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Date: 16 July 2021

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański, President  
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**

**Appeal Brief against Decision ICC-02/05-01/20-430**

**Source:** Mr Cyril Laucci, Lead Counsel

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

**Office of the Prosecutor**

Mr Karim Khan, Prosecutor  
Mr Julian Nicholls, Senior Trial Lawyer

**Counsel for the Defence**

Mr Cyril Laucci, Lead Counsel

**Legal Representatives of Victims**

Ms Amal Clooney  
Mr Nasser Mohamed Amin Abdalla

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**Office of Public Counsel for Victims**

Ms Paolina Massidda, Principal Counsel  
Ms Sarah Pellet, Counsel

**Office of Public Counsel for the  
Defence**

Mr Xavier-Jean Keïta, Principal Counsel  
Ms Marie O'Leary

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**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

## PROCEDURAL HISTORY RELATING TO MR ALI MUHAMMAD ALI ABD-AL-RAHMAN'S DETENTION

1. Mr Ali Muhammad Ali Abd-Al-Rahman surrendered himself to the Court's authorities in June 2020. He was transferred from the Central African Republic – where he had surrendered himself – to The Hague and since 10 June 2020 has been detained without interruption in the Court's Detention Centre. On 15 June 2020, he made his first appearance.<sup>1</sup>

2. On 1 July 2020, the Defence filed an initial request for release, pursuant to article 60(2) of the Statute ("Initial Release Request").<sup>2</sup> That initial request was rejected without a hearing, on the basis of the parties' written submissions only, on 14 August 2020 by the Honourable Pre-Trial Chamber II<sup>3</sup> and on 8 October 2020 by the Honourable Appeals Chamber.<sup>4</sup>

3. The Defence repeated its request for release on the occasion of the first review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention, on 27 November 2020 ("1<sup>st</sup> Review").<sup>5</sup> The 1<sup>st</sup> Review was rejected without a hearing, on the basis of the parties' written submissions only, on 11 December 2020 by the Honourable Pre-Trial Chamber II<sup>6</sup> and on 5 February 2021 by the Honourable Appeals Chamber.<sup>7</sup>

4. On 22 March 2021, the Defence submitted a first application for, *inter alia*, the convening of a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence ("Rules") in order to submit its observations on the second review of Mr Ali Muhammad Ali Abd-Al-Rahman's Detention ("1<sup>st</sup> Rule 118(3) Application").<sup>8</sup> The 1<sup>st</sup> Rule 118(3) Application was rejected by the Honourable Pre-Trial Chamber II on

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<sup>1</sup> [ICC-02/05-01/20-T-001](#).

<sup>2</sup> [ICC-02/05-01/20-12](#).

<sup>3</sup> [ICC-02/05-01/20-115](#).

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

<sup>5</sup> [ICC-02/05-01/20-213-Red](#).

<sup>6</sup> [ICC-02/05-01/20-230-Red](#).

<sup>7</sup> [ICC-02/05-01/20-279-Red OA6](#).

<sup>8</sup> [ICC-02/05-01/20-317-Red](#), para. 29.

21 May 2021.<sup>9</sup> The request for leave to appeal that decision<sup>10</sup> was rejected by the Honourable Pre-Trial Chamber II on 9 July 2021.<sup>11</sup>

5. The Defence again repeated its request for release on the occasion of the second Review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention, on 1 April 2021 ("2<sup>nd</sup> Review").<sup>12</sup> On 9 April 2021, the Defence supplemented its observations on the 2<sup>nd</sup> Review with a second application for a hearing under rule 118(3) of the Rules ("2<sup>nd</sup> Rule 118(3) Application").<sup>13</sup> The 2<sup>nd</sup> Review was rejected without a hearing, on the basis of the parties' written submissions only, on 12 April 2021 by the Honourable Pre-Trial Chamber II<sup>14</sup> and 2 June 2021 by the Honourable Appeals Chamber.<sup>15</sup> On 21 May 2021, the Honourable Pre-Trial Chamber II rejected the 2<sup>nd</sup> Rule 118(3) Application.<sup>16</sup> The request for leave to appeal that decision<sup>17</sup> was rejected by the Honourable Pre-Trial Chamber II on 9 July 2021.<sup>18</sup>

