

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: ICC-02/05-01/20
Date: **16 December 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. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB")***

Public Document

Notice of Appeal against Decision ICC-02/05-01/20-230-RED

Source: Mr Cyril Laucci, Lead Counsel

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

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Victims for
Participation/Reparations**

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**Victims Participation and Reparations
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Other

Mr Marc Dubuisson, Director, Division
of Judicial Services

1. By an email of 16 November 2020, the Honourable Pre-Trial Chamber II instructed the Office of the Prosecutor (OTP) and the Defence to file their observations for the purposes of the first review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention pursuant to rule 118(2) of the Rules of Procedure and Evidence ("Review").¹

2. Accordingly, as instructed, the OTP filed its observations on the Review on 20 November 2020 under the classification "Confidential". A public redacted version thereof was registered on 25 November 2020 ("OTP Observations").² In essence, the OTP objected to Mr Ali Muhammad Ali Abd-Al-Rahman's release and sought his continued detention.

3. The Defence, in turn, filed its observations on 26 November 2020 ("Defence Observations").³ In essence, the Defence submitted that in the Review regard needed to be had to two new circumstances, *viz.* (i) the discovery of the absence of an agreement between Sudan and the Court authorizing the latter to carry out its activities on the territory of Sudan;⁴ and (ii) the discovery of the OTP's violation of confidentiality rules with respect to records of witness interviews.⁵ The Defence argued that these two circumstances directly affected the admissibility of the evidence relied upon to issue the two warrants of arrest for Mr Ali Muhammad Ali Abd-Al-Rahman; that that evidence had to be excluded from the holistic approach prescribed by the Honourable Appeals Chamber in its first judgment on Mr Ali Muhammad Ali Abd-Al-Rahman's detention ("First Judgment on Detention");⁶ and that the exclusion of the evidence affected by those two new circumstances meant that the criterion for detention under article 58(1)(a) of the Statute – reasonable grounds to believe that Mr Ali Muhammad Ali Abd-Al-Rahman is in any way responsible for the crimes described in the warrants of arrest – could no longer be met. The Defence concluded that the criterion for Mr Ali Muhammad Ali Abd-Al-Rahman's detention under article 58(1)(a) of the Statute was no longer met

¹ Email sent on 16 November 2020 at 14.16.

² [ICC-02/05-01/20-209-Red](#).

³ [ICC-02/05-01/20-213-Red](#).

⁴ [ICC-02/05-01/20-213-Red](#), paras. 18-29.

⁵ [ICC-02/05-01/20-213-Red](#), paras. 30-37.

⁶ [ICC-02/05-01/20-177 OA2](#), paras. 26, 35.

and that he should therefore be released. The Defence also drew ample attention to new circumstances related to health and safety at the Court's Detention Centre.⁷

4. By way of its decision of 11 December 2020, the Honourable Pre-Trial Chamber II conducted the first review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention pursuant to rule 118(2) of the Rules of Procedure and Evidence ("Decision under Appeal").⁸ The Honourable Pre-Trial Chamber II affirmed his continued detention on the main ground that the two new circumstances advanced by the Defence – on whose merits the Honourable Pre-Trial Chamber II is silent – concern only a limited and "relatively insignificant" amount of evidence compared to the entirety of the evidence, and such evidence therefore fails to cast doubt on the validity of the warrants of arrest and/or the fulfilment of the article 58(1)(a) criterion.⁹ Moreover, the Honourable Pre-Trial Chamber II rejects the Defence's submissions on the humanitarian ground for the release sought.¹⁰

5. By way of the present Notice of Appeal, the Defence hereby appeals the Decision under Appeal under article 82(1)(b) of the Statute, rule 154(1) of the Rules of Procedure and Evidence and regulation 64(5) of the Regulations of the Court (RoC).

6. Pursuant to regulation 64(5) of the RoC, the Defence specifies the particulars of the appeal proceedings instituted by this Notice of Appeal:

(a) Name and number of the case: ICC-02/05-01/20, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb");

(b) Title and date of the decision under appeal: [ICC-02/05-01/20-230-Red](#), "Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to Rule 118(2) of the Rules of Procedure and Evidence" (French version not available), 11 December 2020;

(c) The Appeal Brief is directed against paragraphs 26-27, 31 and 34 of the Decision under Appeal;

⁷ [ICC-02/05-01/20-213-Red](#), para. 38.

⁸ [ICC-02/05-01/20-230-Red](#).

⁹ [ICC-02/05-01/20-230-Red](#), para. 26.

¹⁰ [ICC-02/05-01/20-230-Red](#), para. 34.

(d) Provision of the Statute pursuant to which the appeal is filed: article 82(1)(b) of the Statute;

(e) Grounds of appeal: the Defence sets out the three alternative grounds of appeal hereunder:

- First ground of appeal – error of fact and of law: at paragraphs 26 and 27 of the Decision under Appeal, the Honourable Pre-Trial Chamber II committed an error of fact by considering that the portion of the evidence referred to by the Defence in its submissions and affected by the two new circumstances adverted to in the Defence Observations represented only an insignificant part of the evidence presented in the warrants of arrest. In its submissions, the Defence did place particular focus on only the evidence specifically incriminating Mr Ali Muhammad Ali abd-Al-Rahman rather than on evidence relating to the context or to the involvement of Mr Ahmad Harun, which is, by very far, more copious. To require from the Defence submissions which address the entirety of the evidence was irrelevant and cast on the Defence a burden that cannot be discharged, whereas the disclosure process is still ongoing and the Defence has not received all the evidence. By requiring the Defence to make a showing which encompasses the evidence in its entirety, the Honourable Pre-Trial Chamber II therefore also erred in law by rendering it in reality impossible to make a showing for the limited needs of the release;
- Second ground of appeal – error of fact and of law: at paragraph 31 of the Decision under Appeal, the Honourable Pre-Trial Chamber II erred in fact and in law by taking into account the OTP’s witness protection efforts, insofar as it left out of account the absence of an agreement between Sudan and the Court (error of fact), which makes it impossible to protect witnesses on the territory of Sudan, in violation of articles 4(2) and 68(1) of the Statute (error of law);
- Third ground of appeal – error of fact and of law: lastly, at paragraph 34 of the Decision under Appeal, the Honourable Pre-Trial Chamber II erred in fact by considering, on the sole basis of his state of health and in disregard of the risks

inherent to his advanced age and continued detention in the particular context described at paragraph 38 of the Defence Observations, that the special circumstances described in the Defence Observations did not warrant Mr Ali Muhammad Ali Abd-Al-Rahman's release on humanitarian grounds. It thereby committed an error of fact and of law by failing to have regard to the special circumstances related to Mr Ali Muhammad Ali Abd-Al-Rahman's age and prison environment (error of fact) and by not ordering the minimum measures that respect for his right to life demanded (error of law).

(f) Relief sought: the Defence moves the Honourable Appeals Chamber to (i) reverse the Decision under Appeal and (ii) order the immediate release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the Host State, after considering the observations of that State's authorities.

5. Turning to the suitability of a hearing on the present appeal under regulation 64(6)(a) of the RoC, the Defence again defers to the infinite wisdom of the Honourable Appeals Chamber with regard to choosing the option conducive to the swiftest resolution of the present appeal.

[signed]

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

Dated this 16 December 2020

At The Hague, Netherlands