

**Cour
Pénale
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**International
Criminal
Court**

Original: **French**

No.: ICC-02/05-01/20
Date: **19 August 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

**Corrected version of the *“Mémoire d’appel de la décision ICC-02/05-01/20-115
en vertu de l’Article 82-1-b du Statut de Rome”***

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1. This document is the corrected version of the *Mémoire d'appel* ("Appeal Brief") pursuant to article 82(1)(b) of the Rome Statute ("Statute") filed by the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman ("Defence") in support of his appeal against decision ICC-02/05-01/20-115 issued by the Single Judge of the Honourable Pre-Trial Chamber II ("Honourable Single Judge") on 14 August 2020 ("Impugned Decision").¹ The Appeal Brief was filed under article 82(1)(a) of the Statute within the time limit laid down by rule 154(1) of the Rules of Procedure and Evidence ("Rules") and in accordance with the requirements of regulation 64 of the Regulations of the Court (RoC).

SUMMARY OF THE PROCEEDINGS AND THE IMPUGNED DECISION

2. By an application of 1 July 2020 ("Application Pursuant to Article 60(2)"), the Defence sought the interim release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the Kingdom of the Netherlands ("Host State"), subject to any conditions that the Court or the Host State might see fit to apply under rule 119 of the Rules and/or article 38(3) of the Headquarters Agreement between the Court and the Host State ("Headquarters Agreement"), after consultation with the Host State.² All of the submissions in the Application were made pursuant to article 58(1)(b)(i) of the Statute insofar as that article was the sole legal basis on which Mr Ali Muhammad Ali Abd-Al-Rahman's arrest had been applied for and ordered.³

3. On 13 July 2020, the Office of the Prosecutor (OTP) filed its response to the Application Pursuant to Article 60(2) ("Response").⁴ The OTP objected to the release of Mr Ali Muhammad Ali Abd-Al-Rahman on the ground that his continued detention appeared necessary under articles 58(1)(b)(i) and 58(1)(b)(ii) of the Statute. That Response was the first occasion on which the Office of the Prosecutor relied on article 58(1)(b)(ii) of the Statute as a ground for Mr Ali Muhammad Ali

¹ [ICC-02/05-01/20-115](#): "Decision on the Defence Request for Interim Release" (French version not available), 14 August 2020.

² [ICC-02/05-01/20-12](#): "*Requête en vertu de l'Article 60-2*", 1 July 2020.

³ [ICC-02/05-01/20-12](#): *op. cit.*, para. 11.

⁴ [ICC-02/05-01/20-95](#): "Prosecution's Reponse to '*Requête en vertu de l'Article 60-2*' (ICC-02/05-01/20-12)" (French version not available), 12 July 2020.

Abd-Al-Rahman's detention. Three documents were submitted as annexes in support of the Response, including an article published online by an organization called "Darfur Network for Monitoring and Documentation", which was filed as Annex 3 ("Annex 3").⁵

4. On 16 July 2020, the Defence filed a request for leave to reply, limited to the novel arguments advanced by the OTP in relation to article 58(1)(b)(i) of the Statute and those advanced for the first time on the basis of article 58(1)(b)(ii) of the Statute.⁶

5. On 17 July 2020, the Honourable Single Judge granted the Defence leave to reply exclusively to the arguments advanced on the basis of article 58(1)(b)(ii) of the Statute ("Leave to Reply").⁷

6. The Defence Reply ("Reply") was registered on 22 July 2020.⁸ In paragraph 9 of its Reply, the Defence marshalled a series of arguments claiming that Annex 3 was inadmissible because it lacked even the slightest indication of reliability.⁹ The Defence also refuted the OTP's claim – in paragraph 28 of its Response¹⁰ – that it could have witnesses in Sudan¹¹ and contended that the OTP had violated the rules of the Court that protect the confidentiality of information and had compromised the protection of its own witnesses by referring for the first time to the existence of witnesses residing in the European Union in a public document.¹²

7. The Honourable Single Judge rejected the Application Pursuant to Article 60(2) by way of the Impugned Decision, which was issued on 14 August 2020.¹³ The Impugned Decision is founded on a single alternative criterion under

⁵ [ICC-02/05-01/20-95-Anx3](#): "Annex 3: 'Ali Kushayb, wanted by the International Criminal Court, threatened to kill two human rights defenders (HRDs) in Darfur, western Sudan'", 13 July 2020.

⁶ [ICC-02/05-01/20-96](#): "*Requête en vertu de la norme 24-5 du Règlement de la Cour (autorisation de réplique à ICC-02/05-01/20-95)*", 16 July 2020.

⁷ [ICC-02/05-01/20-99](#): "Decision on Defence Request for Leave to Reply" (French version not available), 17 July 2020.

⁸ [ICC-02/05-01/20-100](#): "*Réplique à la 'Prosecution's Response to 'Requête en vertu de l'Article 60-2''*" (ICC-02/05-01/20-95)", 22 July 2020.

⁹ [ICC-02/05-01/20-100](#): *op. cit.*, para. 9.

¹⁰ [ICC-02/05-01/20-95](#): *op. cit.*, para. 28.

¹¹ [ICC-02/05-01/20-100](#): *op. cit.*, para. 10.

¹² [ICC-02/05-01/20-100](#): *op. cit.*, para. 11.

