Cour
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Court

Original: **English**

No.: **ICC-02/05-01/20**
Date: **23 July 2021**

THE 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
THE PROSECUTOR v.
ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB")

Public Document

Victims' Response to the Defence's Appeal against the "Decision on the review of detention" (ICC-02/05-01/20-430)

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. Counsel representing a number of victims participating in the proceedings[1] (the "Legal Representative") submits that the Defence's appeal against the "Decision on the review of detention" (the "Impugned Decision")[2] must be dismissed. The Defence does not demonstrate that Pre-Trial Chamber II (the "Chamber") committed any error when issuing the Impugned Decision.

2. The Legal Representative opposes all grounds of appeal and submits that the Chamber (i) correctly interpreted rule 118(3) of the Rules of Procedure and Evidence (the "Rules") when finding that the main purpose of a hearing pursuant to said provision is to evaluate the conditions of detention; (ii) properly took note that the Defence did not wish to make substantive oral submissions on the review of detention pending a decision on an appeal on the previous ruling; and (iii) correctly concluded that presenting written – instead of oral – submissions on the issue of the detention does not prejudice the rights of the Defence.

3. Accordingly, the overall approach of the Chamber is correct and reasonable, and the Defence does not show any error likely to warrant the quashing of the Impugned Decision.

4. To the extent possible, the Legal Representative discussed the Appeal and the previous observations on the review of detention with victims she represents. They all stressed that Mr Abd-Al-Rahman must be maintained in detention, to ensure that he will appear and face trial before the Court and to avoid any interference with the victims and witnesses. Victims reiterated that the security situation in Darfur remains volatile and that they continue to fear for their safety and the one of their families. Victims residing outside Sudan also echoed these concerns in relation to their relatives still based in Darfur.

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[1] See the "Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests" (Trial Chamber II, Single Judge), No. ICC-02/05-01/20-398, 20 May 2021.
[2] See the "Decision on the review of detention" (Pre-Trial Chamber II), No. ICC-02/05-01/20-430, 5 July 2021 (the "Impugned Decision").

II. PROCEDURAL BACKGROUND

5. On 5 May 2021, the Chamber convened the annual hearing on detention pursuant to rule 118(3) of the Rules.[3]

6. On 24 May 2021, the Defence requested the Chamber to postpone the hearing.[4]

7. On 26 May 2021, the Chamber rejected the Defence request (the "Oral Decision").[5]

8. On 27 May 2021, the Chamber held the annual hearing on detention pursuant to rule 118(3) of the Rules (the "Annual Hearing").[6]

9. On 2 June 2021, the Appeals Chamber issued the "Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention'".[7]

10. On 11 June 2021, the Prosecutor filed observations on the review of Mr Abd-Al-Rahman's detention.[8] On the same day, the two teams of Legal Representatives filed their respective observations.[9]

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[3] See the "Order setting the schedule for the confirmation of charges hearing and convening annual hearing on detention" (Pre-Trial Chamber II), No. ICC-02/05-01/20-378, 5 May 2021.
[4] See the "*Demande d'ajournement de l'audience relative à la détention*", No. ICC-02/05-01/20-408, 25 May 2021.
[5] See the transcripts of the hearing held on 26 May 2021, No. ICC-02/05-01/20-T-009-Red-ENG, p. 1, line 21 to p. 3, line 9.
[6] See the transcripts of the hearing held on 27 May 2021, No. ICC-02/05-01/20-T-010-ENG (the "Annual Hearing").
[7] See the "Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention'" (Appeals Chamber), No. ICC-02/05-01/20-415 OA7, 2 June 2021.
[8] See the "Prosecution's observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("ALI KUSHAYB")", No. ICC-02/05-01/20-419, 11 June 2021.
[9] See the "Victims' observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), No. ICC-02/05-01/20-420, 11 June 2021; the "Victims' observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")", No. ICC-02/05-01/20-420, 11 June 2021, and the "Victims' observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")", No. ICC-02/05-01/20-422, 11 June 2021.

11. On 16 June 2021, the Defence submitted its response on the matter of detention (the "Defence Observations").[10]

12. On 5 July 2021, the Chamber issued the Impugned Decision.[11]

13. On 7 July 2021 the Defence filed its Notice of Appeal.[12]

14. On 9 July 2021, the Appeals Chamber issued the "Order on the conduct of the appeal proceedings" instructing the Defence to file its appeal brief by 16 July 2021 and the Prosecutor and the participating victims to file their responses by 23 July 2021.[13]

15. On 16 July 2021, the Defence filed its Appeal.[14]

III. SUBMISSIONS

1. First Ground: the Chamber correctly interpreted and applied rule 118 of the Rules

16. The Defence alleges that the Chamber committed an error of law in interpreting rule 118(3) of the Rules and in finding that the main purpose of holding a hearing in accordance with said provision is to evaluate the conditions of detention.[15] The Defence's arguments are based on a misrepresentation of both the letter of the provision and the relevant practice of the Court, and as such they should be dismissed in their entirety.

