dismissed the written request on an *in limine* basis. The Appeals Chamber is now seized of the issue of whether the two oral decisions comply with the requirement to give sufficient reasons for a decision and, if not, whether the time limit for interlocutory appeal of those decisions is suspended pending further reasons.

III. PROCEDURAL HISTORY

3. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge on behalf of Pre-Trial Chamber II (the ‘Pre-Trial Chamber’). During the hearing, the Pre-Trial Chamber adopted a number of procedural oral decisions, including (i) a decision to proceed with the reading of the Prosecutor’s allegations against Mr Abd-Al-Rahman, notwithstanding his objection (the ‘First Oral Decision’);¹ and (ii) a decision rejecting Mr Abd-Al-Rahman’s request that a minute of silence be observed in memory of the victims of the situation in Darfur (the ‘Second Oral Decision’)² (collectively, the ‘Oral Decisions’).

4. On 18 June 2020, Mr Abd-Al-Rahman submitted a written request (the ‘Request for Reasons’),³ arguing that the Oral Decisions did not provide any indication of the underlying reasons. In particular, he argued that the First Oral Decision constituted a departure from existing practice, and that the Pre-Trial Chamber’s reasons for such a departure were not apparent.⁴ He also characterised the Pre-Trial Chamber’s rejection of his request for a minute of silence as ‘incomprehensible’, and he asserted that he had a right to be informed of the reasons for the refusal.⁵

¹ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-100-ENG, page 6, lines 16-24.

² Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-100-ENG, page 22, lines 4-12.

³ [Request to Provide Written Reasoning for Two Oral Decisions Delivered at the First Appearance Hearing](#), ICC-02/05-01/20-2-tENG.

⁴ [Request for Reasons](#), para. 8.

⁵ [Request for Reasons](#), para. 9.

5. On 18 August 2020, the Pre-Trial Chamber issued its decision rejecting the Request for Reasons (the ‘Decision on the Request for Reasons’).⁶ In the view of the Pre-Trial Chamber, as Mr Abd-Al-Rahman did not proceed with a request under article 82(1)(d) of the Statute to appeal the Oral Decisions directly, that procedural avenue was foreclosed and the Oral Decisions were *res judicata*. On this basis, the Pre-Trial Chamber dismissed Mr Abd-Al-Rahman’s Request *in limine*.⁷ The Pre-Trial Chamber then explained that the First Oral Decision was taken, in part, so that the public was made aware and precisely informed of the subject matter of criminal proceedings.⁸ The Second Oral Decision was taken because, in its view, ‘the courtroom was “not the place” to submit [a request for a minute of silence]’, and such a proposal fell outside the object and purpose of a hearing and exceeded the powers of the Pre-Trial Chamber.⁹

6. On 28 August 2020, in respect of the Oral Decisions and the Decision on the Request for Reasons (collectively, the ‘Impugned Decisions’), Mr Abd-Al-Rahman submitted a request for leave to appeal (the ‘Request for Leave to Appeal’),¹⁰ seeking leave to appeal in respect of the following two issues:

- 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 reasons?
- 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?¹¹

⁶ [Decision on the Defence Request to provide written reasoning for two oral decisions](#), ICC-02/05-01/20-118.

⁷ [Decision on the Request for Reasons](#), paras 7-8.

⁸ [Decision on the Request for Reasons](#), paras 11-13.

⁹ [Decision on the Request for Reasons](#), para. 14.

¹⁰ [Application for Leave to Appeal against Three Decisions](#), ICC-02/05-01/20-130-tENG.

¹¹ [Request for Leave to Appeal](#), para. 14.

