

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **23 July 2021**

APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding
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 *PROSECUTOR* v.
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“*ALI KUSHAYB*”)**

Public

**Prosecution Response to the Defence
“Mémoire d’appel de la décision ICC-02/05-01/20-430” (ICC-02/05-01/20-436)**

Source: Office of the Prosecutor

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INTRODUCTION

1. Mr Abd-Al-Rahman’s appeal¹ against the Pre-Trial Chamber’s fourth decision² maintaining him in detention should be rejected. First, none of the grounds of appeal advanced by the Defence arise from the Decision. Second, in any event, the Defence fails to establish any legal or factual error. The Appeal could be dismissed on each of these bases alone.

2. At the hearing held on 26 May 2021, the Pre-Trial Chamber rejected the Defence request to postpone the hearing under rule 118(3) of the Rules of Procedure and Evidence (“RPE”), finding that the main purpose of such hearing is to hear submissions regarding the *conditions* of detention, and not the question of *continued* detention (“Oral Decision”).³ At the hearing held on 27 May 2021 pursuant to rule 118(3), the Pre-Trial Chamber heard from Mr Abd-Al-Rahman in person regarding the conditions of his detention and gave the parties and participants the opportunity to make oral submissions on the subject.⁴ The Chamber then set a timetable for the parties to file written submissions on the question of whether or not Mr Abd-Al-Rahman’s detention should continue for the purposes of the Chamber’s review under rule 118(2) of the RPE.⁵ In its Decision, the Pre-Trial Chamber assessed the parties’ and participants’ written submissions and correctly found that there had been no change of circumstances warranting the release of Mr Abd-Al-Rahman pursuant to article 60(3) of the Rome Statute, and remanded him in detention.⁶

3. First, the Defence does not challenge the Chamber’s findings under articles 58(1) and 60(3) of the Statute which led to its decision to maintain Mr Abd-Al-Rahman in detention. Rather, the Defence’s grounds of appeal challenge the Chamber’s decision as to the procedure for conducting its review of detention pursuant to rule 118(2) and (3) of the RPE—a procedure that followed from the Chamber’s Oral Decision. Specifically, the Defence argues that (i) the Pre-Trial Chamber erred in finding that the purpose of an annual hearing under rule 118(3) of the RPE is to hear submissions regarding the *conditions* of detention, and not the question of *continued* detention or release;⁷ (ii) the Chamber erred in assuming

¹ ICC-02/05-01/20-436 (“[Appeal](#)”).

² ICC-02/05-01/20-430 (“[Decision](#)”).

³ ICC-02/05-01/20-T-009-Red-ENG, 1:21-3:9 (“[26 May 2021 Hearing](#)”).

⁴ ICC-02/05-01/20-T-010-ENG (“[Annual Detention Hearing](#)”), 3:3-10:4.

⁵ [Annual Detention Hearing](#), 4:9-17, 10:2-4.

⁶ [Decision](#), para. 28, p. 10.

⁷ [Appeal](#), paras. 16, 22-28 (Ground 1).

that the Defence would have declined to make submissions on continued detention if invited to do so at the Annual Detention Hearing;⁸ and (iii) the Chamber erred in finding that written submissions could replace a hearing and would resolve any prejudice suffered by failing to hold a hearing pursuant to rule 118(3) of the RPE.⁹ These impugned findings arise from the Oral Decision and have no impact on the impugned Decision. The issues that the Defence raises on appeal thus do not arise from the Decision. The Defence's failure to appeal the Oral Decision, and its belated effort to do so now through this Appeal should be dismissed as inadmissible.