¹³ [ICC-02/05-01/20-115](#): *op. cit.*

article 58(1)(b)(ii) of the Statute, that is to say, to ensure that Mr Ali Muhammad Ali Abd-Al-Rahman “does not obstruct or endanger the investigation or the court proceedings”. The Defence arguments advanced on the basis of article 58(1)(b)(i) of the Statute – to ensure the person’s appearance at trial – are not examined in the Impugned Decision on the ground that, where one of the requirements under article 58(1)(b) is fulfilled, there is no need to address the other alternative requirements.¹⁴ The Honourable Single Judge takes the view that the requirement under article 58(1)(b)(ii) is fulfilled on the following grounds: (i) the OTP submits that it is not in a position to protect its witnesses in Darfur;¹⁵ (ii) in its Annex 3 the OTP submits allegations of threats allegedly made by the suspect and his supporters in February 2020;¹⁶ and (iii) the risk that Mr Ali Muhammad Ali Abd-Al-Rahman may exert pressure on witnesses, either directly or through his alleged supporters.¹⁷ In paragraph 32 of the Impugned Decision, the Honourable Single Judge considers that it is unnecessary to embark on the consultations provided for in regulation 51 of the RoC since the release was not granted but confirms that, when his release is contemplated, negotiations with the Host State will have to take place with a view to releasing Mr Ali Muhammad Ali Abd-Al-Rahman to its territory.¹⁸

SUMMARY OF THE GROUNDS OF APPEAL AND RELIEF SOUGHT

8. Pursuant to article 82(1)(b) of the Statute, the Defence respectfully submits that the foregoing three grounds on which the Honourable Single Judge based the Impugned Decision are vitiated by error of law and/or of fact. The first three grounds of appeal advanced in this Brief demonstrate each of those three errors of law and/or fact. Those first three grounds of appeal are alternative in nature, and the Defence therefore respectfully asks the Honourable Appeals Chamber to reverse the Impugned Decision if it finds any of those three grounds to be established. Added to

¹⁴ [ICC-02/05-01/20-115](#): *op. cit.*, paras. 25 and 30.

¹⁵ [ICC-02/05-01/20-115](#): *op. cit.*, para. 28.

¹⁶ [ICC-02/05-01/20-115](#): *op. cit.*, para. 28.

¹⁷ [ICC-02/05-01/20-115](#): *op. cit.*, para. 29.

¹⁸ [ICC-02/05-01/20-115](#): *op. cit.*, para. 32.

those three alternative grounds are two further grounds of appeal, likewise alternative in nature to the first three, which relate to (iv) the fact that the Impugned Decision inverses the standard prevailing before the Court that “pre-trial detention is not the general rule, but it is the exception”¹⁹ and (v) the refusal to begin the consultations required in order to release Mr Ali Muhammad Ali Abd-Al-Rahman under regulation 51 of the RoC and article 38(4) of the Headquarters Agreement. The Honourable Appeals Chamber is respectfully entreated to reverse the Impugned Decision if it finds any of those five grounds of appeal to be established.

9. Should the Honourable Appeals Chamber uphold this appeal and reverse the Impugned Decision, the Defence respectfully requests it (i) to order the interim release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the Host State subject to any conditions that the Court and/or the Host State may see fit to apply under rule 119 of the Rules and/or article 38(3) of the Headquarters Agreement, and (ii) for that purpose, to order immediate commencement of the consultations with the Host State referred to in regulation 51 of the RoC.

FIRST GROUND OF APPEAL – ERROR OF LAW: THE HONOURABLE SINGLE JUDGE TOOK INTO CONSIDERATION THE INABILITY OF THE OFFICE OF THE PROSECUTOR TO PROTECT ITS WITNESSES IN DARFUR

10. In paragraph 28 of the Impugned Decision, the Honourable Single Judge refers to the OTP’s submission that it is not in a position to protect its witnesses in Darfur²⁰ as evidence of a risk that Mr Ali Muhammad Ali Abd-Al-Rahman and/or his alleged supporters – who are not at any point identified – would exert pressure on the witnesses. The information about the OTP’s inability to protect its witnesses in Darfur – and in Sudan more generally – appears in paragraph 28 of the Response.²¹

¹⁹ [ICC-01/04-01/07-330](#): “Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga”, 18 March 2008, pp. 6-8; [ICC-01/05-01/08-403](#): “Decision on Application for Interim Release”, 14 April 2009, para. 36.

²⁰ [ICC-02/05-01/20-115](#): *op. cit.*, para. 28.

²¹ [ICC-02/05-01/20-95](#): *op. cit.*, para. 28.

11. The Defence submits that the information about the OTP's inability to protect its purported witnesses in Sudan is old information, that those circumstances cannot be attributed to Mr Ali Muhammad Ali Abd-Al-Rahman and, for the reasons set out below, that they militate in favour of Mr Ali Muhammad Ali Abd-Al-Rahman's release. The Honourable Single Judge therefore erred in law by finding instead that the information in question suggests that he should remain in detention.

