

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **French**

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

Date: 14 April 2021

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański  
Judge Luz del Carmen Ibáñez Carranza  
Judge Marc Perrin de Brichambaut  
Judge Solomy Balungi Bossa  
Judge Gocha Lordkipanidze

**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-02/05-01/20-338**

**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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**Amicus Curiae**

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**REGISTRY**

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Section**

**Detention Section**

Mr Harry Tjonk

**Victims Participation and Reparations  
Section**

**Other**

Mr Marc Dubuisson, Director,  
Division of Judicial Services

1. By an email of 17 February 2021, the Honourable Pre-Trial Chamber II directed the Office of the Prosecutor (OTP) and the Defence to file their observations for the second review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention pursuant to rule 118(2) of the Rules of Procedure and Evidence ("2<sup>nd</sup> Review").

2. Accordingly, as directed, the OTP filed its observations on the 2<sup>nd</sup> Review on 18 March 2021 with the classification "Confidential". A public redacted version thereof was registered on 22 March 2021 ("OTP Observations").<sup>1</sup> In essence the OTP objected to Mr Ali Muhammad Ali Abd-Al-Rahman's release, on the ground that the conditions warranting his detention enumerated at article 58(1) of the Statute continued in its view to be met, and sought his continued detention. The OTP did not refer, however, to any developments affecting the safety of its witnesses, and it maintained as "secret, *ex parte*, only available to the Prosecution" – not affording the Defence an opportunity to consider and respond to it – a document described as identifying individuals who are "linked", without further specifics, to Mr Ali Muhammad Ali Abd-Al-Rahman and who may constitute sources of potential threats.<sup>2</sup>

3. The Defence in turn filed its observations on 1 April 2021 ("Defence Observations").<sup>3</sup> In essence, the Defence continued to draw lessons from the preceding reviews of detention, in particular judgments OA2<sup>4</sup> and OA6<sup>5</sup> handed down on the matter by the Honourable Appeals Chamber.<sup>6</sup> The Defence submitted that in the 2<sup>nd</sup> Review regard needed to be had to two new circumstances, *viz.* (i) the showing of extreme financial hardship and of the lack of a support network on the part of Mr Ali Muhammad Ali Abd-Al-Rahman, which adduces evidence contrary to the rebuttable presumption educed by Appeal Judgment OA2<sup>7</sup>

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<sup>1</sup> ICC-02/05-01/20-309-Conf. The public redacted version, [ICC-02/05-01/20-309-Red](#), was registered on 22 March 2021.

<sup>2</sup> [ICC-02/05-01/20-309-Red](#), para. 14 and Annex 2.

<sup>3</sup> ICC-02/05-01/20-329-Conf. The public redacted version, [ICC-02/05-01/20-329-Red](#), was registered on the same day.

<sup>4</sup> [ICC-02/05-01/20-177 OA2](#).

<sup>5</sup> [ICC-02/05-01/20-279-Red OA6](#).

<sup>6</sup> [ICC-02/05-01/20-329-Red](#), paras. 3-8.

<sup>7</sup> [ICC-02/05-01/20-177 OA2](#), para. 26.

that he has a support network that might interfere with witnesses (“1<sup>st</sup> Basis”);<sup>8</sup> and (ii) the inexcusable delay by the OTP, within the meaning of article 60(4) of the Statute, caused by the abuse of the trust which the Honourable Pre-Trial Chamber II<sup>9</sup> and the Honourable Appeals Chamber<sup>10</sup> placed in the OTP’s submissions on the imminence of an agreement with the Sudanese authorities which would resolve the problems related to the protection of witnesses. The Defence further submitted that the delay by the OTP was compounded by the absence of a determination by the Honourable Pre-Trial Chamber II on a number of applications that had been pending for several months, which precluded the Defence from making headway and having adequate time to prepare for the confirmation hearing (“2<sup>nd</sup> Basis”).<sup>11</sup> In addition to those two circumstances the Defence drew lessons from the conclusions of the Honourable Appeals Chamber in its Judgment OA2 as regards the burden of proving the state of scientific understanding about the COVID-19 pandemic<sup>12</sup> and submitted, again, that the pandemic had reached a point which justified releasing Mr Ali Muhammad Ali Abd-Al-Rahman to protect his life and health (“3<sup>rd</sup> Basis”).<sup>13</sup>