4. Second, and in any event, the Defence fails to establish any legal or factual error in its three grounds of appeal. Its arguments are based on misrepresentations of the Chamber's reasoning and rely on overly formalistic interpretations of the Statute and RPE. Critically, the Defence fails to demonstrate how any of the alleged errors materially affected the Decision. In light of the Appeals Chamber's explicit reminder to the Defence that an appellant is required to "properly substantiate the alleged error and demonstrate how it materially affected the impugned decision", the Defence's failure to do so in this instance warrants the dismissal of the Appeal *in limine*.¹⁰

SUBMISSIONS

A. The Appeal is inadmissible as the issues alleged do not arise from the Decision

5. The Defence appeals the wrong decision. The question of whether the Pre-Trial Chamber erred in limiting the Annual Detention Hearing under rule 118(3) of the RPE to ascertaining the conditions of Mr Abd-Al-Rahman's detention is one that arose from the Oral Decision and does not arise from the impugned Decision. The Defence itself acknowledges that it was in the Oral Decision that the Pre-Trial Chamber limited the evaluation at the Annual Detention Hearing to the conditions of detention, noting that the Prosecution did not appeal this decision.¹¹ Yet the Defence ignores its own failure to appeal the Oral Decision within the requisite timeframe, and seeks to remedy its failure by erroneously appealing the Decision instead.

⁸ [Appeal](#), paras. 29-31 (Ground 2).

⁹ [Appeal](#), paras. 32-36 (Ground 3).

¹⁰ ICC-02/05-01/20-415 ("[Third Detention AD](#)"), para. 26.

¹¹ [Appeal](#), para. 9. While the Defence refers to the Chamber "partially granting" the Defence Adjournment Request, this is clearly incorrect. The Chamber expressly stated that it "rejected" the Defence Adjournment Request: [Annual Detention Hearing](#), 3:2.

6. Specifically, in its Oral Decision of 26 May 2021 the Chamber rejected the Defence's request to postpone the Annual Detention Hearing until after the Appeals Chamber had delivered its judgment in the Defence's third detention appeal,¹² finding, *inter alia*, that the main purpose of the annual hearing on detention pursuant to rule 118(3) of the RPE is to ascertain the conditions of detention.¹³ Subsequently on 27 May 2021, the Chamber invited Mr Abd-Al-Rahman and the parties and participants to make oral submissions on the conditions of Mr Abd-Al-Rahman's detention¹⁴ and instructed the parties and participants to file written observations on the review of Mr Abd-Al-Rahman's detention pursuant to rule 118(2) of the RPE within specified deadlines.¹⁵

7. The Oral Decision thus guided the procedure for the review of Mr Abd-Al-Rahman's detention under rule 118(2) and (3) of the RPE. Critically, and as the Chamber rightly noted,¹⁶ the Defence did not raise any objection to the Oral Decision at either the 26 May 2021 Hearing or at the Annual Detention Hearing. Nor did the Defence seek leave to appeal the Oral Decision. In fact, when invited to make submissions at the Annual Detention Hearing, Defence counsel stated that he would limit his remarks to the conditions of Mr Abd-Al-Rahman's detention, and gave no indication that the Defence either wanted or expected a further hearing to take place on the question of continuing Mr Abd-Al-Rahman's detention.¹⁷

8. Yet in its subsequent written observations, the Defence chose to challenge the legality of the Chamber's procedure as determined by the Oral Decision rather than address the question of whether there was any change of circumstances warranting the release of Mr Abd-Al-Rahman pursuant to article 60(3).¹⁸ These challenges were raised out of time, and while the Chamber considered and rejected the Defence's arguments in the Decision, its findings had no impact on the Chamber's ultimate conclusion under article 60(3) that Mr Abd-Al-Rahman should remain in detention.¹⁹

¹² ICC-02/05-01/20-408 ("[Defence Adjournment Request](#)").

¹³ [26 May 2021 Hearing](#), 1:21-3:9.

¹⁴ [Annual Detention Hearing](#), 3:3-15 (inviting Mr Abd-Al-Rahman to address the Chamber on the conditions of his detention), 4:3-17 (inviting the Prosecutor to make submissions), 4:21-22 (inviting the OPCV to make submissions), 5:16 and 7:1 (inviting the LRVs to make submissions), 8:11 (inviting the Defence to make submissions).

¹⁵ [Annual Detention Hearing](#), 4:9-15.

¹⁶ [Decision](#), para. 19.

¹⁷ [Annual Detention Hearing](#), 9:2-21. *Contra* [Appeal](#), para. 14.

¹⁸ See generally ICC-02/05-01/20-423 ("[Defence Detention Observations](#)").

¹⁹ See [Decision](#), paras. 16-21.