The Pre-Trial Chamber granted leave to appeal the Impugned Decisions without modifying the issues as framed in Mr Abd-Al-Rahman's Request for Leave to Appeal.¹²

7. In his appeal brief of 9 September 2020 (the 'Appeal Brief'),¹³ Mr Abd-Al-Rahman raises three grounds of appeal. First, he argues that the Pre-Trial Chamber contravened article 74(5) of the Statute in refusing to give further reasons for the Oral Decisions.¹⁴ Second, he argues that the issue of whether the time for interlocutory appeal of the Oral Decisions had lapsed is independent of the issue of whether the Pre-Trial Chamber had an obligation to provide further reasons for the Oral Decisions.¹⁵ And third, he argues that the five-day time period for interlocutory appeal of the Oral Decisions did not begin to run until the Decision on the Request for Reasons was issued.¹⁶

8. The Prosecutor responds that the appeal should be dismissed *in limine*.¹⁷ In the alternative, the Prosecutor argues that the Pre-Trial Chamber did not err because the Oral Decisions were sufficiently reasoned and in any event they are final and can no longer be appealed.¹⁸

IV. PRELIMINARY ISSUES

A. Scope of the appeal

9. Given the complexity of the proceedings leading to this judgment, the Appeals Chamber finds it necessary to provide clarification of the scope of the appeal. In its Decision on the Request for Reasons, the Pre-Trial Chamber determined that the Oral Decisions could not be appealed because the time limit for seeking leave to appeal had elapsed. It dismissed the Request for Reasons on an *in limine* basis. Nevertheless, the first issue for which leave was granted calls upon the Appeals Chamber to examine the scope of application of the legal requirement to give reasons for a decision. Should the Appeals Chamber determine that this legal requirement extends to oral decisions made

¹² [Decision on the Defence Request for Leave to Appeal Three Decisions](#), 31 August 2020, ICC-02/05-01/20-142.

¹³ [Appeal Brief against Three Decisions](#), ICC-02/05-01/20-148-tENG.

¹⁴ [Appeal Brief](#), paras 12-25.

¹⁵ [Appeal Brief](#), paras 26-28.

¹⁶ [Appeal Brief](#), paras 29-33.

¹⁷ [Prosecution Response to « Mémoire d'appel de trois décisions »](#), 21 September 2020, ICC-02/05-01/20-162 (the 'Prosecutor's Response'), paras 3, 5-15.

¹⁸ [Prosecutor's Response](#), paras 16-35.

in a suspect's first appearance, this determination would have direct consequences for the Oral Decisions. In order to give meaning to this examination, the Appeals Chamber understands the Pre-Trial Chamber's position to be that the Oral Decisions can be re-opened to the extent that the question of whether reasons given were or were not sufficient should be answered on appeal.

10. Accordingly, the Appeals Chamber will address the question of whether sufficient reasons were given for the Oral Decisions below. It should be clarified that this issue arises in the present appeal from the Pre-Trial Chamber's refusal to issue further reasons in the Decision on the Request for Reasons. That decision must logically be considered first and, depending on the outcome, the appeals against the Oral Decision would be moot.

11. However, the Appeals Chamber does not view the scope of the appeal to be so broad as to capture the merits of the Oral Decisions, as explained either in the Decision on the Request for Reasons or in the Oral Decisions themselves. In his Appeal Brief, Mr Abd-Al-Rahman has challenged remarks made in the Decision on the Request for Reasons.¹⁹ It is clear that these remarks were made to support the validity of the Oral Decisions. As the legal basis for the Oral Decisions themselves is not presently at issue, Mr Abd-Al-Rahman's arguments fall outside the scope of the issue for which leave to appeal was granted. Therefore, the Appeals Chamber has ignored them.

B. Nature of the appeal

12. The Appeals Chamber is compelled, here, to devote a few remarks to the appropriateness of the use of the appellate process and the nature of the matter at issue. The criteria for granting leave to appeal are clearly stated in article 82(1)(d) of the Statute, and they are regularly referred to and applied in the decisions of first instance chambers. There is no explanation in the Pre-Trial Chamber's decision granting leave to appeal as to how the criteria have been applied, nor as to how they have been satisfied. The Appeals Chamber expresses concern that it is now seized of a matter that has little importance to the outcome of the trial or to the fair and expeditious conduct

¹⁹ [Appeal Brief](#), paras 17-24.

of the proceedings. However, in principle, short of finding that an appeal is inadmissible, the Appeals Chamber is duty-bound to consider its merits.