6. On 5 May 2021, the Honourable Pre-Trial Chamber II convened a hearing on the review of detention pursuant to rule 118(3) of the Rules on Thursday 27 May 2021.<sup>19</sup>

7. By a request of 24 May 2021, the Defence requested an adjournment of the detention hearing pursuant to rule 118(3) of the Rules ("3<sup>rd</sup> Rule 118(3) Application"). The ground for the 3<sup>rd</sup> Rule 118(3) Application was that since Appeal OA7 on the 2<sup>nd</sup> Review of Detention was still being deliberated by the Honourable Appeals Chamber, the parties were not in a position to submit observations on Mr Ali Muhammad Ali Abd-Al-Rahman's release or continued detention without prejudicing the ongoing deliberations of the

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<sup>9</sup> [ICC-02/05-01/20-402](#), para. 16 and p. 17.

<sup>10</sup> [ICC-02/05-01/20-413](#).

<sup>11</sup> [ICC-02/05-01/20-433](#), para. 18.

<sup>12</sup> [ICC-02/05-01/20-329-Red](#).

<sup>13</sup> [ICC-02/05-01/20-336](#), para. 9.

<sup>14</sup> [ICC-02/05-01/20-338](#).

<sup>15</sup> [ICC-02/05-01/20-415 OA7](#).

<sup>16</sup> [ICC-02/05-01/20-402](#), para. 19 and p. 17.

<sup>17</sup> [ICC-02/05-01/20-413](#).

<sup>18</sup> [ICC-02/05-01/20-433](#), para. 18.

<sup>19</sup> [ICC-02/05-01/20-378](#), paras. 20-22.

Honourable Appeals Chamber.<sup>20</sup> The Defence therefore sought an adjournment of the hearing pursuant to rule 118(3) of the Rules to a later date, once the Honourable Appeals Chamber had rendered its judgment in Appeal OA7.

8. By email of 25 May 2021, the Office of the Prosecutor (“OTP”) signalled that it would not oppose the 3<sup>rd</sup> Rule 118(3) Application, but recalled the statutory obligation to hold a hearing on release or continued detention under rule 118(3) of the Rules within one year of Mr Ali Muhammad Ali Abd-Al-Rahman’s first appearance, that is to say, before 15 June 2021.<sup>21</sup>

9. By an oral decision of 26 May 2021 (“Oral Decision”), the Honourable Pre-Trial Chamber II partially granted the 3<sup>rd</sup> Rule 118(3) Application by maintaining the hearing on 27 May 2021 but limiting the matters to be discussed at the hearing to an assessment of the conditions of Mr Ali Muhammad Ali Abd-Al-Rahman’s detention instead of a review of his continued detention.<sup>22</sup> The OTP did not appeal that decision.

10. On 27 May 2021, a hearing took place as planned before the Honourable Single Judge (“Hearing of 27 May”). From the start of the hearing, the Honourable Single Judge made clear: **“This is not a hearing about whether pretrial detention should continue or not.** This will be done in due course.” [Emphasis added].<sup>23</sup> The Honourable Single Judge limited the issue discussed at that hearing to the conditions of detention of Mr Ali Muhammad Ali Abd-Al-Rahman, whom he invited to give his views, in these unambiguous terms:

So Mr Abd-Al-Rahman, good morning. I would like to hear from you about how are you and the conditions of detentions. I’ve seen during these days likely that you look well, but I would like to hear from you. How are you, how you feel and if there’s any consideration you want to make **about the conditions of detention. Again, Mr Abd-Al-Rahman, this is not about whether you should be in pretrial detention,** let alone about your

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<sup>20</sup> [ICC-02/05-01/20-408](#).

<sup>21</sup> Email from the OTP, 25 May 2021, 10:17.

<sup>22</sup> [ICC-02/05-01/20-T-009-Red-FRA](#), p. 1, line 26 to p. 3, line 11.

