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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

Response to Defence ‘Mémoire d’appel de la décision ICC-02/05-01/20-430’

Source: Legal Representative of the Victims

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

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I. INTRODUCTION

1. The Legal Representative of the Victims makes these submissions on behalf of 126 participating victims¹ pursuant to the Appeals Chamber's order of 9 July 2021 permitting participating victims to file responses to the Defence appeal brief,² which challenges the Pre-Trial Chamber's fourth 'Decision on the review of detention' dated 5 July 2021.³

2. The Legal Representative submits that the Defence's appeal should be dismissed. The three alternative grounds of appeal put forward by the Defence in connection with the Pre-Trial Chamber's convention of an annual hearing on detention under rule 118(3) are without merit. The Defence has not identified any errors that would have affected the Pre-Trial Chamber's decision remanding Mr Abd-Al-Rahman in detention. The participating victims remain concerned that any release of the defendant would obstruct and endanger the proceedings. As a result, the Defence request for release of the defendant should be rejected and the appeal dismissed in its entirety.

II. PROCEDURAL HISTORY

3. On 27 April 2007 and 16 January 2018, the Court issued arrest warrants against the defendant for crimes against humanity and war crimes allegedly committed in Darfur in 2003 and 2004.⁴ On 9 June 2020, the defendant surrendered himself to the Court.

4. On 14 August 2020, 11 December 2020 and 12 April 2021, the Appeals Chamber reviewed the defendant's pre-trial detention under articles 60(2) and 60(3) and rejected

¹ [ICC-02/05-01/20-314](#), §25.

² [ICC-02/05-01/20-434](#), §3.

³ [ICC-02/05-01/20-430](#).

⁴ [ICC-02/05-01/07-3-Corr](#); [ICC-02/05-01/07-74-Red](#).

Defence requests for his interim release.⁵ The three decisions on the review of detention were upheld by the Appeals Chamber.⁶

5. On 5 May 2021, the Pre-Trial Chamber issued an order scheduling an annual hearing on review of detention pursuant to rule 118(3) of the Rules on Procedure and Evidence for 27 May 2021.⁷ On 24 May 2021, the Defence requested the Pre-Trial Chamber to postpone the annual hearing on the ground that the Appeals Chamber had not yet ruled on the Defence's appeal against the third decision on the review of detention.⁸ On 26 May 2021, the Pre-Trial Chamber rejected the Defence request.⁹

6. On 27 May 2021, the Chamber held a 'detention hearing under rule 118(3)', inviting the parties and participants, including the defendant himself, to make submissions on the conditions of the defendant's detention orally at the hearing and to file observations on the periodic review of his pre-trial detention in writing after the hearing.¹⁰ On 2 June 2021, the Appeals Chamber upheld the Pre-Trial Chamber's third decision on the review of the defendant's detention.¹¹

7. On 11 June 2021, the Prosecutor and the Legal Representatives of the Victims filed observations in support of the defendant's continued detention.¹² Five days later, the Defence submitted its response, claiming that the Pre-Trial Chamber had violated the requirement under rule 118(3) to 'hold a hearing at least once every year' on pre-trial detention and requesting that the Chamber declare his detention unlawful and order his immediate and unconditional release (the 'Detention Challenge').¹³

⁵ [ICC-02/05-01/20-115](#); [ICC-02/05-01/20-230-Red](#); [ICC-02/05-01/20-338](#).

⁶ [ICC-02/05-01/20-177](#); [ICC-02/05-01/20-279-Red](#); [ICC-02/05-01/20-415](#).

¹⁰ [ICC-02/05-01/20-T-010-ENG ET WT](#).

¹⁰ [ICC-02/05-01/20-T-010-ENG ET WT](#).

¹⁰ [ICC-02/05-01/20-T-010-ENG ET WT](#).

¹⁰ [ICC-02/05-01/20-T-010-ENG ET WT](#).

¹² [ICC-02/05-01/20-419](#); [ICC-02/05-01/20-420](#); [ICC-02/05-01/20-421](#); [ICC-02/05-01/20-422](#).

¹² [ICC-02/05-01/20-419](#); [ICC-02/05-01/20-420](#); [ICC-02/05-01/20-421](#); [ICC-02/05-01/20-422](#).

¹³ [ICC-02/05-01/20-423](#).