4. Furthermore, by an application of 9 April 2021,<sup>14</sup> the Defence sought the urgent convening of a hearing under rule 118(3) of the Rules of Procedure and Evidence (RPE) to determine the conditions of Mr Ali Muhammad Ali Abd-Al-Rahman’s immediate release, made absolutely necessary by the fact that the OTP had not defended the admissibility of the entirety of its testimonial evidence in response to the Defence’s application seeking its exclusion (“Application to Exclude Evidence”) (“4<sup>th</sup> Basis”).<sup>15</sup>

5. By a decision of 12 April 2021, the Honourable Pre-Trial Chamber II conducted the 2<sup>nd</sup> Review of Mr Ali Muhammad Ali Abd-Al-Rahman’s detention pursuant to rule 118(2) of the Rules of Procedure and Evidence

<sup>8</sup> [ICC-02/05-01/20-329-Red](#), paras. 17-25.

<sup>9</sup> [ICC-02/05-01/20-238](#), para. 23.

<sup>10</sup> [ICC-02/05-01/20-279-Red OA6](#), para. 36.

<sup>11</sup> [ICC-02/05-01/20-329-Red](#), paras. 26-31.

<sup>12</sup> [ICC-02/05-01/20-279-Red OA6](#), para. 40.

<sup>13</sup> [ICC-02/05-01/20-329-Red](#), paras. 32-37.

<sup>14</sup> [ICC-02/05-01/20-336](#).

<sup>15</sup> [ICC-02/05-01/20-322](#).

(“Decision under Appeal”).<sup>16</sup> The Honourable Pre-Trial Chamber II affirmed his continued detention. In so doing it refuted the 1<sup>st</sup> Basis by taking the view that the uncontroverted evidence of Mr Ali Muhammad Ali Abd-Al-Rahman and his family’s present financial circumstances and lack of financial support did not suffice to reverse the presumption that he has sympathizers who might interfere with the witnesses.<sup>17</sup> The Honourable Pre-Trial Chamber II excluded the 2<sup>nd</sup> Basis by considering that the acknowledged delays in introducing protective measures for witnesses in Sudan were not due to the OTP or to the time taken for consideration of the pending applications, and that the hope of an agreement with Sudan which would resolve the problems of witness protection had not governed the decision on the second postponement of the confirmation hearing.<sup>18</sup> The 3<sup>rd</sup> Basis was rejected on the premise that it is for the Registry, not the Defence, to determine that the circumstances of the COVID-19 pandemic necessitate Mr Ali Muhammad Ali Abd-Al-Rahman’s release.<sup>19</sup> Lastly, the Honourable Pre-Trial Chamber II rejected the 4<sup>th</sup> Basis by considering that it would be premature to infer the consequences of its pending determination on the Application to Exclude Evidence, and that no inference is to be drawn from the OTP’s lack of objection to that application.<sup>20</sup>

6. By the present Notice of Appeal, the Defence now appeals, pursuant to article 82(1)(b) of the Statute, rule 154(1) of the RPE and regulation 64(5) of the Regulations of the Court (RoC), against the Decision under Appeal.

7. Pursuant to regulation 64(5) of the RoC, the Defence states 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-02/05-01/20-238, “Decision on the Review of Detention” (French version not available), 12 April 2021;

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<sup>16</sup> ICC-02/05-01/20-338.

<sup>17</sup> ICC-02/05-01/20-338, para. 28.

<sup>18</sup> ICC-02/05-01/20-338, paras. 31, 33-35.

<sup>19</sup> ICC-02/05-01/20-338, para. 36.

<sup>20</sup> ICC-02/05-01/20-338, para. 29, 32.