12. As the Defence advanced in paragraph 10 of its Reply,²² the OTP currently has no means of conducting investigations in Sudan. On 7 July 2020, the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman approached the Registry concerning the existence of any agreement relating to the conduct of the Court's operations and/or its privileges and immunities in Sudan and/or any agreement with the United Nations, the African Union or any other organization relating to logistical and/or security support for its operations in Sudan. On 10 July 2020, it was informed that no agreement of that nature existed. In the absence of an agreement between the Court and the Sudanese authorities regarding the conduct of operations – including investigations and/or witness protection – and the privileges and immunities of the Court in Sudan, the OTP is not in a position to carry out investigations in Sudan. The fact that the Court has no logistical and/or security support for its operations in Sudan confirms that point. Conducting investigations in Sudan would present a threat to its staff members and/or any person cooperating with the Court on the territory of Sudan, first and foremost the victims and witnesses. In the Situation in Libya, the fact that Court staff were sent on a mission without a prior agreement on the Court's privileges and immunities led to four members of the Registry staff being arrested and detained in 2012.²³ It is inconceivable that the Court or the OTP would once again deploy staff in a situation country with no legal basis for its operations or its privileges and immunities and with no logistical and security support.

²² [ICC-02/05-01/20-100](#): *op. cit.*, para. 10.

²³ Administrative Tribunal of the International Labour Organization, [Judgment no. 4003, A. v. ICC](#), 26 June 2018, pp. 1-2.

13. As the Defence has argued in its observations in response to order ICC-02/05-01/20-14 of 29 July 2020,²⁴ the difficulties faced by the OTP in carrying out its operations in Sudan – associated in particular with the fact that Sudan is not a party to either the Statute or the Agreement on the Privileges and Immunities of the Court (“APIC”) and that United Nations Security Council Resolution 1593 did not define the nature, extent or field of application of the obligation to cooperate with the Court that it sought to impose on the Sudanese Government, or the conditions attaching to it – are not new and should have been taken into account as relevant circumstances for the OTP’s conclusion under article 53(2)(c) of the Statute. Since they were not taken into consideration or, if they were, they gave rise to the decision to initiate investigations in the Situation in Darfur, including in the instant case, the OTP can no longer rely on those difficulties, of which it was fully aware at the time, as a reason for keeping Mr Ali Muhammad Ali Abd-Al-Rahman in detention or in any other way limiting the exercise of his rights protected by the Statute. The fact that the OTP is not in a position, at the present time, to protect its alleged witnesses in Sudan cannot therefore adversely affect the right of Mr Ali Muhammad Ali Abd-Al-Rahman to be released to the territory of the Host State while the proceedings are taking place.

14. Quite the reverse: those difficulties pose the question of whether the OTP has the ability to conduct a prosecution in relation to the Situation in Sudan. Were they to materialize in the coming months they could form the subject matter of a request for a permanent stay of the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman on the grounds that the OTP lacks the ability to conduct a prosecution against him. The Defence is not filing such a request at this stage because it is awaiting further information, including as part of the forthcoming disclosures in preparation for the hearing on the confirmation of charges, about the OTP’s ability to conduct a prosecution against Mr Ali Muhammad Ali Abd-Al-Rahman. However, since

²⁴ ICC-02/05-01/20-106-Conf: “*Observations en réponse à l’Ordonnance ICC-02/05-01/20-14*”, 29 July 2020, para. 17. On 17 August 2020, the Single Judge ordered that a public redacted version of those observations be registered and it is currently being prepared. The information referred to falls within the information not requiring redaction and may be made public.

the Defence would have no alternative but to apply for a stay of proceedings on those grounds, and since the Court would have no option but to find that the OTP was incapable of conducting proceedings and to terminate the prosecution, Mr Ali Muhammad Ali Abd-Al-Rahman's continued detention in those circumstances would be likely to give rise to an action for compensation for unlawful detention under article 85(1) of the Statute. As the Honourable Pre-Trial Chamber I held in *Ngudjolo*,

an arrest or pre-trial detention does not automatically become unlawful simply because the accused has been acquitted. It is not permissible to seek compensation if the pre-trial detention was based on properly reasoned decisions, in keeping with the provisions of the Statute, including article 58, interpreted in accordance with internationally recognised human rights law.²⁵

One of the purposes of the Application Pursuant to Article 60(2) was to guard against the likelihood of such an action by preventing aggravation of the harm caused to Mr Ali Muhammad Ali Abd-Al-Rahman's continued detention while awaiting procedures which the OTP has already conceded it is not capable of conducting, in particular as regards its investigations and the protection of victims and witnesses in Sudan. The OTP's acknowledged inability to protect its witnesses in Sudan therefore militates in favour of releasing Mr Ali Muhammad Ali Abd-Al-Rahman. The Honourable Single Judge therefore erred in law by relying on that consideration as a ground for his continued detention.

15. However, the Honourable Single Judge has not been totally taken in by that argument, since he explicitly warns that the OTP "in collaboration with the VWU, is expected to take reasonable steps to put in place mechanisms to protect potential witnesses and/or safeguard potential evidence" before the review of the decision on continued detention due in 120 days.²⁶ That warning shows that the Honourable Single Judge fully appreciated the difficulty posed by Mr Ali Muhammad Ali Abd-Al-Rahman's continued detention so long as the OTP was not able to conduct its operations in Sudan. Nevertheless, that warning is not

²⁵ [ICC-01/04-02/12-301-tENG](#): "Decision on the 'Requête en indemnisation en application des dispositions de l'Article 85(1) et (3) du Statut de Rome'", 16 December 2015, para. 18.

