

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: ICC-02/05-01/20
Date: **9 September 2020**

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
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

Public Document

Appeal Brief 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:

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Julian Nicholls, Senior Trial Lawyer

Counsel for the Defence

Mr Cyril Laucci, Lead Counsel

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta, Principal Counsel
Ms Marie O'Leary

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Esteban Peralta-Losilla

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Ms Sonia Robla, Public Information and
Outreach Section

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) submits this document (“Brief”) in support of its appeal against the following three decisions: the oral decision to have the charges read out in their entirety at the first appearance hearing despite Mr Ali Muhammad Ali Abd-Al-Rahman’s waiver of his right to have them read out (“First Impugned Decision”);¹ the oral decision rejecting Mr Ali Muhammad Ali Abd-Al-Rahman’s request to be able to observe a minute of silence for the victims at his first appearance hearing (“Second Impugned Decision”);² and the “Decision on the Defence Request to Provide Written Reasoning for two oral Decisions” (“Third Impugned Decision”).³ This Brief follows the decision of the Honourable Single Judge of 31 August 2020 granting leave to appeal (“Decision Granting Leave to Appeal”).⁴

SUMMARY OF PROCEEDINGS LEADING TO THE PRESENT APPEAL

2. On 15 June 2020, at the first appearance hearing, the Honourable Single Judge delivered orally the First and Second Impugned Decisions: the First Impugned Decision 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 to have them read out;⁵ and the Second Impugned Decision rejecting Mr Ali Muhammad Ali Abd-Al-Rahman’s request to be able to observe a minute of silence for the victims at the hearing.⁶ 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”).⁷ On 18 June 2020, the Defence filed a Request for the written reasoning for the First and Second Impugned Decisions

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

² [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 21, lines 22-16.

³ 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.

⁴ [ICC-02/05-01/20-142](#): “Decision on the Defence Request for Leave to Appeal three Decisions” (French version not available), 31 August 2020.

⁵ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 6, lines 23-24.

⁶ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 21, lines 22-16.

⁷ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 1-6.

(“Request”).⁸ At paragraph 6, the Request cited a previous holding of the Honourable Appeals Chamber that “the reasons for a decision should be comprehensible from the decision itself”.⁹ 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 cases ICC-01/14-01/18¹⁰ and ICC-01/14-02/18¹¹ and that the reasons for such a departure from that practice should therefore be given. 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 it violated the presumption of innocence to which Mr Ali Muhammad Ali Abd-Al-Rahman is entitled under article 66 of the Statute.

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”).¹² 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, which it says are now *res judicata*.¹³ Further, at paragraphs 10-14 of the Third Impugned Decision, a number of “remarks” are made for the sake of the “public’s understanding”.¹⁴ While it is the Defence’s understanding that those remarks are not meant to constitute the reasons for the First and Second Impugned Decisions, the Defence considers it relevant to advert to them in the grounds it sets out below.

⁸ [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.

⁹ [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.

¹⁰ [ICC-01/14-01/18-T-1-FRA](#): French version of the transcript, 23 November 2018, p. 6, lines 2-7.

¹¹ [ICC-01/14-02/18-T-1-FRA](#): French version of the transcript, 25 January 2019, p. 4, lines 25-28 to p. 5, lines 1-2.

¹² [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.

¹³ [ICC-02/05-01/20-118](#): *op. cit.*, para. 8.

¹⁴ [ICC-02/05-01/20-118](#): *op. cit.*, para. 9.

5. On 24 August 2020, the Defence applied for leave to appeal against the First, Second and Third Impugned Decisions (“Application for Leave to Appeal”).¹⁵ At paragraphs 6 and 7 of its Application for Leave to Appeal, the Defence argued that its approach – filing one single application for leave to appeal three decisions under article 82(1)(d) of the Statute, within the time limit allowed in which to seek leave to appeal the last of those three decisions – was legitimate. It submitted in particular that those three decisions were inextricably linked insofar as the third dismissed the request for the reasons for the first two and that the condition triggering the five-day time limit for seeking leave to appeal under rule 155(1) of the Rules of Procedure and Evidence (“Rules”), which is that the appellant must be notified of the impugned decision, had not been met in respect of the first two decisions until the refusal to provide the reasoning for them was notified by way of the Third Impugned Decision.¹⁶

6. On 28 August 2020, the OTP moved that the Application for Leave to Appeal be dismissed.¹⁷

7. On 31 August 2020, the Honourable Single Judge granted leave to appeal the three Decisions under article 82(1)(d) of the Statute (“Decision Granting Leave to Appeal”).¹⁸

8. This Brief under article 82(1)(d) of the Statute is filed within the time limit, set by regulation 65(4) of the Regulations of the Court (“RoC”), of 10 days from notification of the Decision Granting Leave to Appeal.