8. On 5 July 2021, the Pre-Trial Chamber issued its fourth decision on the review of detention, rejecting the Detention Challenge (the ‘Detention Decision’).¹⁴

9. On 7 July 2021, the Defence filed a notice of appeal, challenging paragraphs 16 – 21 of the Detention Decision, which addressed the Defence argument based on rule 118(3). On 9 July 2021, the Appeals Chamber issued an order on the conduct of the appeal proceedings, requiring the Defence to submit a full appeal brief and permitting the Prosecutor, the participating victims, and the OPCV to file responses to the brief.

10. The Defence’s appeal brief was filed on 16 July 2021, raising three alternative grounds of appeal and requesting the reversal of the Detention Decision and the defendant’s immediate and unconditional release.¹⁵

III. DEFENCE GROUNDS OF APPEAL AND THE RELIEF SOUGHT

1. *First ground of appeal*

11. In its Detention Challenge before the Pre-Trial Chamber, the Defence argued that a year had passed since the defendant’s initial appearance before the Court on 15 June 2020 ‘without a hearing on the conditions of his continued detention or release’ as required under rule 118(3) of the Rules of Procedure and Evidence.¹⁶ According to the Defence, the hearing convened by the Pre-Trial Chamber on 27 May 2021 did not meet the requirements of rule 118(3) because it was limited to a discussion of the defendant’s ‘health and living conditions in confinement’.¹⁷ The Defence suggested that the ‘purpose’ of a hearing under rule 118(3) was to review the conditions for ‘continued detention or release’ of the defendant under article 58(1) of the Rome Statute and that the failure to do so rendered the defendant’s detention ‘illegal as of 16 June 2021’.¹⁸

¹⁴ [ICC-02/05-01/20-430](#).

¹⁵ [ICC-02/05-01/20-436](#).

¹⁶ [ICC-02/05-01/20-423](#), §23.

¹⁷ [ICC-02/05-01/20-423](#), §18.

¹⁸ [ICC-02/05-01/20-423](#), §§16 (paraphrasing article 58(1)); §23.

12. Pre-Trial Chamber II dismissed the Defence argument in the Detention Decision, finding that ‘it was not the case that rule 118(3) hearings must be devoted to discussing the continued lawfulness of the detention’ and noting that ‘its obligation to periodically review the continued detention was independent of its obligation to hold at least one hearing with the detained person every year’ although Chambers had ‘in the past often combined the two’.¹⁹

13. Under the first ground of appeal, the Defence argues that the Pre-Trial Chamber ‘clearly erred in law ... by holding that a hearing could be held under Rule 118(3) ... without the issue of continued detention or release being addressed’ and was ‘negligent’ in failing to convene such a hearing by 15 June 2021, the anniversary of the defendant’s initial appearance before the Court.²⁰ In support of this ground of appeal, the Defence argues that the jurisprudence cited in its Detention Challenge ‘makes it clear’ that the purpose of a hearing under rule 118(3) is to decide on the defendant’s continued release or detention.²¹

2. *Second ground of appeal*

14. In its request to postpone the annual hearing on detention under rule 118(3) until the Appeals Chamber issued its judgement on the Pre-Trial Chamber’s third review of detention, the Defence argued that it was unable to make any submissions on the issue of pre-trial detention without knowing the outcome and reasoning of the Appeals Chamber judgment.²² In the subsequent Detention Challenge, the Defence suggested that the Pre-Trial Chamber should have dealt with the situation by hearing the parties and participants at the hearing but affording them the possibility of making further submissions in writing once the Appeals Chamber issued its judgment.²³ The

¹⁹ [ICC-02/05-01/20-430](#), §17.

²⁰ [ICC-02/05-01/20-436](#), §27.

²¹ [ICC-02/05-01/20-436](#), §§ 23-24.

²² [ICC-02/05-01/20-408](#), §4.

²³ [ICC-02/05-01/20-423](#), §21 (provided that the Appeals Chamber judgment was issued before the deadline for review of pre-trial detention had expired).