(c) The Appeal Brief is directed against paragraphs 28-37 of the Decision under Appeal;

(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 will advance the five alternative grounds of appeal hereunder:

- 1<sup>st</sup> ground of appeal – error of law: the Defence will argue that the Honourable Pre-Trial Chamber II erred in law at paragraph 28 of the Decision under Appeal<sup>21</sup> by turning the rebuttable presumption previously introduced by the Honourable Appeals Chamber in its Appeal Judgment OA2<sup>22</sup> – that Mr Ali Muhammad Ali Abd-Al-Rahman has sympathizers who might interfere with the witnesses – into a conclusive presumption that is not open to attack by evidence to the contrary, or by applying to it a standard of proof which cannot be met by any reasonable evidence whatsoever.
- 2<sup>nd</sup> ground of appeal – error of fact: the Defence will argue that the Honourable Pre-Trial Chamber II made an error of fact at paragraphs 31 and 34 of the Decision under Appeal<sup>23</sup> by considering that the hope of an agreement with the Sudanese authorities, based on the OTP’s unsustainable submissions to that effect, had not been the sole ground on which the 2<sup>nd</sup> postponement of the confirmation hearing had been decided,<sup>24</sup> and that Mr Ali Muhammad Ali Abd-Al-Rahman’s detention had not, therefore, been unjustifiably prolonged by the 2<sup>nd</sup> postponement.
- 3<sup>rd</sup> ground of appeal – error of law: the Defence will argue also that the Honourable Pre-Trial Chamber II erred in law at paragraph 32 of the Decision under Appeal<sup>25</sup> by refusing to draw the logical conclusions from the OTP’s lack of objection to the Defence’s submissions challenging the admissibility of

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<sup>21</sup> ICC-02/05-01/20-338, para. 28.

<sup>22</sup> [ICC-02/05-01/20-177 OA2](#), para. 26.

<sup>23</sup> ICC-02/05-01/20-338, paras. 31, 34.

<sup>24</sup> [ICC-02/05-01/20-238](#), para. 23.

<sup>25</sup> ICC-02/05-01/20-338, para. 32.

the entirety of its testimonial evidence in the Application to Exclude Evidence.<sup>26</sup> The OTP's lack of objection to the Defence's arguments against admissibility gave rise to the new circumstance that the OTP had chosen not to defend the admissibility of the evidence on which it intended to rely to discharge the burden of proving, under article 58(1)(a) of the Statute, that there are reasonable grounds to believe that Mr Ali Muhammad Ali Abd-Al-Rahman committed the crimes with which he is charged. This new circumstance was a consideration central to the 2<sup>nd</sup> Review and was disregarded by the Honourable Pre-Trial Chamber II.

- 4<sup>th</sup> ground of appeal – error of fact and law: the Defence will argue further that the Honourable Pre-Trial Chamber II erred in fact and law at paragraph 35 of the Decision under Appeal<sup>27</sup> by construing the Defence's submissions about the delays caused to its preparation for the confirmation hearing by the absence of rulings on a significant number of applications that have been pending for several months as an attempt to impose on the Chamber the order and time in which it should issue its rulings, whereas the Defence's submissions on this point were confined to arguing that the absence of rulings affected Mr Ali Muhammad Ali Abd-Al-Rahman's right to have adequate time to prepare his defence pursuant to article 67(1)(b) and to appear at the confirmation hearing within a reasonable time pursuant to article 61(1) of the Statute.<sup>28</sup> As a result of the misapprehension of the Defence's submissions on this point (error of fact), regard was not had, in the determination on the 2<sup>nd</sup> Review, to the violation of articles 67(1)(b) and 61(1) of the Statute (error of law);
- 5<sup>th</sup> ground of appeal – error of law: the Defence will argue lastly that the Honourable Pre-Trial Chamber II erred in law at paragraph 36 of the Decision under Appeal by holding that it was for the Registry alone to apply for Mr Ali Muhammad Ali Abd-Al-Rahman's release if the circumstances of the

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<sup>26</sup> [ICC-02/05-01/20-322](#).

<sup>27</sup> ICC-02/05-01/20-338, para. 35.

<sup>28</sup> [ICC-02/05-01/20-329-Red](#), para. 30.

COVID-19 pandemic so required, whereas that task (i) is not within the Registry's remit, (ii) is incompatible with its duty of neutrality and (iii) clearly falls within the ambit of the rights vested exclusively in the Defence by rule 118 of the RPE.

(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.

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 and most efficient resolution of this appeal.

[signed]

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

Dated this 14 April 2021

At The Hague, Netherlands