ISSUES PUT TO THE APPEALS CHAMBER FOR CONSIDERATION

9. At paragraph 14 of its Application for Leave to Appeal, the Defence identified the following two issues which it argued were involved in the three Impugned Decisions, taken together, for the purposes of a determination on leave to appeal under article 82(1)(d) of the Statute:

¹⁵ [ICC-02/05-01/20-130](#): “*Demande d’autorisation d’interjeter appel de trois décisions*”, 24 August 2020.

¹⁶ [ICC-02/05-01/20-130](#): *op. cit.*, paras. 6-7.

¹⁷ [ICC-02/05-01/20-139](#): “Prosecution Response to Request for Leave to Appeal Three Decisions” (French version not available), 28 August 2020.

¹⁸ [ICC-02/05-01/20-142](#): *op. cit.*

[TRANSLATION] 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?¹⁹

10. The Decision Granting Leave to Appeal reiterated these two issues verbatim at paragraph 5 and granted leave to appeal.²⁰

GROUND OF APPEAL AND SUPPORTING ARGUMENTS

11. Paragraph 8 of the Third Impugned Decision reads as follows:

Since Counsel opted not to proceed with a request under article 82(1)(d) within the relevant time limit, that procedural avenue is now foreclosed. Both the First and the Second Oral Decisions are now *res judicata* and the Request [to provide written reasoning for the First and Second Impugned Decisions] must be dismissed *in limine*. [French version not available].²¹

The Defence submits that the conclusions stated in that paragraph are marred by three errors of law. First, the refusal by way of the Third Impugned Decision to provide the reasoning for the First and Second Impugned Decisions is marred by an error of law in that it is in contravention of article 74(5) of the Statute as it applies to interlocutory decisions handed down by Trial Chambers (first ground of appeal). Second, the fact – which is contested – that the time limit for appealing the First and Second Impugned Decisions had expired could not be the basis for dismissing *in limine* the Request for a statement of the reasons for those decisions (second ground of appeal). Lastly, the Impugned Decision erred in law in considering that the time limit for appealing the First and Second Decisions had expired, insofar as it could not have run while the statement of reasons for those two decisions was pending and therefore the Defence had been unable to apprise itself of every facet of those two decisions so as to determine the advisability of seeking leave to appeal (third ground of appeal). These three grounds of appeal are alternative in nature

¹⁹ [ICC-02/05-01/20-130](#): *op. cit.*, para. 14.

²⁰ [ICC-02/05-01/20-142](#): *op. cit.*, paras. 5, 10.

²¹ [ICC-02/05-01/20-118](#): *op. cit.*, para. 8.

insofar as granting any single one of them, considered individually, clears the way for the relief sought.

First ground of appeal – error of law: the reasoning for the First and Second Impugned Decisions must be provided

12. By dismissing *in limine* the Request²² to be provided with the reasons for the First and Second Impugned Decisions, the Third Impugned Decision erred in law by failing to comply with the obligation to state the reasons for decisions issued by the honourable Chambers of the Court in accordance with article 74(5) of the Statute.

13. At paragraph 6 of its Request,²³ the Defence argued that reasons had to be provided for decisions issued by the Honourable Judges of the Court, in accordance with article 74(5) of the Statute. The Defence noted that, while article 74(5) of the Statute applies primarily to decisions rendered by a Trial Chamber at the close of the trial, its ambit had been broadened to encompass all decisions rendered by the Honourable Judges of the Court, including its Pre-Trial Chambers and/or their Single Judges. Thus the Honourable Appeals Chamber, ruling on an appeal against a decision issued by the Honourable Pre-Trial Chamber I, made the following determination:

The reasons for a decision should be comprehensible from the decision itself. It is not sufficient for the Pre-Trial Chamber to identify simply which filings were before it. **The decision must set out which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive for the determination it reached.** [...] The Appeals Chamber will not consider the other arguments of the Prosecutor, which address the question of whether the authorisation of the redactions was justified. This question must be distinguished from whether the reasoning of the Impugned Decision was sufficient: it may well be that there was good cause for the Pre-Trial Chamber to authorise the redactions. The question that arises under the first ground of appeal, however, is not whether the redactions were justified **but whether the factual reasoning in the Impugned Decision was sufficient.** [Original English]. [Emphasis added].²⁴

²² [ICC-02/05-01/20-118](#): *op. cit.*, para. 8.

²³ [ICC-02/05-01/20-2](#): *op. cit.*, para. 6.

²⁴ [ICC-01/04-01/06-774](#): *op. cit.*, paras. 33-34. See also [ICC-01/04-01/07-572](#): “Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 9 June 2008, paras. 26-27.

14. The Defence noted in its Request that the reasoning for the First and Second Impugned Decisions was either not given or was insufficient, and identified gaps in the reasoning that was provided, which it argued required clarification.