9. In rejecting the Defence’s arguments,²⁰ the Chamber largely repeated its reasoning in the Oral Decision that (i) the main purpose of holding an annual hearing in the presence of a detained person is to evaluate his or her state and conditions of detention;²¹ and (ii) it was possible to conduct a periodic review of detention while an appeal against a previous detention decision is pending.²² The Chamber’s repeated reasoning did not involve questions of law or fact relevant to—and thus had no impact on—its ruling to maintain Mr Abd-Al-Rahman in detention,²³ but served the sole purpose of addressing the Defence’s belated challenge. Accordingly it cannot be said that the Appeal involves issues that arise from (or that impacted) the Decision.²⁴ The Defence’s failure to ground its Appeal in issues arising from the Decision thus warrants the dismissal of the appeal as inadmissible.

10. Moreover, the Defence’s appeal could also be deemed inadmissible given that it now challenges the import of the Oral Decision which guided the procedure for the detention review, and was not a decision granting or denying release for which there is an automatic right of appeal under article 82(1)(b).

B. The Chamber did not err, nor does the Defence allege that it did so, in its assessment under articles 58(1) and 60(3) of the Statute

11. The Pre-Trial Chamber found that there had been no change of circumstances since its prior rulings on detention²⁵—all of which were upheld on appeal²⁶—that would warrant Mr

²⁰ [Decision](#), paras. 16-21.

²¹ [26 May 2021 Hearing](#), 3:1-2. See [Decision](#), para. 17.

²² [26 May 2021 Hearing](#), 2:21-3:5. See [Decision](#), para. 18.

²³ [Decision](#), paras. 22-28.

²⁴ ICC-01/04-01/06-1433 (“[Lubanga Oral Disclosure AD, Judge Song Dis. Op.](#)”), para. 4 (“A decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made”), citing [ICC-01/04-01/06-168](#), para. 9; ICC-01/04-168 (“[DRC Extraordinary Review Decision](#)”), para. 9 (“An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”). See e.g. ICC-01/05-01/08-980 (“[Bemba Amended DCC ALA Decision](#)”), paras. 17-19 (rejecting as an issue a determination on a procedural question regarding time limits that would not materially change any subsequent ruling on the substantive matter at hand); ICC-01/05-01/13-1489 (“[Bemba et al. Defence ALA Decision](#)”), para. 8 (rejecting as an issue a matter arising from the Pre-Trial Chamber’s *obiter dictum* that was not essential for the determination of the impugned decision).

²⁵ ICC-02/05-01/20-115 (“[First Detention Decision](#)”) and ICC-02/05-01/20-230-Conf (public redacted version: ICC-02/05-01/20-230-Red) (“[Second Detention Decision](#)”); ICC-02/05-01/20-338 (“[Third Detention Decision](#)”).

²⁶ ICC-02/05-01/20-177 (“[First Detention AD](#)”); ICC-02/05-01/20-279-Conf (public redacted version: ICC-02/05-01/20-279-Red) (“[Second Detention AD](#)”); ICC-02/05-01/20-415 (“[Third Detention AD](#)”).

Abd-Al-Rahman’s release, with or without conditions, pursuant to article 60(3).²⁷ The Pre-Trial Chamber’s Decision is reasonable and correct.²⁸

12. As discussed above, the Defence had made no observations before the Pre-Trial Chamber nor alleged any error on appeal in the Chamber’s reasoning or conclusion in relation to its assessment of the factors in article 58(1) and 60(3) of the Statute. Instead, the Defence only gives two examples—without elaboration—of issues that it would have raised in oral submissions on Mr Abd-Al-Rahman’s continued detention or release had it been given the opportunity, namely: demonstrating the absence of a factual basis for the claim that his release would constitute a threat to witnesses and to the investigation, and demonstrating the absence of a legal and/or factual basis for the Registry’s *ex parte* assertion that cooperation with the Court would not incur the death penalty in Sudan.²⁹ The impact that these issues may have had on the Chamber in reaching its decision on detention is purely speculative and have no relevance whatsoever in this Appeal. These two issues do not suffice to discharge the Defence’s duty to identify and substantiate errors in an impugned decision on appeal.³⁰ In the absence of any errors identified on appeal in relation to the Chamber’s assessment under article 58(1) and 60(3), the Appeal should be dismissed.