²⁶ [ICC-02/05-01/20-115](#): *op. cit.*, para. 31.

sufficient to protect the rights of Mr Ali Muhammad Ali Abd-Al-Rahman, since (i) he has remained in detention since that time and (ii) the reasonable steps taken by the OTP – but which are insufficient to resolve the matter of its inability to conduct its operations and protect its witnesses in Sudan – cannot, in 120 days’ time, constitute grounds for extending his continued detention. That warning therefore does not cure the error of law committed by the Honourable Single Judge on that first point.

16. The Defence therefore respectfully requests the Honourable Appeals Chamber to reverse the Impugned Decision on that first ground.

SECOND GROUND OF APPEAL – ERROR OF FACT AND OF LAW: ANNEX 3 WAS TAKEN INTO CONSIDERATION

17. In paragraph 28 of the Impugned Decision, the Honourable Single Judge also refers to the OTP’s Annex 3 as sufficiently establishing the existence of threats allegedly made by Mr Ali Muhammad Ali Abd-Al-Rahman and his supporters in February 2020 against human rights defenders in Darfur.²⁷ The Honourable Single Judge relies on two precedents in order to justify taking Annex 3 into consideration: the first in the *Gbagbo* case and the second in *Ntaganda*.

18. In paragraph 9 of its Reply, the Defence set out three arguments to the effect that Annex 3 should not be taken into account when examining the Application Pursuant to Article 60(2) and the OTP’s Response: (i) no link was established between Annex 3 and Mr Ali Muhammad Ali Abd-Al-Rahman; (ii) the document presented in Annex 3 consisted of anonymous hearsay and was not remotely reliable; and (iii) the organization that was the source of the document submitted in Annex 3 gave contradictory information on its website, thereby signalling a need for extreme caution as regards the reliability of information originating on its website.

19. The Honourable Single Judge nevertheless relied on Annex 3 in his decision-making on the Application Pursuant to Article 60(2) and found solely on the basis of the document submitted in that annex that there was an “appearance” that

²⁷ [ICC-02/05-01/20-115](#): *op. cit.*, para. 28.

Mr Ali Muhammad Ali Abd-Al-Rahman and his supporters had threatened human rights activists in February 2020, although he neither referred to nor established any link rendering that alleged event relevant to his conclusion on the Application Pursuant to Article 60(2). The Defence submits that the Honourable Single Judge thereby erred in fact and in law for at least the following two reasons.

20. First, the Honourable Single Judge erred in fact by finding on the basis of Annex 3 that there was an appearance of risk to victims and witnesses.²⁸ Quite apart from the fact that – as described below – the document submitted in Annex 3 completely lacks reliability and is inadmissible, the Honourable Single Judge erred in fact by attributing information to that document which it simply does not contain. The Honourable Single Judge committed at least three errors of fact:

- (i) The Honourable Single Judge refers in the Impugned Decision to facts which supposedly occurred in “February 2020”, whereas the document submitted in Annex 3 specifically refers to the alleged facts as having occurred on 22 and 24 January 2020,²⁹ that is to say, outside the material time period referred to in the Impugned Decision;
- (ii) Annex 3 does not establish a link between Mr Ali Muhammad Ali Abd-Al-Rahman and the risk of interference with witnesses. The Honourable Single Judge states that the acts alleged in Annex 3 were committed by Mr Ali Muhammad Ali Abd-Al-Rahman, among others, whereas Annex 3 concerns acts attributed to a person referred to by the name “Ali Kushayb”, and neither substantiates nor demonstrates any link with Mr Ali Muhammad Ali Abd-Al-Rahman. The link – alleged in the two successive warrants of arrest for Mr Ali Muhammad Ali Abd-Al-Rahman – between the latter and an “Ali Kushayb” was ventilated when Mr Ali Muhammad Ali Abd-Al-Rahman made his first appearance³⁰ and was

²⁸ [ICC-02/05-01/20-115](#): *op. cit.*, para. 28 and footnote 20.

²⁹ [ICC-02/05-01/20-95-Anx3](#): *op. cit.*, pp. 2-3.

³⁰ [ICC-02/05-01/20-T-001-FRA](#), 15 June 2020, p. 5, lines 6 to 28.

the subject matter of a separate decision by the Honourable Single Judge³¹ issued in the light of the submissions of the parties,³² which has not been appealed and has therefore become final. In its submissions on the matter, the OTP was unable to substantiate any link between the two people concerned when questioned directly about it and concluded in response that the reference to “Ali Kushayb” in the name of the case was unlikely to cause any prejudice to Mr Ali Muhammad Ali Abd-Al-Rahman.³³ By his decision ICC-02/05-01/20-8, the Honourable Single Judge ordered that

from now on, the suspect will have to be addressed as “Abd-Al-Rahman” or “Mr Abd-Al-Rahman” as opposed to “Ali Kushayb” in court proceedings, **official court documents and filings**, as well as in the context of public information material emanating from the Court. [Emphasis added].³⁴

Without prejudice to the fact that it is within the discretion of the OTP, where relevant to its case, to submit evidence proving that the person known as “Ali Kushayb” and Mr Ali Muhammad Ali Abd-Al-Rahman are, as claimed, the same person, and so long as it has not been proved that those two people are the same, the allegations concerning “Ali Kushayb” – such as those in Annex 3 – cannot be relied upon to counter Mr Ali Muhammad Ali Abd-Al-Rahman’s request for release. In its Response, the OTP did not even take the trouble to establish that the allegations in Annex 3 related to Mr Ali Muhammad Ali Abd-Al-Rahman. In the absence of the slightest evidence of any link between Mr Ali Muhammad Ali Abd-Al-Rahman and “Ali Kushayb”, the Honourable Single Judge therefore erred in fact by construing Annex 3 as alleging that Mr Ali Muhammad Ali Abd-Al-Rahman was involved in some way in the events recounted in that annex. He also erred in law by disregarding – at least partially – his final decision ICC-02/05-01/20-8 according to which Mr Ali Muhammad Ali

³¹ [ICC-02/05-01/20-8](#): “Decision on the Defence Request to Amend the Name of the Case” (French version not available), 26 June 2020.