15. As regards the First Impugned Decision, the Defence noted that it had been based, at the first appearance hearing, on the “view” of the Honourable Single Judge but that the reasoning for this “view” still had to be given, especially since the First Impugned Decision seemed to go against the practice of the Honourable Pre-Trial Chamber II in other cases, such as at the first appearance hearings of the suspects in cases ICC-01/14-01/18²⁵ and ICC-01/14-02/18.²⁶ Mr Ali Muhammad Ali Abd-Al-Rahman’s wish to receive clarification on the reasons for departing from this practice was therefore legitimate.²⁷

16. In the “remarks” made for the sake of the public’s understanding in the Third Impugned Decision, it is stated (i) that the request for the reasoning 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;²⁸ (ii) that the obligation to provide reasoning for decisions does not apply to all the issues;²⁹ and (iii) 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.³⁰ The Third Impugned Decision makes plain that these remarks do not constitute a statement of the reasons for the First Impugned Decision and cannot be considered as such. Even if they had been meant to serve as reasoning for the First Impugned Decision, the Defence notes nonetheless that they would not have been satisfactory.

17. Remark (i) indeed clearly conflates Duty Counsel’s show of deference in accordance with the duty of courtesy required of his profession under, *inter alia*, article 7(1) of the Code of Professional Conduct for counsel (“CPCC”), and respect for

²⁵ [ICC-01/14-01/18-T-1-FRA](#): *op. cit.*, p. 6, lines 2-7.

²⁶ [ICC-01/14-02/18-T-1-FRA](#): *op. cit.*, p. 4, lines 25-28 to p. 5, lines 1-2.

²⁷ [ICC-02/05-01/20-2](#): *op. cit.*, para. 8.

²⁸ [ICC-02/05-01/20-118](#): *op. cit.*, para. 10.

²⁹ [ICC-02/05-01/20-118](#): *op. cit.*, para. 12.

³⁰ [ICC-02/05-01/20-118](#): *op. cit.*, para. 13.

the Honourable Single Judge's authority with regard to the conduct of the hearing, with a waiver of the procedural right to seek leave to appeal the Single Judge's decision under article 82(1)(d) of the Statute. A waiver of appeal must be explicit and cannot be inferred from Duty Counsel's respectful attitude at the hearing. The decision to seek leave to appeal the Single Judge's decision was to be taken within the time limit laid down by rule 155(1) of the Rules; it did not have to be taken at the hearing. Duty Counsel's courteous and respectful responses to the Honourable Single Judge cannot be equated with a waiver of appeal. The Honourable Single Judge clearly reversed his initial view on that point, expressed in the Third Impugned Decision, since in the Decision Granting Leave to Appeal, he granted leave to appeal the First Impugned Decision.³¹

18. Remark (ii) establishes a distinction between decisions according to their nature and content to suggest that reasoning does not need to be provided for some of them. That distinction remains blurred since the Third Impugned Decision does no more than state that the First Impugned Decision was excluded from among the decisions for which a statement of reasons was necessary but did not further define the contours of that category. Moreover, such a distinction is not founded on any instrument of the Court. Even assuming that not all the Court's decisions require the same degree of detail in their reasoning, the Defence argues that, where a party specifically requests a statement of reasons for a decision – as in these proceedings – the reasoning for that decision must be provided, in accordance with article 74(5) of the Statute. Remark (ii) is thus marred by an error of law in that it refused to give the reasoning for the First Impugned Decision, despite the Defence's express and repeated requests.³² Insofar as this remark is intended to justify the refusal to provide the reasons for the First Impugned Decision, it cannot in any event constitute reasoning for that decision.

19. Lastly, remark (iii) refers to the principle of publicity of the proceedings to justify reading out the charges but advances no reasons for departing from the prior

³¹ [ICC-02/05-01/20-142](#): *op. cit.*

³² [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 1-6; [ICC-02/05-01/20-2](#): *op. cit.*

practice of the Honourable Pre-Trial Chamber II as concerns the waiver of the reading of the charges at first appearance hearings in cases ICC-01/14-01/18³³ and ICC-01/14-02/18.³⁴ Yet it is precisely on that aspect of the First Impugned Decision that the Defence based its Request for reasons.³⁵ The principle of publicity of the proceedings was equally applicable in cases ICC-01/14-01/18, ICC-01/14-02/18 and in the case at hand. Moreover, the principle of publicity of the proceedings cannot constitute a valid reason for reading out the charges at the first appearance hearing against the will of the person appearing. The sole purpose of reading out the charges at the first appearance hearing, according to article 60(1) of the Statute, is to ensure that the person appearing is “informed of the crimes he or she is alleged to have committed”. This is, therefore, a right of the person appearing, which may be waived by that person, and not a right of the public to be informed. In this specific instance, Mr Ali Muhammad Ali Abd-Al-Rahman had been informed of the charges against him by his Duty Counsel and did not want them to be read out at the hearing. In the first two cases, the suspects’ requests that the charges not be read out at the hearing had been granted. In the instant case, the First Impugned Decision paid no heed and the charges were read out. The reasons for departing from the prior practice of Pre-Trial Chamber II have still not been provided, in breach of article 74(5) of the Statute; that departure is at odds with Mr Ali Muhammad Ali Abd-Al-Rahman’s right under article 60(1) of the Statute to waive the reading of the charges and has undermined the presumption of innocence to which he is entitled under article 66(1) of the Statute by subjecting him to a demeaning presentation of the charges brought against him by the OTP at a public hearing, against his will, without its being warranted for reasons of publicity of the proceedings.