<sup>23</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 3, lines 5-6.

responsibilities. Those will be dealt with in due course. **It's about your everyday living in the detention centre, how you feel and if you are in good health.** [Emphasis added].<sup>24</sup>

In reply, Mr Ali Muhammad Ali Abd-Al-Rahman introduced himself, stated his wish to “pray for mercy for all the victims who died in Darfur and we hope that Darfur lives in peace away from all tribal conflicts”, confirmed that his living conditions in detention were “totally fine” and thanked the Honourable Single Judge for his concern.<sup>25</sup>

11. The Honourable Single Judge then invited the parties and participants to take the floor and repeated once more: “Again, let me recall that the detention on the review of the pretrial detention within the 120-day time limit under paragraph 2 of rule 118 will be taken in due course **and this is not the moment.**” [Emphasis added].<sup>26</sup> The OTP declined the invitation to take the floor on the conditions of detention.<sup>27</sup> The Defence complied with the Honourable Single Judge’s repeated instructions by limiting its remarks strictly to the conditions of detention.<sup>28</sup>

12. Last, the Honourable Single Judge invited the OTP, the distinguished Legal Representatives of Victims (“LRVs”) and the Defence to file their written observations on the third review of detention and set deadlines for doing so.

13. On 2 June 2021, the Honourable Appeals Chamber delivered its judgment on Appeal OA7 concerning the 2<sup>nd</sup> Review of Detention.<sup>29</sup>

14. Contrary to all expectations, the Honourable Pre-Trial Chamber II, which therefore still had two weeks in which to do so before the anniversary of Mr Ali Muhammad Ali Abd-Al-Rahman’s first appearance, did not convene a further hearing, this time on his continued detention or release, to satisfy the requirements of rule 118(3) of the Rules.

<sup>24</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 3, lines 7-14.

<sup>25</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 3, line 21 to p. 4, line 2.

<sup>26</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 4, lines 9-11.

<sup>27</sup> [ICC-02/05-01/20-T-010-FRA](#), p. 4, lines 15-16.

<sup>28</sup> [ICC-02/05-01/20-T-010-FRA](#), p. 7, lines 21-23.

<sup>29</sup> [ICC-02/05-01/20-415 OA7](#).

15. The OTP filed its observations on 10 June 2021;<sup>30</sup> the LRVs on 11 June 2021;<sup>31</sup> and the Defence on 16 June 2021 (“Defence Observations”).<sup>32</sup> In its Observations, the Defence sought a finding that rule 118(3) of the Rules had been violated and that the Chamber should in consequence declare the detention unlawful and order Mr Ali Muhammad Ali Abd-Al-Rahman’s immediate and unconditional release to the territory of the host State.

16. By a decision of 5 July 2021 (“Decision under Appeal”),<sup>33</sup> the Honourable Pre-Trial Chamber II rejected the request for Mr Ali Muhammad Ali Abd-Al-Rahman’s immediate and unconditional release and confirmed his continued detention. The Defence submissions were rejected essentially on the ground that the main purpose of the hearing under rule 118(3) of the Rules is to evaluate the conditions of detention rather than the matter of continued detention or release.<sup>34</sup> The Defence is bringing this appeal, under article 82(1)(b) of the Statute, rule 154(1) of the Rules and regulation 64(5) of the Regulations of the Court (“RoC”), against that decision and that ground specifically.

17. The Defence lodged its Notice of Appeal against the Decision under Appeal on 7 July 2021.<sup>35</sup> On the same day, the Honourable Appeals Chamber designated the Honourable Judge Piotr Hofmański as the presiding judge in Appeal OA9.<sup>36</sup> On 9 July 2021, the Honourable Appeals Chamber laid down the timetable for submissions.<sup>37</sup> This Appeal Brief is lodged within the deadline laid down by that timetable.

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<sup>30</sup> [ICC-02/05-01/20-419-Conf.](#)

<sup>31</sup> [ICC-02/05-01/20-420](#); [ICC-02/05-01/20-421](#); [ICC-02/05-01/20-422](#).

<sup>32</sup> [ICC-02/05-01/20-423](#).

<sup>33</sup> [ICC-02/05-01/20-430](#).

<sup>34</sup> [ICC-02/05-01/20-430](#), para. 17.

<sup>35</sup> [ICC-02/05-01/20-431](#).

<sup>36</sup> [ICC-02/05-01/20-432](#).

<sup>37</sup> [ICC-02/05-01/20-434](#).