³² [ICC-02/05-01/20-1](#): “*Requête aux fins de changement du nom porté au dossier de l’affaire ICC-02/05-01/20*”, 17 June 2020; [ICC-02/05-01/20-4](#): “Prosecution’s Response to ‘*Requête aux fins de changement du nom porté au dossier de l’affaire ICC-02/05-01/20*’”, 19 June 2020.

³³ [ICC-02/05-01/20-4](#): *op. cit.*, para. 7.

³⁴ [ICC-02/05-01/20-8](#): *op. cit.*, para. 15.

Abd-Al-Rahman was no longer to be referred to by the nickname “Ali Kushayb” in official Court documents and filings;³⁵

(iii) Lastly, the Honourable Single Judge erred in fact by inferring from the facts alleged in Annex 3 relating to allegations of threats against two human rights defenders in Sudan that releasing Mr Ali Muhammad Ali Abd-Al-Rahman would pose a risk to the witnesses. Nowhere does Annex 3 mention or suggest that the two human rights defenders whom it is claimed were threatened in January 2020 were witnesses to facts alleged in the charges and which purportedly occurred in 2003-2004. The Honourable Single Judge therefore reached a generalized conclusion and erred in fact by inferring a threat to witnesses in the case from the events alleged in Annex 3, which bear no relation to witness safety.

21. Second, the Honourable Single Judge erred in law by entertaining Annex 3 when examining the Application Pursuant to Article 60(2) and finding that the document in question provided a “reason to believe” that there was a risk of interference with witnesses or victims, even though the document was completely unreliable and should therefore have been inadmissible. The Honourable Single Judge took no account of the Defence submissions in paragraph 9 of the Reply to the effect that Annex 3 should be found to be inadmissible as lacking even the slightest probative value. The Defence relied on the wording itself of article 69(4) of the Statute, according to which evidence that has no probative value must be ruled inadmissible where its admission would prejudice “a fair trial”, and on the case law of the Honourable Pre-Trial Chamber II in a different composition in the *Katanga and Ngudjolo* case.³⁶

22. The Honourable Single Judge’s attempts to justify his reliance on Annex 3 on the basis of the precedents in the *Gbagbo* and *Ntaganda* cases do nothing to alter the

³⁵[ICC-02/05-01/20-8](#): *op. cit.*, para. 15.

³⁶[ICC-01/04-01/07-717](#): “Decision on the confirmation of charges”, 30 September 2008, para. 77.

fact that the error of law occurred. The quotation from the *Gbagbo* case³⁷ is irrelevant, since it concerned the use of a number of media articles – which is not the case of Annex 3 alone – and refers to the need to determine the weight to be given to such sources, as article 69(4) of the Statute requires. That quotation therefore does not mean that article 69(4) of the Statute does not apply to rulings on release from detention. The fact that the decision was upheld on appeal, as the Honourable Single Judge sees fit to mention,³⁸ is irrelevant since that specific aspect of the decision was not disputed by the parties.³⁹ Similarly, although the cited decision in *Ntaganda* does indeed state that

the evidence presented in relation to the necessity of continued detention for the purpose of article 58(1)(b) of the Statute does not have to be of the same nature and strength as the evidence required to establish reasonable grounds to believe that the person has committed one or more crimes,⁴⁰

that passage does not cast doubt on the standard of admissibility and the absence of any impact on the fairness of the trial referred to in article 69(4) of the Statute.

23. The Court has held in its case law that article 69 of the Statute can apply to the various stages of proceedings, including the pre-trial phase and the hearing of applications for release.⁴¹ The case law of the Court has established, on the basis of article 69(4), that “probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence” and that the Chamber “must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis.”⁴² According to the case law, in respect of second-hand (hearsay) information whose source is identified – such as Annex 3 – “its probative value is to

³⁷ [ICC-02/11-01/11-180-Red](#): “Decision on the ‘*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’”, 13 July 2012, para. 54.

³⁸ [ICC-02/05-01/20-115](#): *op. cit.*, footnote 17.

³⁹ [ICC-02/11-01/11-278-Red OA](#): “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘*Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo”*’”, 26 October 2012.

⁴⁰ [ICC-01/04-02/06-147](#): “Decision on the Defence’s Application for Interim Release”, 18 November 2013, para. 47.

⁴¹ [ICC-01/04-101-tENG-Corr](#): “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 17 January 2006, paras. 42-43.