20. As regards the Second Impugned Decision, the Defence noted the Honourable Single Judge’s comments at the first appearance hearing when rejecting the request for a minute of silence for the victims³⁶ and remarked that this refusal, thus

³³ [ICC-01/14-01/18-T-1-FRA](#): *op. cit.*, p. 6, lines 2-7.

³⁴ [ICC-01/14-02/18-T-1-FRA](#): *op. cit.*, p. 4, lines 25-28 to p. 5, lines 1-2.

³⁵ [ICC-02/05-01/20-2](#): *op. cit.*, para. 8.

³⁶ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 21, lines 22-26.

expressed, appeared to violate the presumption of innocence to which Mr Ali Muhammad Ali Abd-Al-Rahman is entitled under article 66 of the Statute.³⁷ It is, moreover, this refusal to grant the minute of silence in the Second Impugned Decision that prompted the request, at the hearing, for the full statement of reasons for the First and Second Impugned Decisions to be provided at a later date, so as to dispel any misunderstanding about the presumption of innocence afforded to Mr Ali Muhammad Ali Abd-Al-Rahman.³⁸ The Request therefore made explicit reference to the presumption of innocence and explained that that presumption of innocence rendered incomprehensible the denial of Mr Ali Muhammad Ali Abd-Al-Rahman's request to join his prayers for the victims with those of the Court.³⁹

21. Despite the Defence's clear and repeated indications that the refusal of the minute of silence was seen as a sign of disregard for the presumption of innocence afforded to Mr Ali Muhammad Ali Abd-Al-Rahman, as well as bias against him on the part of the Honourable Single Judge, the Third Impugned Decision declines to give any explanation capable of dispelling this perception and, rather than enumerating reasons, merely imparts remarks that (iv) the Second Impugned Decision is also among the "self-evident" decisions for which reasoning is not needed, and the request to observe a minute of silence (v) exceeded the suspect's prerogatives and (vi) impinged on the Chamber's authority as regards the conduct of the hearing.⁴⁰ As in the case of remarks (i) to (iii) above, the Defence notes that the Third Impugned Decision explicitly states that remarks (iv) to (vi) are not intended to constitute the reasoning for the Second Impugned Decision, but that, if that had been their purpose, they would not have been sufficient to dispel the perception of bias noted against Mr Ali Muhammad Ali Abd-Al-Rahman, in violation of his presumption of innocence.

22. Remark (iv) calls for the same observations as remark (ii) above. Even assuming that detailed reasoning is not necessary for some of the Court's decisions, it

³⁷ [ICC-02/05-01/20-2](#): *op. cit.*, para. 9.

³⁸ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 1-6.

³⁹ [ICC-02/05-01/20-2](#): *op. cit.*, para. 9.

⁴⁰ [ICC-02/05-01/20-118](#): *op. cit.*, para. 14.

became imperative to provide a statement of reasons for the Second Impugned Decision because the Defence had specifically requested it, explaining that the purpose of the request was to dispel a perception of bias against Mr Ali Muhammad Ali Abd-Al-Rahman and his presumption of innocence. By not providing the reasoning therefor, the Honourable Single Judge turned down the opportunity that was expressly offered to him by the Defence to set straight that he did have regard for Mr Ali Muhammad Ali Abd-Al-Rahman's presumption of innocence. To quote Lord Hewart's maxim from the judgment in *Rex v. Sussex Justices, ex parte Mc Carthy*, "Justice should not only be done, but should undoubtedly and manifestly be seen to be done."⁴¹ By refusing to provide reasoning for the Second Impugned Decision, the Honourable Single Judge declined the opportunity presented to him by the Defence to restore the perception that Justice was undoubtedly seen to be done and to remove any doubt as to his regard for Mr Ali Muhammad Ali Abd-Al-Rahman's presumption of innocence.