13. Notwithstanding the issues rendering the Appeal inadmissible, even if the Appeals Chamber were to entertain the merits of the three grounds of appeal alleged by the Defence, these grounds should be rejected for failing to demonstrate any legal or factual error, let alone errors that had any material impact on the Decision, for the reasons that follow.

²⁷ [Decision](#), paras. 23-26, 27-28.

²⁸ [Third Detention AD](#), para. 23 (stating in relation to the standard of review in appeals in relation to decisions granting or denying interim release, that the Appeals Chamber “will not review the findings of the Pre-Trial Chamber de novo, instead, it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision”), 24 (stating that with respect to errors of law, the Appeals Chamber “will not defer to the Trial Chamber’s interpretation of the law” and “will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law” and “will only intervene if the error materially affected the Impugned Decision”), 25 (with respect to errors of fact, the Appeals Chamber “will [] not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”. As regards the “misappreciation of facts” the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber’s findings”). *See also* [Second Detention AD](#), paras. 11-13.

²⁹ [Appeal](#), para. 33.

³⁰ [Third Detention AD](#), para. 26.

C. Ground 1: The Pre-Trial Chamber did not violate rule 118(3) of the RPE

14. The Defence argues that the Chamber erred in law by considering that rule 118(3) of the RPE is mainly concerned with the conditions of detention and not the question of continued detention or release.³¹ The Defence relies on an overly formalistic interpretation of the RPE that ignores the circumstances of this case and the opportunities that were afforded to the Defence—which it did not take—to argue the question of maintaining Mr Abd-Al-Rahman in detention.

15. The Defence’s argument is centred on its claim that a detained person has an absolute right to an oral hearing on his or her continued detention.³² However, while rule 118(3) of the RPE requires the Pre-Trial Chamber to hold a hearing at least once every year in relation to a person’s detention from the date of their first appearance, the rule does not stipulate the format, content or procedure for the hearing.³³ Chambers thus have discretion as to the conduct of the hearing and how they will receive submissions on questions relevant to maintaining a person in detention. While, as the Defence notes, the Chamber cites a decision in *Gbagbo & Blé Goudé* which stated in the English translation that the purpose of the rule 118(3) hearing was to focus on “[Gbagbo’s] detention conditions”, whereas the original French text stated that the purpose of the rule 118(3) hearing was “l’examen de sa detention”,³⁴ this distinction is of no import. The practice of Pre-Trial Chambers in this court demonstrates that Chambers vary in their approaches as to how they will receive submissions at the annual detention hearing pursuant to rule 118(3), such as by permitting only oral submissions, or receiving written submissions while permitting the parties to make preliminary oral comments.³⁵ The jurisprudence the Defence cites indicates no more than the

³¹ [Appeal](#), paras. 22-28.

³² [Appeal](#), paras. 25-26, 33, 35.

³³ Rule 118(3) of the [RPE](#) provides: “After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year”.

³⁴ [Appeal](#), para. 23(i). Compare [ICC-02/11-01/11-T-22-Red-ENG](#), 3:2-3 with [ICC-02/11-01/11-T-22-Red-FRA](#), 2:27-3:1.

³⁵ See e.g. [ICC-01/04-02/06-T-16-ENG](#), 3:5-13 (inviting the parties to make oral submissions on Mr Ntaganda’s continued detention or release and noting that it does not wish to receive written observations on this matter); [ICC-02/11-01/11-516](#), para. 10 (noting that the Chamber will issue its decision under article 60(3) of the [Statute](#) and rule 118(2) of the RPE on the basis of oral submissions received during the annual detention hearing); [ICC-02/04-01/15-503](#), para. 5 (noting that the parties were given the opportunity to make written submissions and preliminary oral comments on the matter of Mr Ongwen’s detention for the purpose of the hearing under rule 118(3) of the [RPE](#)).