Pre-Trial Chamber rejected these submissions, observing that ‘the Defence would clearly have refused to make substantive submissions’ on the defendant’s release at the hearing on 27 May 2021 given that the Appeals Chamber judgment on the Pre-Trial Chamber’s third detention review had not yet been issued at that time.²⁴

15. In its appeal brief, the Defence alleges that this ‘deduction’ by the Pre-Trial Chamber is ‘tainted by an error of fact’. The Defence suggests that if the Chamber had instructed it to make oral submissions on the issue of the defendant’s release at the 27 May 2021 hearing, the Defence would ‘naturally have complied with this instruction’.²⁵ The Defence also contends that the Pre-Trial Chamber ‘erred in law’ in that the Defence was under a ‘legal obligation’ to comply with the Chamber’s instructions and therefore would not have refused to do so.²⁶

3. *Third ground of appeal*

16. In its third ground of appeal, the Defence takes issue with the Pre-Trial Chamber’s observation that ‘the Defence was able to make fully informed submissions after the Appeals Chamber’s Third Review Judgment was rendered’ and ‘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’.²⁷

17. In its appeal brief, the Defence argues that the obligation to hold a detention hearing at least once a year under rule 118(3) is absolute and ‘does not require the showing of any special prejudice’ to find a violation.²⁸ The Defence argues that the Pre-Trial Chamber erred in law ‘by claiming that written submissions could replace or

²⁴ [ICC-02/05-01/20-430](#), §§ 19-20.

²⁵ [ICC-02/05-01/20-436](#), §30.

²⁶ [ICC-02/05-01/20-436](#), §30 (referring to the Code of Professional Conduct for Counsel as the source of this obligation).

²⁷ [ICC-02/05-01/20-430](#), §20.

²⁸ [ICC-02/05-01/20-436](#), §33.

compensate for the absence of oral submissions’ .²⁹ According to the Defence, the defendant suffered prejudice ‘by being deprived of his right to appear before a judge’ on the specific issue of his pre-trial detention.³⁰ And the Defence ‘could not address ... aspects of the conditions of detention under Article 58(1)’ in writing because to do so would have exceeded the prescribed page limit.³¹

4. *The relief sought*

18. The Defence requested the Appeals Chamber to annul the Detention Decision ‘[i]n light of the ... three alternative grounds of appeal’ it had put forward and ‘to order the immediate and unconditional release’ of the defendant.³²

IV. SUBMISSIONS

19. The Detention Decision was made under article 60(3) of the Rome Statute, which requires that the Pre-Trial Chamber ‘shall periodically review its ruling on the release or detention of the person’.³³

20. When considering the ‘applicable standard of review for appeals against decisions under article 60’, the Appeals Chamber has recalled that it ‘will not review the findings of the Pre-Trial Chamber de novo’ and ‘will intervene ... only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision’.³⁴ With respect to errors of law, the Appeals Chamber will ‘determine whether or not’ the Pre-Trial Chamber ‘misinterpreted the law’.³⁵ For alleged errors of

²⁹ [ICC-02/05-01/20-436](#), §§ 32-34, 36.

³⁰ [ICC-02/05-01/20-436](#), §35.

³¹ [ICC-02/05-01/20-436](#), §36.

³² The Defence also suggests that the defendant may be entitled to compensation for unlawful arrest or detention but does not include this in its request for relief: [ICC-02/05-01/20-436](#), §§ 28, 34, cf. §37.

³³ The relevant conditions under article 58(1) include the existence of ‘reasonable grounds to believe that the person has committed a crime’, the need ‘[t]o ensure the person’s appearance at trial’ and ‘that the person does not obstruct or endanger the investigation or the court proceedings’.

³⁴ [ICC-02/05-01/20-415](#), §23 (citing Appeals Chamber, *Laurent Gbagbo and Charles Blé Goudé*, [ICC-02/11-01/15-992-Red \(19 July 2017\)](#), §14).

³⁵ [ICC-02/05-01/20-415](#), §24 (citing Appeals Chamber, *Laurent Gbagbo and Charles Blé Goudé*, [ICC-02/11-01/15-992-Red \(19 July 2017\)](#), §15).

fact, 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’ and 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’, ‘thereby according a margin of deference’ to the Chamber’s findings.³⁶ Ultimately, in order to be successful in their appeal, ‘the appellant must properly substantiate the alleged error and demonstrate how it *materially affected the impugned decision*’.³⁷

21. Contrary to the Defence’s argument in its first ground of appeal, the Pre-Trial Chamber decisions and transcripts cited by the Defence³⁸ do not suggest that the Chamber committed an error that ‘materially affected the impugned decision’ in conducting the hearing on 27 May 2021 as it did.³⁹ As the Prosecutor argues, these do not establish ‘any mandatory requirements of rule 118(3) of the RPE as to the format of submissions before the Chamber’.⁴⁰