23. Similarly, remark (v) has no basis in any Court instrument or principle of law. Mr Ali Muhammad Ali Abd-Al-Rahman's request to observe a minute of silence at the hearing in memory of the victims of the crimes in Darfur and, more generally, in Sudan, came within his prerogatives in his capacity as an individual, albeit accused by the OTP but presumed innocent, who had come freely and on his own accord to appear before the Court to seek justice, not only for himself but also for all the victims of armed violence in his country. That request was testament to his genuine concern for the suffering of the victims, the sincerity of which has since been confirmed by his Request and Observations on Reparations pursuant to article 75(1) of the Statute,⁴² also dismissed *in limine* by the Honourable Single Judge for the same reason and on the same day as the Third Impugned Decision⁴³ – a further denial of Mr Ali Muhammad Ali Abd-Al-Rahman's right to concern himself with the fate of

⁴¹ *Rex v. Sussex Justices, ex parte Mc Carthy*, 9 November 1923, reported 1924, p. 259.

⁴² [ICC-01/05-01/20-98](#): "Requête et Observations sur les réparations en vertu de l'Article 75-1", 17 July 2020.

⁴³ [ICC-02/05-01/20-117](#): "Decision on the Request and Observations on Reparations pursuant to Article 75(1) of the Rome Statute" (French version not available), 18 August 2020 (also pending before the Honourable Appeals Chamber).

the victims. In formulating this request, Mr Ali Muhammad Ali Abd-Al-Rahman was but making use of his right to make an application to the Honourable Single Judge exercising the functions of the Honourable Pre-Trial Chamber II under article 57(2) of the Statute. That right therefore fell within his procedural prerogatives. The exercise of that right called for a reasoned decision of the Honourable Single Judge. The Second and Third Impugned Decisions took that right from him, in breach of article 74(5) of the Statute.

24. Lastly, remark (vi) that the request for a minute of silence impinges on the Honourable Single Judge's prerogatives in terms of the conduct of the first appearance hearing is simply devoid of any basis – whether factual or legal – since that request called precisely for the Honourable Single Judge to exercise his authority over the conduct of the hearing and since his authority was respected, even though it had been exercised in a manner contrary to the wishes of the Defence. The alleged impingement might have taken place, for example, had Mr Ali Muhammad Ali Abd-Al-Rahman, on his own initiative, observed a minute of silence without the Honourable Single Judge's prior consent. No such thing occurred and Mr Ali Muhammad Ali Abd-Al-Rahman remained in compliance at all times with the way in which the Honourable Single Judge chose to exercise his authority over the conduct of the first appearance hearing. Therefore, even if remark (vi) had been formulated as a reason for the Second Impugned Decision – which is explicitly not the case – it would have fallen short of constituting adequate reasoning.

25. In the light of the foregoing, the Defence therefore submits that the three Impugned Decisions all erred in law by failing to satisfy the obligation to provide reasons for decisions, laid down by article 74(5) of the Statute as it applies to all decisions issued by Trial Chambers or their Single Judges, in accordance with the Honourable Appeals Chamber's prior rulings mentioned above.⁴⁴ That the Honourable Single Judge gave no reasons orally for his First and Second Impugned Decisions was in itself understandable, considering the particular constraints of the first appearance hearing, as the Defence acknowledged at paragraph 10 of its

⁴⁴ [ICC-01/04-01/06-774](#): *op. cit.*, paras. 33-34; [ICC-01/04-01/07-572](#): *op. cit.*, paras. 26-27.

Request.⁴⁵ However, since an express request had been made for the provision at a later date of a written statement in respect of these two decisions,⁴⁶ the Defence prays the Honourable Appeals Chamber to rule that the Honourable Single Judge was bound by the obligation to provide the reasoning for his decisions and that, in explicitly refusing to do so with the dismissal *in limine* of the Request by way of the Third Impugned Decision, he erred in law by not fulfilling his obligation under article 74(5) of the Statute. This error of law arises from the three interlinked Impugned Decisions taken together and constitutes the first ground on which the Defence prays the Honourable Appeals Chamber to reverse them pursuant to rule 158(1) of the Rules. As demonstrated in paragraphs 34 to 40 below, this error was prejudicial to the rights and interests of the Defence as it has denied the Defence, in particular, its right to receive and understand the reasons for the Impugned Decisions, which is a safeguard of Mr Ali Muhammad Ali Abd-Al-Rahman's right to a fair hearing under article 67(1) of the Statute.

Second ground of appeal – error of law: the disputed expiry of the time limit to appeal the First and Second Impugned Decisions had no bearing on the obligation to provide the reasoning for them

26. The Third Impugned Decision rejects the Request on the ground that the First and Second Impugned Decisions are now *res judicata* and that the Defence could no longer appeal them. The issue of the time limit for appealing the First and Second Impugned Decisions constitutes the third ground of appeal below. Independently of that aspect, the Defence submits, as the second ground of appeal, that the fact – which is disputed – that the First and Second Impugned Decisions had become final had no bearing on the obligation under article 74(5) of the Statute to provide the reasoning for them.

27. The obligation under article 74(5) of the Statute to issue reasoned decisions, as extended to encompass decisions issued by all the Court's Chambers, is in no way

⁴⁵ [ICC-02/05-01/20-2](#): *op. cit.*, para. 10.