V. MERITS

A. Mr Abd-Al-Rahman's first ground of appeal

13. The Appeals Chamber will first consider Mr Abd-Al-Rahman's first ground of appeal, as it concerns the central issue on appeal: whether the Pre-Trial Chamber was justified in refusing to give further reasons for the Oral Decisions. This question calls upon the Appeals Chamber to decide, in the context of the very early stage of the proceeding against Mr Abd-Al-Rahman from which this appeal arises, whether there is a right to a reasoned decision and the scope of that right. The Appeals Chamber observes, first, that the Statute and the Rules of Procedure and Evidence (the 'Rules') require that reasons be given only for certain types of judgments or decisions,²⁰ none of which is the type of decision at issue here. In this regard, the Appeals Chamber finds that Mr Abd-Al-Rahman's reliance on article 74(5) of the Statute is misplaced. That provision outlines the requirements for a decision made regarding conviction or acquittal, rather than setting out a general rule applicable at all stages of a case.

14. Nevertheless, the Appeals Chamber recognises that chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions. This duty is an element of the broader right to a fair trial,²¹ which applies as early as a person's initial appearance before the Court.²² It also applies, in principle, to oral decisions of a chamber. The Appeals Chamber recognises, however, that whether the reasons given are indeed 'sufficient' will depend invariably on the circumstances.²³ There is no

²⁰ E.g. articles 72(7)(a)(ii), 74(5), and 83(4) of the Statute; rules 50(5), 64(2), 108(1), 110(1), 115(3), 139(2), 159(2), and 224(5) of the Rules.

²¹ See *Prosecutor v. Thomas Lubanga Dyilo*, [Judgment 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 (OA5) ('Lubanga OA5'), para. 20, referring to ECtHR, *Hadjianastassiou v. Greece*, [Judgment](#), 16 December 1992, application no. 12945/87, para. 32.

²² See rule 121(1) of the Rules, stating that, in a person's initial appearance, '[s]ubject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67'.

²³ See [Lubanga OA5](#), para. 20; *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled](#)

prescribed formula for what is or is not sufficient, and the extent to which the duty to provide reasons applies may vary according to the nature of the decision.²⁴

15. Turning to the present case, the Appeals Chamber emphasises that this appeal arises from two relatively minor procedural decisions taken by the Single Judge during Mr Abd-Al-Rahman’s first appearance. As for the First Oral Decision, prior to reading out the allegations, the Single Judge explained to Mr Abd-Al-Rahman that the scope of the appearance pursuant to article 60 of the Statute was quite limited, that no evidence would be presented, and that the charges on which the Prosecutor intends to seek trial had by no means been confirmed.²⁵ The Single Judge then explained that one of the purposes of the hearing is so that ‘the Single Judge [is] satisfied that the person subject to the arrest warrant is informed of the crimes he is alleged to have committed’.²⁶ After Mr Abd-Al-Rahman’s counsel informed the Single Judge that he waived his right to be informed of the charges, the Single Judge, in the First Oral Decision, indicated that ‘the charges should be appropriately read anyway’.²⁷

16. Indeed, the Appeals Chamber notes that one of the primary purposes of a first appearance is so that the Pre-Trial Chamber may itself be satisfied that the person appearing is aware of the allegations against him or her. This purpose was explained by the Single Judge, and it is evident in the text of article 60(1) of the Statute. Therefore, if those allegations are read out over the objection of counsel, any additional reasons given for doing so need not be extensive. The Appeals Chamber finds that, in the circumstances, the reasons given were sufficient.

17. As for the Second Oral Decision, the Appeals Chamber recalls that, after hearing the request of counsel for Mr Abd-Al-Rahman to observe a minute of silence in memory of the victims of Darfur, the Single Judge responded as follows:

Judge Aitala: [12:00:39] Well, sir, this is – I understand the purpose of the request, but this is not the place to do this. We will all do this individually and at

[“Decision on the ‘Requête de mise en liberté’ submitted by the Defence for Jean-Jacques Mangenda”](#), 11 July 2014, ICC-01/05-01/13-560 (OA4), para. 116.