## SUMMARY OF GROUNDS OF APPEAL

18. The Notice of Appeal sets out the following three alternative grounds of appeal:

- (i) the Honourable Pre-Trial Chamber II erred in law at paragraph 17 of the Decision under Appeal by finding that the main purpose of the hearing under rule 118(3) of the Rules was to evaluate the conditions of detention rather than the issue of continued detention or release.<sup>38</sup> That legal conclusion corresponds to neither the letter nor the spirit of rule 118(3) of the Rules and is therefore vitiated by an error of law (“1<sup>st</sup> Ground”);
- (ii) the Honourable Pre-Trial Chamber II also erred in fact and law at paragraphs 19 and 20 of the Decision under Appeal by assuming that at the hearing of 27 May 2021 the Defence would have refused to make submissions on continued detention had it been invited to do so by the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber<sup>39</sup> (“2<sup>nd</sup> Ground”);
- (iii) the Honourable Pre-Trial Chamber II lastly erred in law at paragraph 20 of the Decision under Appeal by finding that the Defence’s written submissions filed subsequently to the OA7 judgment could stand in place of the holding of a hearing under rule 118(3) of the Rules and nullify any prejudice suffered as a result of its failure to hold one.<sup>40</sup> That conclusion corresponds to neither the letter nor the spirit of rule 118(3) of the Rules and is therefore vitiated by an error of law (“3<sup>rd</sup> Ground”).

19. Those three alternative grounds are expanded upon in detail below.

20. This appeal does not concern paragraph 18 of the Decision under Appeal, on whether or not a hearing can be held under rule 118(3) of the Rules when the Honourable Appeals Chamber is still deliberating on the previous decision on continued detention. Indeed, the Defence specifically put forward that hypothesis in

<sup>38</sup> [ICC-02/05-01/20-430](#), para. 17.

<sup>39</sup> [ICC-02/05-01/20-430](#), paras. 19-20.

<sup>40</sup> [ICC-02/05-01/20-430](#), paras. 19-20.



the Defence Observations<sup>41</sup> and therefore concurs with paragraph 18 of the Decision under Appeal. This point is however irrelevant since, irrespective of whether or not it could have been held, no hearing on continued detention under rule 118(3) of the Rules took place, either while the Honourable Appeals Chamber was still deliberating or afterwards.

### APPLICABLE LAW

21. Rule 118 of the Rules (“Pre-trial detention at the seat of the Court”) states in paragraph (3):

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.** [Emphasis added].

The fact that it is placed in rule 118 of the Rules (“Pre-trial detention at the seat of the Court”) and immediately after paragraphs (1) – on the initial request for release – and (2) – on the periodic review of detention – likewise confirms that the main purpose of the annual hearing required by rule 118(3) is to evaluate continued detention, not the conditions of detention.

### 1<sup>ST</sup> GROUND OF APPEAL: ERROR OF LAW

22. The Decision under Appeal states in paragraph 17:

First, it is not the case that rule 118(3) hearings must be devoted to discussing the continued lawfulness of detention. The Chamber notes 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. Although Chambers have in the past often combined the two, there is no obligation to do so. Unless there is a need to hear witnesses, there is generally no reason why it would be necessary to hold a hearing to discuss whether or not the criteria of article 58(1) of the Statute are still met. Accordingly, the main purpose of holding a hearing in the presence of the detained person once a year is to evaluate his or her state and conditions of detention. [Footnotes omitted].<sup>42</sup>

23. In support of its interpretation of rule 118(3) of the Rules, the Honourable Pre-Trial Chamber has only been able to adduce a quotation from the English version

<sup>41</sup> [ICC-02/05-01/20-423](#), para. 21.