⁴⁶ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 1-6; [ICC-02/05-01/20-2](#): *op. cit.*

predicated on whether those decisions are appealable. The possibility of an appeal means only that the Honourable Appeals Chamber may subsequently set right the failure to satisfy the obligation to provide reasoning, as it may in these proceedings. In other cases, however, where decisions are not, or no longer, appealable or where leave to appeal as required under article 82(1)(d) of the Statute is refused, the failure to fulfil the obligation to provide reasoning remains a breach of article 74(5) of the Statute and an error of law. The fact that it cannot be rectified by way of appeal cannot, in itself, expunge the error from a decision that is not in compliance with the obligation to provide reasoning. Even an unlawful decision can legally become final and *res judicata* if the parties do not fulfil their responsibility to be vigilant to pre-empt that occurrence by using the procedural avenues available to them or if the parties are refused those avenues. In the latter case, where a party requests leave to appeal an unlawful decision and where it is refused that leave for whatever reason, the decision becomes final and *res judicata* but its unlawfulness persists and may – depending on the nature of the decision and the prejudice it caused the parties – become a ground for the Honourable Appeals Chamber, acting on an appeal against the confirmation of charges or the judgment, to set aside the proceedings. The mere absence of an appeal therefore cannot cure a decision of its unlawfulness.

28. The unlawfulness arising from the failure to provide reasoning for the First and Second Impugned Decisions was not cured but, on the contrary, confirmed by the dismissal *in limine* of the Request seeking a written statement of the reasons for those decisions in the Third Impugned Decision. The erroneous assertion in the Third Impugned Decision that the First and Second Impugned Decisions can no longer be appealed has no bearing whatsoever on their unlawfulness. The three Impugned Decisions are therefore all marred by the same failure to satisfy the obligation under article 74(5) of the Statute to provide reasoned decisions and must all be reversed together by the Honourable Appeals Chamber on that ground.

Third ground of appeal – error of law: the time limit for seeking leave to appeal the First and Second Impugned Decisions had not begun to run (ground limited to the Third Impugned Decision)

29. Lastly, the assertion in the Third Impugned Decision that the First and Second Impugned Decisions had become *res judicata* and could no longer be appealed because the time limit for seeking leave to do so had expired was itself erroneous. This third and final ground of appeal is confined specifically to the Third Impugned Decision, since no ruling had been made, in the two previous decisions, on the time limit for seeking leave to appeal.

30. At the first appearance hearing, no reasons were given for the First and Second Impugned Decisions. At the hearing and in the Request, the Defence requested that the reasons be subsequently explained in a written decision⁴⁷ and did not appeal those two decisions pending the statement of the reasons for them. The Defence could not seek leave to appeal the First and Second Impugned Decisions since it had not been able to apprise itself of all the aspects of those two decisions. Absent the essential component of those decisions, as required by article 74(5) of the Statute – the reasons – the Defence was in no position to take an informed decision on the advisability of seeking leave to appeal them. Accordingly the Defence rightfully requested, on the same day and at the hearing, to be provided with the reasoning for them in order to be fully informed of all the aspects of the First and Second Impugned Decisions before deciding whether to appeal them. The Honourable Single Judge did not reject the request for the statement of reasons and confirmed that the request was on the record of the hearing.⁴⁸ The Defence then reiterated its request for a statement of reasons, by filing its Request, to ensure that it was indeed taken into account and to explain its precise intentions, *viz.* to invite the Honourable Single Judge to complete and correct his two decisions by providing the reasons for them.

⁴⁷ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 1-6; [ICC-02/05-01/20-2](#): *op. cit.*

⁴⁸ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 7-8.

31. In accordance with the Court's prior rulings, the request for a statement of reasons suspended the time limit for seeking leave to appeal the First and Second Impugned Decisions until the issuance of the Third Impugned Decision, which confirmed the refusal to provide reasons. Before receipt of the statement of reasons for the First and Second Impugned Decisions or, as it happened, the refusal to provide the reasons, the Defence had not been fully informed of those two decisions. The reasoning for the two decisions, an essential component of them under article 74(5) of the Statute as applicable to decisions of Pre-Trial Chambers,⁴⁹ had not been notified to the Defence and thus the event as of which the time limit for seeking leave to appeal under rule 155(1) of the Rules did not occur. The First and Second Impugned Decisions were not fully notified – that is, with the confirmed refusal to provide the reasoning – until the Third Impugned Decision was notified. Until it had been notified thereof, the Defence had not been fully apprised of all the aspects of the First and Second Impugned Decisions. The time limit for seeking leave to appeal them thus could not have run and had not expired on the day the Third Impugned Decision was issued. By seeking leave to appeal the three decisions together within the time limit laid down by rule 155(1) of the Rules, which started running when the Third Impugned Decision was notified,⁵⁰ the Defence acted in accordance with the requirements of that rule with a view to being granted leave to appeal the three Impugned Decisions.