17. Rule 118(3) does not establish any obligation for the Pre-Trial Chamber to discuss orally a request for interim release once a year. On the contrary, the first sentence of paragraph 3 explicitly mentions the need, after the first appearance, for

[10] See the "*Réponse aux Observations relatives à la Mise en Liberté*", No. ICC-02/05-01/20-423, 16 June 2021.
[11] See the Impugned Decision, *supra* note 2.
[12] See the "*Acte d'appel de la décision ICC-02/05-01/20-430*", No. ICC-02/05-01/20-431 OA9, 7 July 2021.
[13] See the "Order on the conduct of the appeal proceedings" (Appeals Chamber), No. ICC-02/05-01/20-434 OA9, 9 July 2021.
[14] See the "*Mémoire d'appel de la décision ICC-02/05-01/20-430*", No. ICC-02/05-01/20-436, 16 July 2021 (the "Defence Appeal").
[15] *Idem*, paras. 18, and 22-28.

such request and to be made in writing.[16] By the same token, the provision further indicates that the Pre-Trial Chamber shall decide after having received observations on the issue *in writing*.[17]

18. In fact, rule 118 establishes two different sets of time limits in relation to the issue of detention of the suspect or the accused at the seat of the Court. On the one hand, paragraph 2 makes it mandatory for the Chamber to review its initial ruling on the detention, at least every 120 days. On the other hand, paragraph 3 requires the Chamber to hold a yearly hearing on the general conditions of detention.

19. This distinction was first identified by Pre-Trial Chamber I in the *Gbagbo* et al. case. In its order scheduling a hearing pursuant to rule 118(3), Pre-Trial Chamber I indicated that the purpose was to discuss *'any matters relating to the detention of the accused persons'*, not involving submissions on the change of circumstances pursuant to article 60(3) of the Rome Statute.[18] This was further confirmed at the relevant hearing. In particular, Pre-Trial Chamber I noted that since it was "*receiving written submissions concerning the review of Mr Gbagbo's detention, it will not be necessary for the parties to make any oral submissions this morning on the changed circumstances under Article 60(3) of the Statute with respect to Mr Gbagbo, which is a matter which will be reviewed in due course. Therefore, the parties may limit their submissions today to discussing any other matters which are related to the detention of Mr Gbagbo* [and] *Mr Blé Goudé. For this reason, the Chamber has decided to include in the agenda of today's status conference the general conditions of detention for Mr Blé Goudé in addition to Mr Gbagbo*".[19]

20. In the present Appeal, the Defence seems to acknowledge such distinction when referring to its previous requests to the Chamber for, *inter alia*, holding a hearing under

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[16] See rule 118(3) of the Rules: "*After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request.* […]".
[17] See rule 118(3) of the Rules: "*The Pre-Trial Chamber shall decide after having received observations* ***in writing*** […]". (Emphasis added).
[18] See the "Order scheduling a status conference and a hearing on detention" (Trial Chamber I), No. ICC-02/11-01/15-214, 10 September 2015, para. 5.
[19] See the transcripts of the hearing held on 25 September 2015, No. ICC-02/11-01/15-T-4-ENG, p. 5 lines, lines 2-10.

rule 118(3) of the Rules.[20] In fact, both the 22 March and the 9 April 2021 Defence Requests[21] raised the need for oral discussions of "*terms and conditions*" relevant to the release of Mr Abd-Al-Rahman,[22] pending the review of detention pursuant to rule 118(2) of the Rules, and in parallel with the Defence written submissions for this purpose.

21. In light of the above considerations, the Legal Representative submits that Chamber was correct in concluding that its "*obligation to periodically review the continued lawfulness of the detention is independent of its obligation to hold at least one hearing with the detained person every year*".[23] Contrary to the Defence arguments, this was in fact a reasonable approach in line with both the legal framework and practice of the Court. The Defence has not demonstrated any error in this regard and its First Ground of appeal should be dismissed.

2. Second Ground: the Chamber properly took note of the Defence refusal to make substantive oral submissions pending the appeal against the previous decision on detention

22. The Defence alleges that the Chamber committed an error of fact in presuming that – during the Annual Hearing[24] – it did not wish to make substantive oral submissions on the continued detention of Mr Abd-Al-Rahman.[25]

23. The Defence's arguments are ill-construed and should be dismissed. The Chamber's decision to convene a rule 118(3) hearing to discuss the general conditions of detention, was issued prior to, and independently from, the Defence request to adjourn such hearing. In the Impugned Decision, the Chamber simply recalled the Defence's unwillingness to make oral submissions on the continued detention of the

[20] See the Defence Appeal, *supra* note 14, para. 27, footnote 52.
[21] See the "*Version publique expurgée de la Requête aux fins d'audience*", No. ICC-02/05-01/20-317-Red, 22 March 2021, paras. 2 and29 ; and the "*Nouvelle Requête aux Fins de Convocation Urgente d'une Audience*", No. ICC-02/05-01/20-336, 9 Avril 2021, para. 9.
[22] *Idem*.
[23] See the Impugned Decision, *supra* note 1, para. 17.
[24] See the Annual Hearing, *supra* note 6.
[25] See the Defence's Appeal, *supra* note 14, paras. 29-31.