Chambers' common practice in this regard, and is not reflective of any mandatory requirements of rule 118(3) of the RPE as to the format of submissions before the Chamber.³⁶

16. Nor can it be said that rule 118(3) of the RPE mandates the questions to be addressed at the oral hearing.³⁷ Rather, what matters is that the detained person has been given adequate opportunity to address the Chamber on issues regarding his or her detention. But to that end, the Defence does not explain why the question of the *continuation* of detention is one that must necessarily be heard by way of oral submissions. Rather, it would seem more relevant for a Chamber to see and hear from the detained person directly as to their *conditions* of detention, rather than arguments in relation to the continuation of detention or release, which counsel would be competent to address on the detained person's behalf and in writing.

17. Given that the Defence draws parallels between rule 118(3) of the RPE and the right of *habeus corpus*,³⁸ it is also relevant to recall—as the Pre Trial Chamber rightly did³⁹—that international human rights law does not impose a uniform, unvarying standard as to the procedural guarantees to be afforded to detained persons on the review of their detention.⁴⁰ A person detained in the pre-trial stage must be afforded guarantees of a judicial procedure determining their detention; the proceedings must be adversarial and must ensure equality of arms between the parties; and the detained person must be given the possibility of being heard, either in person or through some form of representation,⁴¹ however a hearing is not essential in all circumstances, particularly where no further clarification is expected to be provided.⁴² Contrary to the Defence's claim, this jurisprudence is not irrelevant simply because it relates to national procedures;⁴³ but rather is instructive for its interpretation of human rights standards that apply across jurisdictions, and is therefore relevant to understanding the contours of a detained person's right to be heard under rule 118(3) of the RPE.

³⁶ See [Appeal](#), para. 23(iii) (fn. 48).

³⁷ *Contra* [Appeal](#), paras. 25-27.

³⁸ [Appeal](#), para. 24.

³⁹ [Decision](#), para. 17 (fn. 16), citing ECtHR: [A. and Others v. The United Kingdom](#), App. No. 3455/05, 19 February 2009, para. 204.

⁴⁰ ECtHR: [Černák v. Slovakia](#), App. No. 36997/08, Judgment, 17 December 2013, para. 78.

⁴¹ ECtHR: [Kampanis v. Greece](#), App. No. 17977/91, Judgment, 13 July 1995, para. 47; [Nikolova v. Bulgaria](#), App. No. 31195/96, Judgment, 25 March 1999, para. 58; [Lutsenko v. Ukraine](#), App. No. 6492/11, Judgment, 3 July 2012, para. 96.

⁴² ECtHR: [Derungs v. Suisse](#), App. No. 52089/09, Judgment, 10 May 2016, para. 75.

⁴³ [Appeal](#), para. 24.

18. In this case, Mr Abd-Al-Rahman was provided with the necessary guarantees that were fully consistent with his rights. He received the opportunity to be heard orally in relation to his conditions of detention, and in writing on the continuation of his detention. Mr Abd-Al-Rahman addressed the Chamber in person at the Annual Detention Hearing, confirming that he had no issues with the conditions of his detention,⁴⁴ and his Defence counsel provided further oral submissions on this.⁴⁵ Defence counsel did not raise any issue at the Annual Detention Hearing regarding the continuation of Mr Abd-Al-Rahman's detention, notwithstanding that the LRVs had made brief oral submissions on that subject.⁴⁶ Nor did the Defence avail itself of the opportunity to make written submissions on this issue, instead electing to challenge the Chamber's prior procedural decision.

19. It is incongruous for the Defence to argue that the right to a hearing on detention is absolute in circumstances where it chose not to utilise any of the opportunities afforded to it to make submissions on the continuation of Mr Abd-Al-Rahman's detention.⁴⁷ Moreover, the Defence's accusation of negligence on the part of the Pre-Trial Chamber in failing to grant the Defence's prior requests to call a rule 118(3) hearing is unsubstantiated.⁴⁸ The Chamber is not obliged to grant a party's request to convene a rule 118(3) hearing, but must convene a hearing once a year, which it did in this case.