32. Suspending the time limit for appeal pending the statement of reasons for a decision is in line with the practice of the Court, as recalled at paragraph 7 of the Application for Leave to Appeal:

⁴⁹ [ICC-01/04-01/06-774](#): *op. cit.*, paras. 33-34; [ICC-01/04-01/07-572](#): *op. cit.*, paras. 26-27.

⁵⁰ [ICC-02/05-01/20-130](#): *op. cit.*

[TRANSLATION] [...] In the *Gbagbo and Blé Goudé* case, the Honourable Trial Chamber I handed down, on 15 January 2019, an oral decision acquitting the accused in this case without communicating the reasons for those 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.”⁵¹ The reasons for the acquittals were notified on 16 July 2019⁵² and the OTP’s Notice of Appeal was filed on 16 September 2019,⁵³ after an extension of the time limit requested on 16 July 2019.⁵⁴ [Footnotes in the original].⁵⁵

33. The error of law committed in considering that the time limit for seeking leave to appeal the First and Second Impugned Decisions had expired was implicitly admitted and corrected by the Honourable Single Judge, since he granted the Defence leave to appeal those two decisions, along with the third, in his Decision Granting Leave to Appeal.⁵⁶ If the Honourable Single Judge had always considered that the First and Second Impugned Decisions had become final and could no longer be appealed, he would have granted leave to appeal only the Third Impugned Decision and not the two earlier decisions, and he would have accordingly rephrased the issue raised by the Defence in its Application for Leave to Appeal, which explicitly applied to all three Impugned Decisions.⁵⁷ However, the Honourable Single Judge granted leave to appeal without rephrasing the issue.⁵⁸ He therefore did intend to grant leave to appeal the three Impugned Decisions, including the first two, which he had stated in the Third Impugned Decision were no longer appealable. The fact that the First and Second Impugned Decisions are currently pending before the Honourable Appeals Chamber therefore confirms the error of law committed in the Third Impugned Decision, which was to consider that the time limit for seeking leave to appeal them had expired. The Defence prays the Honourable Appeals Chamber to

⁵¹ [ICC-02/11-01/15-T-232-FRA](#): “Judgment”, 15 January 2019, p. 4, lines 9-10.

⁵² [ICC-02/11-01/15-1263](#): “Reasons for oral decision of 15 January 2019 on the ‘*Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquiescement pourtant 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.

⁵³ [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.

⁵⁴ [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.

⁵⁵ [ICC-02/05-01/20-130](#): *op. cit.*, para. 7.

⁵⁶ [ICC-02/05-01/20-142](#): *op. cit.*

⁵⁷ [ICC-02/05-01/20-130](#): *op. cit.*, para. 14.

⁵⁸ [ICC-02/05-01/20-142](#): *op. cit.*, paras. 5, 10.

reverse the Third Impugned Decision on this third ground, in addition to the two preceding grounds.

PREJUDICE CAUSED TO THE DEFENCE BY THE THREE IMPUGNED DECISIONS

34. The prejudice caused to the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman by the three Impugned Decisions, read together, is twofold.

35. First, by dismissing *in limine* the Request and by refusing to provide the reasons for the First and Second Impugned Decisions, the Third Impugned Decision deprived the Defence of its right to be informed of the reasons for two decisions rejecting the requests that it had made at the first appearance hearing not to have the charges read out in full at the hearing and to allow Mr Ali Muhammad Ali Abd-Al-Rahman to observe a minute of silence and a moment of reflection in memory of the victims of the armed violence in Darfur and, more generally, in Sudan. Being informed of the reasons for decisions that adversely affect him is a right which Mr Ali Muhammad Ali Abd-Al-Rahman is expressly afforded under article 74(5) of the Statute, which comes under the broader umbrella of his right to a “fair” hearing under article 67(1) of the Statute. The obligation to issue reasoned judicial decisions has in particular been established as one of the fundamental safeguards of the right to a fair trial by the European Court of Human Rights.⁵⁹ By refusing to provide reasons for the First and Second Impugned Decisions, the Third Impugned Decision infringed Mr Ali Muhammad Ali Abd-Al-Rahman’s right to a fair hearing.

36. Second, the statement of reasons for the First and Second Impugned Decisions had been requested after it was noted that those two decisions together fuelled a perception that they were inspired by bias against Mr Ali Muhammad Ali Abd-Al-Rahman which is irreconcilable with the presumption of innocence which he is afforded under article 66(1) of the Statute.⁶⁰

⁵⁹ ECtHR, 19 April 1994, [Van de Hurk v. The Netherlands](#), Application no. 16034/90, para. 61; ECtHR, 16 December 1992, [Hadjianastassiou v. Greece](#), Application no. 12945/87, para. 33.