⁴² [ICC-01/04-01/07-717](#): *op. cit.*, para. 77.

be analysed on a case by case basis taking into account factors such as [...] the reliability of the source".⁴³ In the present case, the Defence identified the reasons for doubting the reliability of the source of the document presented in Annex 3, in paragraph 9(ii) and (iii) of its Reply. Neither the OTP nor the Honourable Single Judge has contested those reasons. The only rational conclusion in the light of the Defence's uncontested arguments should have been that Annex 3 must be rejected as *prima facie* lacking any probative value, since it originated from an organization composed of anonymous individuals which gives inconsistent and contradictory information about its own composition. A decision whereby a person is kept in detention that relies solely on a document containing second-hand (hearsay) information from an anonymous source that provides contradictory information about its composition and where there is no guarantee of its independence and/or what its affiliations may be is manifestly incompatible with a fair trial and contrary to article 69(4) of the Statute. The Honourable Single Judge therefore erred in law by taking Annex 3 into consideration and finding, in reliance solely on that document, that Mr Ali Muhammad Ali Abd-Al-Rahman still had supporters capable of compromising witnesses.⁴⁴

24. Relying on the precedent represented by the fact that the Honourable Single Judge took Annex 3 into consideration to thwart the release of Mr Ali Muhammad Ali Abd-Al-Rahman, any pressure group whatsoever consisting of one or more persons will in the future be able, without identifying itself, to post online completely fanciful allegations against individuals being prosecuted by the Court with the sole aim of systematically preventing their release, impairing the fairness of proceedings before the Court and disseminating a picture of the Court as an institution that does not hold to the fundamental principles according to which it seeks to function. By giving weight to Annex 3 as his single source of information and rejecting the application for release in reliance on that annex alone, the

⁴³ [ICC-01/04-01/07-717](#): *op. cit.*, para. 141.

⁴⁴ [ICC-02/05-01/20-115](#): *op. cit.*, footnote 20.

Honourable Single Judge has created a precedent that is extremely dangerous to the image and integrity of proceedings before the Court.

THIRD GROUND OF APPEAL – ERROR OF FACT AND LAW: THE RISK OF PRESSURE ON WITNESSES WAS TAKEN INTO CONSIDERATION

25. In paragraph 29 of the Impugned Decision, the Honourable Single Judge bases his decision to keep Mr Ali Muhammad Ali Abd-Al-Rahman in detention on the existence of an unacceptable risk that he may exert pressure on witnesses, directly or through his alleged supporters or connections he has as a result of a high-ranking position he is alleged to have held previously.⁴⁵ In reaching that finding, the Honourable Single Judge does not distinguish between witnesses in Sudan and those who reside in other countries around the world.

26. In paragraphs 10 and 11 of its Reply, the Defence drew a distinction between the two situations. In respect of the alleged witnesses in Sudan, the Defence contended that, since the OTP had no means of investigating and protecting its witnesses in Sudan, in technical terms it could not have any witnesses in Sudan. The OTP's witnesses, if it has any, are by definition outside Sudanese territory. The Defence submitted therefore that the OTP could not claim that the interim release of Mr Ali Muhammad Ali Abd-Al-Rahman to the Netherlands would cause a risk to the safety of purported witnesses in Sudan and applied for the OTP's submissions in that respect to be rejected.⁴⁶ The OTP disclosed in paragraph 29 of its Response that there were witnesses in the territory of the European Union.⁴⁷ In its Reply, the Defence objected to that confidential information upon which the safety of witnesses depended being referred to in an OTP public document, asked the Honourable Single Judge to remind the OTP of its obligations to protect its own witnesses and specifically requested that this infringement of the confidentiality of information relating to the location of OTP witnesses should not be used as an argument to defeat the request for the release of Mr Ali Muhammad Ali

⁴⁵ [ICC-02/05-01/20-115](#): *op. cit.*, para. 29.

⁴⁶ [ICC-02/05-01/20-100](#): *op. cit.*, para. 10.

⁴⁷ [ICC-02/05-01/20-95](#): *op. cit.*, para. 29.

Abd-Al-Rahman (*nemo auditur propriam turpitudinem allegans*).⁴⁸ The Defence submissions on the lack of any allegations that Mr Ali Muhammad Ali Abd-Al-Rahman threatened the administration of justice⁴⁹ – as opposed to the inadmissible allegations against an “Ali Kushayb” made in Annex 3 – and on the fact that the identities of none of the OTP’s witnesses had thus far been disclosed to him⁵⁰ have gone unheeded and have not been taken into consideration by the Honourable Single Judge. In the Impugned Decision, the Honourable Single Judge finds there to be a risk to witnesses but does not distinguish between those in Sudan and those in other countries, does not respond to or even mention the Defence’s line of argument to the effect that the presence of OTP witnesses in Sudan is physically and legally impossible, does not remind the OTP of its obligations relating to the confidentiality of information and the safety of witnesses and does not assess the impact of the Defence submissions on his assessment of the risk that witnesses would face were Mr Ali Muhammad Ali Abd-Al-Rahman to be released. The Honourable Single Judge’s finding is therefore erroneous in fact and law because it fails to take those factors into account and because it fails to give reasons for summarily rejecting them without even giving them consideration, despite their undisputed merit and in breach of the obligation under article 74(5) of the Statute to state reasons for decisions.