22. Nor do the second or third grounds – focusing on the timing and modalities of its submissions on the issue of whether continued detention was appropriate – establish such an error or advance the Defence argument in support of the requested relief. Indeed, as the Prosecutor has argued ‘none of the grounds of appeal advanced by the Defence arise from the Decision’ or establish why it was wrong for the Pre-Trial Chamber to conclude that there was no ‘change of circumstances’ warranting reversal of the decision to maintain detention under articles 58(1) and 60(3) of the Statute.⁴¹

23. In its review of detention, the Pre-Trial Chamber concluded, as the Prosecutor and participating victims had argued, that the defendant’s ‘continued detention

³⁶ [ICC-02/05-01/20-415](#), §25 (citing Appeals Chamber, *Laurent Gbagbo and Charles Blé Goudé*, [ICC-02/11-01/15-992-Red \(19 July 2017\)](#), §16).

³⁷ [ICC-02/05-01/20-415](#), §26 (citing [ICC-02/05-01/20-177](#), §16) (emphasis added).

³⁸ See [ICC-02/05-01/20-436](#), §23(iii) (referring to [ICC-02/05-01/20-423](#), §16, fn 31).

³⁹ See §20 (above).

⁴⁰ Prosecution Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-430” (ICC-02/05-01/20-436) dated 23 July 2021, §15.

⁴¹ Prosecution Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-430” (ICC-02/05-01/20-436) dated 23 July 2021, §1.

remains necessary to ensure that he does not obstruct and endanger the investigations or the court proceedings'.⁴² The Defence chose not to make submissions on this issue when it had the opportunity to do so and has identified no error of law that affected the Detention Decision. The grounds of appeal should therefore be dismissed. And, as the Prosecutor argues, the Defence's failure to seek leave to appeal the procedural issues – issues that do not lead to an automatic right of appeal under article 82(1)(b) – 'and its belated effort to do so now through this Appeal should be dismissed as inadmissible'.⁴³

24. In addition, the Defence has provided no satisfactory explanation as to why any of its grounds of appeal should necessitate the requested relief -- 'the immediate and unconditional release' of the defendant --even if its appeal were successful.⁴⁴ In a review of a decision under article 60(3) in which the Appeals Chamber found that the Trial Chamber 'did not carry out a proper review of detention', the Appeals Chamber allowed the appeal, 'reverse[d] the Impugned Decision', and remanded the matter 'to the Trial Chamber for a new review' in light of the Appeals Chamber judgment, making clear that '[u]ntil, and subject to, that review', the defendant should 'remain in detention'.⁴⁵ The Defence has offered no valid reason why the Appeals Chamber should reach a different conclusion here, meaning that even if it were to find any ground of appeal meritorious, the appropriate remedy would be the holding of the hearing that the defence has requested or such further submissions as the Chamber may deem appropriate.

⁴² In reaching this conclusion, the Pre-Trial Chamber took into consideration that the 'victims expressed concerns regarding his possible release in light of the continued volatile situation in Darfur': [ICC-02/05-01/20-430](#), §28. See also [ICC-02/05-01/20-421](#), §§ 18-19.

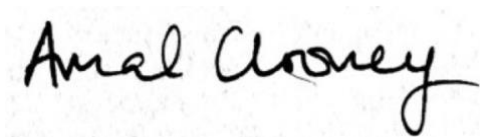
⁴³ Prosecution Response to the Defence "Mémoire d'appel de la décision ICC-02/05-01/20-430" (ICC-02/05-01/20-436) dated 23 July 2021, §3; Appeals Chamber, *Bemba* [ICC-01/05-01/08 OA4 \(19 November 2010\)](#) (19 November 2020), §70.

⁴⁴ See §18 (above).

⁴⁵ Appeals Chamber, *Bemba* [ICC-01/05-01/08 OA4 \(19 November 2010\)](#) (19 November 2020), §95.

V. CONCLUSION

25. For these reasons, the Legal Representative requests that the Defence's appeal against the Detention Decision should be rejected.

A handwritten signature in black ink that reads "Amal Clooney". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Ms Amal Clooney
Legal Representative of the Victims

Dated this 23rd day of July 2021