20. Additionally, there was no obligation, or expectation on the Chamber to convene a *further* hearing once the Appeals Chamber had rendered its judgment of the Defence's third detention appeal.⁴⁹ In arguing otherwise, the Defence misrepresents the Oral Decision as "partially rejecting" or "partially granting" the Defence Adjournment Request.⁵⁰ To the contrary, the Presiding Judge set out the Chamber's reasoning as to why it would not postpone the hearing, stating that "[t]he Defence request to postpone the annual hearing on detention is [] rejected", and the subsequent day, clearly confirmed the procedure for the oral and written submissions.⁵¹ The Defence appears to rely on its misrepresentation of this decision as "partially granting"/"partially rejecting" the Defence Adjournment Request to claim that there was an expectation of a further hearing,⁵² so as to justify its failure to appeal

⁴⁴ [Annual Detention Hearing](#), 3:16-4:2.

⁴⁵ [Annual Detention Hearing](#), 9:6-21.

⁴⁶ See [Annual Detention Hearing](#), 5:18-6:24, 7:2-8:8.

⁴⁷ *Contra* [Appeal](#), paras. 25-27.

⁴⁸ [Appeal](#), para. 27.

⁴⁹ *Contra* [Appeal](#), paras. 27-28.

⁵⁰ [Appeal](#), paras. 9, 27.

⁵¹ [26 May 2021 Hearing](#), 3:9; [Annual Detention Hearing](#), 3:11-13, 4:9-15.

⁵² [Appeal](#), paras. 14

the Oral Decision, its failure to request a further hearing, and its failure to take any action before the lapse of one year in detention since the initial appearance, and to claim a violation of rule 118(3) of the RPE. Indeed, the Defence's strategy appears to have been to wait until Mr Abd-Al-Rahman's first year in detention had lapsed in order to argue that the Pre-Trial Chamber violated rule 118(3) of the RPE by failing to convene the further expected hearing.

21. Significantly, the Defence fails to explain how the alleged error materially affected the Decision, in the sense that without the error, the Decision would have been substantially different.⁵³ The Defence broadly claims that the alleged legal error renders Mr Abd-Al-Rahman's detention illegal as of 16 June 2021—the date after the first anniversary of his initial appearance in these proceedings—and will aggravate the compensation he is owed under article 85(1) of the Statute.⁵⁴ The Defence cannot simply assert that an alleged error automatically invalidates a decision to maintain a person in detention, let alone threaten compensation proceedings on account of that detention, without first explaining how the error invalidates the accused's detention, or addressing the criteria for maintaining a person in detention under article 58(1) and 60(3) of the Statute.

22. For the reasons set out above, the Defence's first ground of appeal should be rejected.

D. Ground 2: The Chamber's assumption regarding the Defence's willingness to make submissions at the Annual Detention Hearing had no impact on its Decision

23. The Defence argues that the Chamber erred factually in assuming that even if the Defence had been given the opportunity to make submissions on Mr Abd-Al-Rahman's continued detention or release at the Annual Detention Hearing, the Defence would have declined to do so.⁵⁵ The Defence further alleges that insofar as this assumes that the Defence would have willingly violated the Chamber's instruction, this was also a legal error as the Defence is always bound to comply with a Chamber's instructions.⁵⁶ The Defence's arguments in the second ground of appeal fail to identify any error.

24. *First*, the Chamber's assumption was not unfounded. The Defence had expressly stated in its request to adjourn the Annual Detention Hearing that it would be unable to formulate

⁵³ ICC-01/04-169 (“[DRC Arrest Warrant AD](#)”) para. 84.

⁵⁴ [Appeal](#), para. 28.

⁵⁵ [Appeal](#), paras. 29-30.

⁵⁶ [Appeal](#), para. 31.

submissions on detention while its third detention appeal was pending before the Appeals Chamber.⁵⁷ It was not unreasonable for the Chamber to recall this statement in its Decision.⁵⁸

25. *Second*, even if the Chamber incorrectly assumed that the Defence would have refused to make substantive submissions at the Annual Detention Hearing, this could not have impacted the Decision given that it was concerned with whether or not the criteria under article 58(1) and 60(3) of the Statute were met. The Decision did not concern the question of whether or not the Annual Detention Hearing should be confined to ascertaining the conditions of an accused's detention—as already stated, that question was addressed in the Chamber's Oral Decision.⁵⁹

26. *Third*, the Defence fails to substantiate the alleged legal error and its impact on the Decision. While it is correct that parties are required to comply with orders of the chambers, whether or not parties ultimately do so is a matter for them. It is unclear how the Chamber is alleged to have erred legally in assuming the Defence would take one course of action over another, or how this error would have impacted the Decision.