FOURTH GROUND OF APPEAL – ERROR OF LAW: THE HONOURABLE SINGLE JUDGE INVERSED THE STANDARD APPLICABLE BEFORE THE COURT TO CONTINUED DETENTION

27. Besides the fact that in paragraph 23 the Impugned Decision begs the question when it states that detention is the exception and not the rule,⁵¹ the reasoning advanced by the Honourable Single Judge in paragraphs 28 to 30 of his decision inversed that same standard, in practice making detention the rule and release the unattainable exception.

⁴⁸ [ICC-02/05-01/20-100](#): *op. cit.*, para. 11.

⁴⁹ [ICC-02/05-01/20-100](#): *op. cit.*, para. 12.

⁵⁰ [ICC-02/05-01/20-100](#): *op. cit.*, para. 13.

⁵¹ [ICC-02/05-01/20-115](#): *op. cit.*, para. 23.

28. In paragraph 16 of its Reply, the Defence maintained that the case against Mr Ali Muhammad Ali Abd-Al-Rahman was the first before the Court in which a suspect had on his own initiative undertaken a perilous two-month journey accompanied by two of his sons, crossing dangerous zones in the African continent to voluntarily surrender himself to the Court in his search for justice.

29. Unlike other cases before the Court, here it is uncertain whether he is indeed the person referred to in the OTP's charges and the items of evidence presented thus far to be examined by the Honourable Pre-Trial Chambers, all of which mention a person known as "Ali Kushayb" whom Mr Ali Muhammad Ali Abd-Al-Rahman states he does not recognize himself as and who does not correspond to his accepted civil status. It is that same uncertainty which constituted the grounds of the Honourable Single Judge's final decision prohibiting the use of the name "Ali Kushayb" to designate Mr Ali Muhammad Ali Abd-Al-Rahman in official Court documents and filings.⁵² The time will come when, if it considers it helpful to its case, the OTP can seek to prove that the person known as "Ali Kushayb" referred to in the charges and the evidence that the OTP intends to tender is none other than Mr Ali Muhammad Ali Abd-Al-Rahman. Until that circumstance has been proved, however, doubt remains and Mr Ali Muhammad Ali Abd-Al-Rahman must have the benefit of that doubt. If, as the OTP claimed, the reference to "Ali Kushayb" in the name of the case does not cause any prejudice to Mr Ali Muhammad Ali Abd-Al-Rahman,⁵³ the mere mention of that name in the documents submitted by the OTP could not be interpreted as referring to Mr Ali Muhammad Ali Abd-Al-Rahman in order to bar his release.

30. Furthermore, the strictest of security conditions – use of an electronic bracelet, limitation of telephone contacts, an obligation to report regularly to a monitoring authority and the retention of his passport and other travel documents – with which Mr Ali Muhammad Ali Abd-Al-Rahman indicated he was prepared to comply under

⁵² [ICC-02/05-01/20-8](#): *op. cit.*, para. 15.

⁵³ ICC-02/05-01/20-4: "Prosecution's Response to 'Requête aux fins de changement du nom porté au dossier de l'affaire ICC-02/05-01/20'", 19 June 2020, <https://www.legal-tools.org/doc/7v316m/pdf>, para. 7.

rule 119 of the Rules and/or article 38(3) of the Headquarters Agreement, in addition to his sworn statement that he would not abscond from the authority of the Court and the genuine ongoing concern for the victims and witnesses he has expressed since his first appearance,⁵⁴ should have been found to be sufficient to dispel the last remaining fears that his release might cause.

31. The Impugned Decision is underpinned entirely by the following three considerations of the Honourable Single Judge: (i) the Prosecution lacks the means to protect its witnesses in Darfur (paragraph 28), even though that factor must not prejudice Mr Ali Muhammad Ali Abd-Al-Rahman and should have militated in favour of his release, as demonstrated in the first ground of appeal; (ii) Annex 3, which has been shown in the second ground of appeal to allege facts that have no bearing on Mr Ali Muhammad Ali Abd-Al-Rahman and which should have been found to be *prima facie* inadmissible as lacking in any probative value and incompatible with a fair trial (paragraph 28 and footnote 20); and (iii) the high-ranking position that the suspect is alleged to have held in the past and the possibility that he still has supporters (paragraph 29). The OTP advanced that last point in its Response which sought to draw a parallel with the *Ntaganda* case.⁵⁵ However, as the Defence submitted in subparagraph 14(i) of its Reply, the links that were established and acknowledged by the Defence for Mr Bosco Ntaganda with identified loyalists in the Democratic Republic of Congo⁵⁶ have no equivalent in this case in which no similar link has been established or acknowledged in relation to Mr Ali Muhammad Ali Abd-Al-Rahman. The OTP and the Honourable Single Judge merely make evasive allegations of links with certain “supporters” but do not even specify whom, and rely on Annex 3, which under the Court’s case law and article 69(4) of the Statute, should have been found inadmissible as manifestly unreliable and incompatible with a fair trial. The Honourable Single Judge was not

⁵⁴ [ICC-02/05-01/20-T-001-FRA](#): *op. cit.*, p. 21, lines 14-26; [ICC-02/05-01/20-98](#): “*Requête et observations sur les réparations en vertu de l’Article 75-1*”, 17 July 2020; [ICC-02/05-01/20-100](#): *op. cit.*, para. 11; [ICC-02/05-01/20-106-Conf](#): *op. cit.*, para. 23.

⁵⁵ [ICC-02/05-01/20-95](#): *op. cit.*, paras. 25-26.