⁶⁰ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 1-6; [ICC-02/05-01/20-2](#): *op. cit.*, para. 9.

37. Devoting more than thirty minutes to reading the list of charges brought against him by the OTP at the first appearance hearing when doing so was warranted only by the exercise of his right, which he had explicitly waived, to be informed “of the crimes with which he is charged”, was legitimately perceived by Mr Ali Muhammad Ali Abd-Al-Rahman as a demeaning act seeking to lay out these unproven accusations, which he challenges, in a public hearing so as to make him appear guilty of these crimes to a lay public unversed in the nuances of the presumption of innocence and procedure before the Court. The primary purpose of the Defence request for a statement of reasons was to provide the opportunity to rectify this initial perception.

38. This initial perception of a violation of the presumption of innocence to which Mr Ali Muhammad Ali Abd-Al-Rahman is entitled was compounded by the Second Impugned Decision denying him permission to observe a minute of silence in memory of the victims of armed violence in Darfur, and more generally, in Sudan, again, without providing reasons.⁶¹ Duty Counsel immediately noted that this refusal appeared to be incompatible with the presumption of Mr Ali Muhammad Ali Abd-Al-Rahman’s innocence, and the refusal prompted the request, made at the hearing, for the reasons for the First and Second Impugned Decisions to be provided at a later date.⁶² The Request clarified that point, explaining that the refusal of the minute of silence, compounded by the preceding thirty-three minute recital of the charges at the hearing, was beyond comprehension for Mr Ali Muhammad Ali Abd-Al-Rahman and irreconcilable with his presumption of innocence.⁶³ As with the First Impugned Decision, the primary aim of the request for a statement of reasons for the Second Impugned Decision was to provide the opportunity to rectify this perception.

39. By dismissing *in limine* the Request for a statement of reasons, by way of the Third Impugned Decision, the Honourable Single Judge declined the opportunity to justify his First and Second Decisions and to rectify the legitimate perception of a

⁶¹ [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 21, lines 15-26.

⁶² [ICC-02/05-01/20-T-001 FRA](#): *op. cit.*, p. 22, lines 1-6.

⁶³ [ICC-02/05-01/20-2](#): *op. cit.*, para. 9

violation of Mr Ali Muhammad Ali Abd-Al-Rahman's right to a fair and impartial hearing in which he is presumed innocent, which arose from the failure to provide reasons for the First and Second Impugned Decisions. The three decisions that helped shape this perception are public documents and prejudice the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman insofar as they foster the perception of his guilt in the opinion of the public, unversed in the nuances of the presumption of innocence and procedure before the Court, whereas the charges against him have yet to be confirmed and the OTP has yet to disclose the slightest evidence as to his guilt. Such prejudice is serious and requires that the Honourable Appeals Chamber intervene immediately to attempt to limit the impact as far as possible.

RELIEF SOUGHT

40. In the light of the foregoing, and pursuant to rule 158(1) of the Rules, the Defence prays the Honourable Appeals Chamber, first, to reverse the three Impugned Decisions.

41. Second, the Defence prays the Honourable Appeals Chamber (i) to confirm the obligation to provide reasoning for all decisions issued by Trial Chambers and (ii) to confirm that the time limits to appeal a decision or to seek leave to do so start running only as of the notification of the reasons or of the refusal to provide them, where a request to that effect is pending.

42. Most of the harm to the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman is done and cannot be repaired: the charges were read out *in extenso* for thirty-three minutes in open court, at the first appearance hearing, against his will; the minute of silence he had asked to observe on that occasion was refused and could not take place. Reparation of the prejudice caused by the perception that the Honourable Single Judge violated the presumption of innocence extends beyond the limited scope of the present appeal. The perception of the violation of the presumption of innocence remains in the eyes of the public, in particular the Sudanese public. The Defence defers to the wisdom of the Honourable Appeals Chamber to contemplate and order, by way of amendment of the three Impugned Decisions under rule 158(1)

of the Rules, any public information and/or outreach activities it might see fit, with the participation of the Defence and/or that of the Honourable Single Judge, and with the assistance of the relevant Registry services, with a view to rectifying that perception.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE APPEALS CHAMBER to:

GRANT the present appeal and **REVERSE** the Impugned Decision;

ADJUDGE AND DECLARE that (i) the obligation to state reasons applies to decisions issued by Trial Chambers, in particular where a party makes a specific request to that end and (ii) that the time limits to appeal a decision or to seek leave to do so start to run only as of the notification of the reasons or the refusal to provide them, where a request to that effect is pending; and

ORDER any public information and/or outreach activities that the Honourable Appeals Chamber might see fit, directed at the public and in particular the Sudanese public, with the assistance of the relevant Registry services, with a view to rectifying the perception that Mr Ali Muhammad Ali Abd-Al-Rahman's presumption of innocence was violated.

[signed]

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

Dated this 9 September 2020

At The Hague, Netherlands