27. The second ground of appeal should be rejected for the above reasons.

E. Ground 3: The Pre-Trial Chamber did not err in deciding to receive written, rather than oral, submissions regarding Mr Abd-Al-Rahman's continued detention

28. The Defence argues in the third ground of appeal that the Chamber erred in law in finding that there was no prejudice in requiring written submissions on the continuation of detention, *in lieu* of oral submissions. The Defence argues that (i) there is no need to demonstrate any special prejudice to find that rule 118(3) has been violated,⁶⁰ and (ii) in any case the Chamber erred in finding that Mr Abd-Al-Rahman was not prejudiced by the alleged rule 118(3) violation. Contrary to the Defence's submission,⁶¹ it is inherently relevant whether a chamber's procedural error caused prejudice to the accused to assessing whether

⁵⁷ [Defence Adjournment Request](#), para. 4 (« La Défense soumet respectueusement qu'en conséquence de la délibération en cours, elle n'est pas en mesure de participer à l'audience convoquée le 27 mai 2021 par l'Honorable Chambre Préliminaire II en vertu de la Règle 118-3 du RPP. Elle ne saurait en effet présenter la moindre soumission sur cette question alors qu'elle est en cours de délibéré et sans connaître les motivations ni les conclusions de l'arrêt que l'Honorable Chambre d'Appel rendra sur l'Appel OA7 »).

⁵⁸ [Decision](#), para. 19, citing [Defence Adjournment Request](#), para. 4.

⁵⁹ *See above* paras. 5-9.

⁶⁰ [Appeal](#), paras. 32-36.

⁶¹ [Appeal](#), paras. 33-34.

that error materially impacted the impugned decision on appeal.⁶² To this end, the Appeals Chamber has routinely considered whether procedural violations had resulted in prejudice when assessing whether chambers have erred.⁶³ In any case, the Defence's arguments as to the alleged prejudice suffered in this case are unpersuasive.

29. *First*, the Defence mischaracterises and oversimplifies several aspects of the procedural history in this case to support its strategic choices concerning the fourth review of Mr Abd-Al-Rahman's detention. Specifically:

- a. The Defence incorrectly states that Mr Abd-Al-Rahman was kept in detention for over one year without participating in legal debate before judges.⁶⁴ To the contrary, Mr Abd-Al-Rahman was given the opportunity to address the Pre-Trial Chamber in person regarding his conditions of detention, and he availed himself of this opportunity and participated in legal debate through the written submissions filed by his counsel;⁶⁵
- b. Mr Abd-Al-Rahman was not deprived of the right under article 67(1) of the Statute to have his cause heard publicly.⁶⁶ The parties' and participants' written observations on detention were filed publicly. The mere fact that the observations were made in writing and not delivered orally does not deprive the litigation of its publicity;
- c. The Defence was not compelled by any act or order of the Chamber to devote its written submissions solely to alleging a violation of rule 118(3).⁶⁷ The Defence's claim that it did not have sufficient pages to address the question of the continuation of detention, and that it did not request a page extension given that the Chamber had rejected its previous page extension requests⁶⁸ is speculative. To

⁶² [Statute](#), article 83(2).

⁶³ See e.g. ICC-01/12-01/18-1562-Red ("[Al Hassan Regulation 55\(2\) AD](#)"), para. 65 (stating that it would consider whether the Trial Chamber complied with procedural guarantees to protect the accused's rights in order to assess whether the impugned decision would have been substantially different if the Trial Chamber had not committed a procedural error); ICC-01/14-01/18-678-Red ("[Yekatom Admissibility AD](#)"), paras. 55-56 (assessing whether the Trial Chamber's procedural decision caused prejudice to Mr Yekatom and whether it thus affected the outcome of the impugned decision).

⁶⁴ [Appeal](#), para. 33.

⁶⁵ [Annual Detention Hearing](#), 3:16-4:2; [Defence Detention Observations](#).

⁶⁶ *Contra* [Appeal](#), para. 35.

⁶⁷ *Contra* [Appeal](#), para. 36.