Accused during the Annual Hearing.[26] This consideration did not, and could not, inform the Chamber's decision to limit the oral submissions to the general conditions of detention. The Chamber instead relied on said consideration, *obiter dicta*, to remind the Defence of its duty to act with diligence and good faith, and to reiterate that no prejudice was caused by holding such a hearing.

24. In fact, the Chamber rightly considered that the Defence notice of its refusal to make oral submissions on the Accused continued detention[27] – coupled with the absence of a request for leave to appeal the Oral Decision[28] and of objections to the limited purpose of the hearing[29] – pointed to both the Defence unwillingness to engage in oral discussions on the detention review and acceptance of the Chamber's rulings.[30]

25. In this regard, the Legal Representative further recalls that it is a party's duty to raise an issue before the Chamber as soon as it becomes aware of it. The Defence did not exercise due diligence in raising its concerns at the earliest available opportunity.[31] It appears instead to have intentionally waited to do so in its observations on the detention review pursuant to rule 118(2) of the Rules.[32] A party cannot remain silent on a matter only to raise it afterwards on appeal;[33] it is instead required to raise formally and timely any issue of contention, "*failure to do so may result in the complainant having waived his right to raise the issue on appeal*".[34] In this sense, the appeal process "*is not designed for the purpose of allowing parties to remedy their own failings or oversights*".[35]

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[26] See the Impugned Decision, *supra* note 1, para. 19.
[27] See the "*Demande d'ajournement de l'audience relative à la détention*", *supra* note 4.
[28] See the Oral Decision, *supra* note 5.
[29] See the Impugned Decision, *supra* note 2, para. 19.
[30] *Idem*, paras. 19-20
[31] See *e.g.* the "Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision" (Trial Chamber IX), No. ICC-02/04-01/15-1147, 24 January 2018, para. 18.
[32] See the Defence Observations, *supra* note 10.
[33] See the ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 55.
[34] See the ICTY, *Prosecutor v. Boškoski* et al., Case No. IT-04-82-A, Appeal Judgment, 19 May 2010, para. 244.
[35] See the ICTY, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeal Judgement, 7 October 1997, para. 15. See also, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 55; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 20; *Prosecutor v. Delalić* et al., Case No. IT-96-21-A, Appeal Judgement,

26. Accordingly, the Defence's arguments should be dismissed. The Legal Representative posits that the Chamber rightly took into account the Defence's refusal to make oral submissions and properly considered the Defence's arguments in this regard untimely and unmeritorious. The Chamber's approach was reasonable and as such, the Second Ground of appeal should be equally dismissed.

3. Third Ground: the Chamber correctly concluded that presenting written submissions on the detention review does not prejudice the rights of the Defence

27. The Defence claims that the Chamber erred in law in considering that the Defence did not suffer prejudice as a result of the fact that the parties and participants made their submissions on the review of detention in writing, instead of orally.[36]

28. The Defence's arguments in this regard constitute a mere disagreement with the Impugned Decision and as such, should be dismissed. In fact, the Defence failed, yet again, to identify any prejudice it would have suffered by presenting written observations on the continued detention. Instead, it provides a non-exhaustive list of potential issues it could have raised orally before the Chamber,[37] but fails to explain why it did not so in its written Observations.

29. In this regard, the Legal Representative also posits that the Defence had ample opportunity to raise its concerns on the need for an additional hearing – even after the issuance of the judgment on the review of detention on 2 June 2021.[38] The Defence elected not to do so. The Legal Representative recalls her submissions *supra* on the Defence's duty – and failure in the present case – to act with due diligence and in good faith.[39] In addition, she also reiterates that – contrary to the Defence's arguments[40] –

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20 February 2001, para. 724; *Prosecutor v. Kupreškić* et al., Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 408.

[36] See the Defence Appeal, *supra* note14, paras. 32-36.

[37] *Idem*, para. 33.

[38] See the "Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention'", *supra* note 7.

[39] See *supra*, para. 25.

[40] See the Defence Appeal, *supra* note 14, paras. 33-36.

rule 118(3) of the Rules does not impose an obligation upon the Chamber to receive oral submissions on the issue of the review of detention.[41]

30. Accordingly, the Chamber was correct in concluding that "[t]*he Defence has not identified any prejudice it would have suffered as a result of the fact that the parties and participants made their submissions on the review of detention in writing instead of orally and the Chamber cannot discern any either*",[42] and that as such that "[t]*here was therefore no need to convene another hearing after the Appeals Chamber rendered its Third Review Judgment*".[43]

31. This constitutes a reasonable approach, and the Defence does not show any error that invalidates the Impugned Decision. Hence, the Third Ground of appeal should be also be dismissed.

IV. CONCLUSION

32. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to dismiss the Defence's Appeal in its entirety.

Paolina Massidda
Principal Counsel

Dated this 23rd day of July 2021

At The Hague, The Netherlands

[41] See *supra*, paras. 17-20.
[42] See the Impugned Decision, *supra* note 2, para. 20.
[43] *Ibid*.