⁵⁶ [ICC-01/04-02/06-147](#): “Decision on the Defence’s Application for Interim Release”, 18 November 2013, para. 58.

entitled, on the basis of those three factors alone – none of which in isolation stands up to analysis – to find that it was necessary to keep Mr Ali Muhammad Ali Abd-Al-Rahman in detention.

32. If the principle that “pre-trial detention is not the general rule, but it is the exception”⁵⁷ still applied before the Court, Mr Ali Muhammad Ali Abd-Al-Rahman’s release should have been granted. Rejecting the request to release Mr Ali Muhammad Ali Abd-Al-Rahman even though there are no grounds on which to establish an appearance of any risk posed by him and notwithstanding his repeated willingness to comply with all conditions that the Honourable Single Judge and/or the Host State may see fit sends out the message that no application for release can ever succeed before the Court unless it relates to prosecutions unconnected with the crimes under article 5 of the Statute: detention will be held to be the rule and release, the exception. It is that very shift from which the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman entreated the Honourable Single Judge to refrain come what may. That is the shift of the hitherto progressive case law of the Court, one which is both damaging and contrary to the rights of the person, that the Honourable Single Judge decided upon in the Impugned Decision.

FIFTH GROUND OF APPEAL – ERROR OF LAW: THE HONOURABLE SINGLE JUDGE REFUSED TO COMMENCE CONSULTATIONS WITH THE HOST STATE

33. In paragraph 32 of the Impugned Decision, the Honourable Single Judge finds lastly that it is unnecessary to consult the Host State on the possibility of releasing Mr Ali Muhammad Ali Abd-Al-Rahman to its territory because he does not intend to grant that release.

34. By not consulting the Host State as the Defence requested in paragraph 17 of its Application Pursuant to Article 60(2),⁵⁸ the Honourable Single Judge errs in law

⁵⁷ [ICC-01/04-01/07-330](#): “Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga”, 18 March 2008, pp. 6-8; see also [ICC-01/05-01/08-403](#): “Decision on Application for Interim Release”, 14 April 2009, para. 36.

⁵⁸ [ICC-02/05-01/20-12](#): *op. cit.*, para. 17.

since regulation 51 of the RoC provides that the Pre-Trial Chamber must seek “observations from the host State and from the State to which **the person seeks to be released**” [Emphasis added]. The criterion that renders consultation necessary is therefore not the Honourable Single Judge’s intention to grant the release but the fact that release has been requested. In the matter at hand, since Mr Ali Muhammad Ali Abd-Al-Rahman applied to be released to the territory of the Host State, there was only one State – the Host State – to be consulted, but that prior consultation was a necessary and mandatory part of hearing the Application Pursuant to Article 60(2).

35. The Honourable Appeals Chamber overturned a decision ordering interim release in the *Bemba* case on the grounds that

[i]n granting conditional release it is necessary to specify the appropriate conditions that make conditional release feasible, identify the State to which Mr Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court.⁵⁹

The Honourable Appeals Chamber took the view in particular that

in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary. Rule 119 (3) of the Rules of Procedure and Evidence obliges the Court to seek, *inter alia* the views of the relevant States **before imposing** or amending any conditions restricting liberty. It follows that **a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release.** [Emphasis added].⁶⁰

Obtaining the observations of the State to whose territory the release is sought is therefore a step preceding the decision on the release or continued detention and forms part of the hearing of that matter. By failing to consult that State the Honourable Single Judge therefore erred in law.

36. That error of law prejudices Mr Ali Muhammad Ali Abd-Al-Rahman since, in the event that the Honourable Appeals Chamber were to uphold this appeal and reverse the Impugned Decision, it would find it difficult to order his release because the prior consultation with the Host State has not taken place. By refusing to order consultation with the Host State, the Honourable Single Judge has therefore

⁵⁹ [ICC-01/05-01/08-631-Red](#): “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, para. 2.

⁶⁰ [ICC-01/05-01/08-631-Red](#): *op. cit.*, para. 106.

presented the Honourable Appeals Chamber with a *fait accompli* that prevents it from ordering the immediate release of Mr Ali Muhammad Ali Abd-Al-Rahman. To overcome that difficulty, it will be for the Honourable Appeals Chamber to order the prompt commencement of the consultations laid down by regulation 51 of the RoC and to postpone implementation of the release ordered for the period strictly necessary for their swift conclusion. The lack of consultation also affects the phase relating to the periodic review of the decision on release or continued detention which, in the event that release is ordered, will have to be delayed on account of the consultation. By not carrying out the consultation requested, the Honourable Single Judge therefore clearly signalled that he has no intention of granting release at the time of the periodic review phases, thereby prejudging any merits the Defence submissions advocating release may have.

FOR THESE REASONS, LEAD COUNSEL RESPECTFULLY ASKS THE HONOURABLE APPEALS CHAMBER TO:

UPHOLD this appeal and **REVERSE** the Impugned Decision;

ORDER the interim release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the Host State subject to any conditions that the Court and/or the Host State might see appropriate to apply under rule 119 of the Rules and/or article 38(3) of the Headquarters Agreement; and to that effect,

ORDER the immediate commencement of the consultations with the Host State laid down by regulation 51 of the RoC.

[signed]

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

Dated this 19 August 2020

At The Hague, Netherlands