⁶⁸ [Appeal](#), para. 36.

the extent the Defence implies that it confined its submissions due to prior actions of the Chamber, this must be firmly rejected.

30. *Second*, the Defence's submission that it would have been able to demonstrate at a hearing that there was no factual basis for the claim that Mr Abd-Al-Rahman's release would constitute a threat to victims/witnesses, is purely speculative and should be rejected.⁶⁹ The lack of any substantive arguments by the Defence on the merits of maintaining Mr Abd-Al-Rahman in detention renders it impossible to determine if and to what extent the Pre-Trial Chamber might have decided differently had it heard the Defence's oral submissions. Nor is it adequate for the Defence to now refer on Appeal to two brief examples of the oral submissions it could have made to bolster its assertion that its submissions might have had an impact on the Decision.⁷⁰

31. *Third*, the Defence does not identify any concrete reason as to why an oral hearing on the continuation of detention was preferable to written submissions in this case.⁷¹ Rather, the Defence purports that the benefits of conducting a hearing are that it can be publicly broadcast,⁷² but these are primarily benefits for the public, and not the detained person.

32. *Finally*, the Defence's own strategy in this case is incompatible with its claim that Mr Abd-Al-Rahman has suffered any prejudice as a result of the procedure adopted by the Pre-Trial Chamber in reviewing his detention under rules 118(2) and (3) of the RPE. Specifically:

- a. Despite being given the opportunity to file written submissions on the question of Mr Abd-Al-Rahman's continued detention, the Defence did not address any issues relevant to ascertaining whether continued detention was justified. The Defence did not make any argument relevant to the criteria under article 58(1), nor did it allege that there had been any change of circumstance warranting Mr Abd-Al-Rahman's release;
- b. The Defence appeals the Decision but have not challenged the Chamber's conclusion that Mr Abd-Al-Rahman should remain in detention. Once again, the Defence decided not to take this opportunity to address the question whether there had been any change of circumstance warranting Mr Abd-Al-Rahman's release;

⁶⁹ [Appeal](#), paras. 33, 35. *See above* para. 12.

⁷⁰ *Contra* [Appeal](#), paras. 35, 26. *See above* para. 12.

⁷¹ *Contra* [Appeal](#), para. 36.

⁷² [Appeal](#), para. 35.

- c. The Defence never raised any doubts, questions or objections to the procedure decided upon by the Chamber in the 26 May 2021 Hearing or the Annual Detention Hearing, nor did the Defence seek leave to appeal the Oral Decision;
- d. After the Appeals Chamber issued its judgment in the third detention appeal on 2 June 2021, and despite arguing that a further hearing was necessary, the Defence did not apply to the Chamber to convene a further hearing under rule 118(3). While the Defence now claims that the Chamber acted “against all expectations” in failing to reconvene a hearing, the Defence does not explain why it did not proactively seise the Chamber with a request to do so. The claim that the parties had expectations that the Chamber would reconvene a hearing after the Appeals Chamber had issued its judgment is also based on a misrepresentation of the Chamber’s Oral Decision,⁷³ particularly given the clear and unambiguous instructions from the Chamber as to the procedure for its review of Mr Abd-Al-Rahman’s detention as set out in the Oral Decision;
- e. The Defence waited until a day after the lapse of Mr Abd-Al-Rahman’s anniversary in detention from his first appearance to argue that the failure to hold a rule 118(3) hearing within one year rendered his detention illegal.⁷⁴

33. In addition to the above, the Defence again fails to explain the material impact of the alleged errors on the Decision.

34. For the reasons outlined above, the third ground of appeal should be rejected.

⁷³ *Contra* [Appeal](#), para. 14. *See above* para. 20.

⁷⁴ Mr Abd-Al-Rahman made his first appearance before the Pre-Trial Chamber on 15 June 2020: [ICC-02/05-01/20-T-001-Eng](#). The Defence filed the [Defence Detention Observations](#) on 16 June 2021.

CONCLUSION AND RELIEF SOUGHT

35. For the foregoing reasons the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal and affirm the Decision.



Karim A. A. Khan QC, Prosecutor

Dated this 23rd day of July 2021
At The Hague, The Netherlands