²⁴ ECtHR, *Baydar v. The Netherlands*, [Judgment](#), 24 April 2018, application no. 55385/14, para. 40. *See also* ICTY, Appeals Chamber, *The Prosecutor v. Anto Furundzija*, [Judgement](#), 21 July 2000, IT-95-17/1-A, para. 69, *referring to* ECtHR, *Ruiz Torija v. Spain*, [Judgment](#), 9 December 1994, application no. 18390/91, para. 29.

²⁵ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, p. 4, lines 13-17.

²⁶ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, p. 4, lines 18-21.

²⁷ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, p. 6, lines 19-23.

the International Criminal Court we do this very often, we always think about the victims. So this request now is rejected. We'll continue with the proceedings.²⁸

Referring back to article 60 of the Statute and rule 121(1) of the Rules, the Appeals Chamber observes that, while there are several matters that in principle should be addressed during the first appearance, partaking in a short memorial ceremony is not one of them. Accordingly, if reasons are indeed given for refusing such a request, those reasons are merely gratuitous and not required by law. Given the circumstances, the Appeals Chamber finds that the reasons given were sufficient.

18. Indeed, though not comprehensive, the Appeals Chamber finds that the reasons given in the Oral Decisions were relevant in relation to the importance of the questions decided by the Single Judge. Therefore, Mr Abd-Al-Rahman's first ground of appeal is dismissed.

B. Mr Abd-Al-Rahman's second and third grounds of appeal

19. The Appeals Chamber will determine Mr Abd-Al-Rahman's second and third grounds of appeal together, as both touch upon the same issue: whether the filing of the Request for Reasons had the effect of suspending the five day period for interlocutory appeal of the Oral Decisions. In his third ground of appeal, Mr Abd-Al-Rahman argues that this was indeed the case. In his second ground of appeal, he argues that even if, *arguendo*, this was not the case, the fact that the Oral Decisions were indeed final and not capable of being appealed is not a relevant factor in the determination of his Request for Reasons.

20. The Appeals Chamber notes, first, in relation to Mr Abd-Al-Rahman's second ground of appeal, that the duty to provide a reasoned decision fulfils at least two primary interests. One of the purposes is so that proper appellate review can take place.²⁹ However, a reasoned decision also protects the parties from arbitrariness by demonstrating to them that they have been heard, and thus contributes to a greater

²⁸ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, p. 22, lines 9-12.

²⁹ [Lubanga OA5](#), para. 20, referring to ICTY, Appeals Chamber, *The Prosecutor v. Momir Nikolić, Judgement on Sentencing Appeal*, 8 March 2006, IT-02-60/1-A, para. 96; ICTY, Appeals Chamber, *The Prosecutor v. Dragoljub Kunarac et al., Judgement*, 12 June 2002, IT-96-23 & 23/1-A, para. 41.

acceptance of the decision.³⁰ Therefore, a chamber cannot, in principle, avoid the duty to give reasons solely on the basis that appellate review is no longer possible.

21. Nevertheless, as the Appeals Chamber has found that the Oral Decisions were sufficiently reasoned, any superseding question as to the basis for the Pre-Trial Chamber's rejection of the Request for Reasons is moot. There was no obligation of the Pre-Trial Chamber to provide further reasons in a separate decision. Therefore, Mr Abd-Al-Rahman's second ground of appeal is dismissed. The finding that the Oral Decisions were sufficiently reasoned also answers Mr Abd-Al-Rahman's third ground of appeal. The issue as to whether a request for reasons acts to automatically suspend the time permitted for interlocutory appeal is moot, because in this case there was no period during which the communication of reasons was pending. The reasons were given fully and appropriately at the time of the Oral Decisions. Therefore, Mr Abd-Al-Rahman's third ground of appeal is dismissed.

VI. APPROPRIATE RELIEF

22. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Decision on the Request for Reasons and dismiss the appeals against the Oral Decisions as moot.

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



Judge Piotr Hofmański
Presiding

Dated this 18th day of December 2020

At The Hague, The Netherlands

³⁰ ECtHR, *Magnin c. France*, [Décision](#), 10 May 2012, application no. 26219/08, para. 29.