<sup>42</sup> [ICC-02/05-01/20-430](#), para. 17.

of a hearing transcript in *Gbagbo et al.*<sup>43</sup> Even if it is cited merely by way of illustration, the single reference chosen is nevertheless a completely isolated example and most infelicitous because:

- (i) the ambivalent expression “his detention conditions” used in the English version translated from the original transcript in French imperfectly conveys the unequivocal expression “*examen de sa détention*” [in French, literally, “review of his detention”]<sup>44</sup>, which refers without any possible doubt to the conditions for continued detention within the meaning of articles 58(1) and 60(2) of the Statute. Since the original transcript is in French, the French version is authoritative and the Honourable Pre-Trial Chamber II therefore manifestly erred in law when it cited that extract as an example of a decision requiring a rule 118(3) hearing to focus solely on living conditions in detention. The purpose of the hearing reproduced in that transcript was unequivocally to evaluate continued detention;
- (ii) the transcript to which the Honourable Pre-Trial Chamber II refers furthermore clearly indicates that it concerns the review of a detained person’s detention, even though the most recent decision on his detention was pending before the Honourable Appeals Chamber. This is made clear in lines 17 to 23, also of page 3, of the transcript,<sup>45</sup> which were expressly cited in the Defence Observations.<sup>46</sup> Its limitation by the Decision under Appeal to living conditions in detention on the basis of the foregoing mistaken quotation is therefore also refuted by the transcript itself;
- (iii) the Court’s unanimous case law cited in the Defence Observations<sup>47</sup> states that the hearing that must be held at least once a year after the initial appearance, under rule 118(3) of the Rules, has the purpose of “deciding on

<sup>43</sup> [ICC-02/11-01/11-T-22-Red-ENG](#), p 3, lines 1-3, cited in footnote 17 of the Decision under Appeal.

<sup>44</sup> [ICC-02/11-01/11-T-22-Red-FRA](#), p 3, line 1.

<sup>45</sup> [ICC-02/11-01/11-T-22-Red-FRA](#), p 3, lines 17-23; [ICC-02/11-01/11-T-22-Red-ENG](#), p 3, line 20 to p. 4, line 1.

<sup>46</sup> [ICC-02/05-01/20-423](#), para. 21 and footnote 50.

<sup>47</sup> [ICC-02/05-01/20-423](#), para. 16, footnote 31.

[the suspect's] interim release or continued detention",<sup>48</sup> notwithstanding the fact that additional topics may also be dealt with at that hearing at the discretion of the Honourable Chambers.<sup>49</sup>

24. The Honourable Pre-Trial Chamber II also seeks to rely on the case law of the European Court of Human Rights.<sup>50</sup> However, that case law concerns national procedures and does not take into consideration the specific legal framework applicable before the Court, in particular the wording of rule 118(3) of the Rules. It is therefore irrelevant. According to article 21(3) of the Statute, moreover, such case law may only be adduced in support of an interpretation that extends the right of detained persons to be heard in respect of their continued detention, and not, as the Decision under Appeal mistakenly does, in order to restrict that right to situations in which witnesses need to be heard.

25. The wording of rule 118(3) of the Rules does not include any restriction of that nature. The requisite hearing must take place "at least once every year" irrespective of whether or not witnesses are called. That obligation to hold a hearing is informed directly by the right to have access to a judge and by *habeas corpus*, which require that the detained person appear regularly in person before a judge and be heard by that judge on his or her continued detention. There was no good reason for derogating from that right in the instant case.

26. The obligation to hold a hearing on continued detention "at least once every year" is absolute. It is not necessary to demonstrate any specific prejudice in order to find non-compliance to be unlawful. The failure to hold a hearing under rule 118(3) of the Rules therefore caused prejudice in this case since Mr Ali Muhammad Ali Abd-Al-Rahman has been kept in detention for over a year without being able to participate in a legal exchange of arguments on the matter before his judges. The

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<sup>48</sup> [ICC-01/05-01/08-425](#), para. 10; [ICC-01/04-02/06-T-16-FRA](#), p 3, lines 10-24; [ICC-02/11-01/11-270](#), para. 6; [ICC-02/11-01/11-512](#), para. 10; [ICC-02/04-01/15-503](#), para. 5.

<sup>49</sup> [ICC-01/05-01/08-T-13-FRA](#), p 8, lines 12 to 17; [ICC-02/05-01/20-T-010-FRA](#), p 3, lines 16-19.

<sup>50</sup> [ICC-02/05-01/20-430](#), para. 17, footnote 16.

Defence will return to the actual existence of that prejudice in relation to the 3<sup>rd</sup> Ground of Appeal below.

27. The Decision under Appeal therefore manifestly erred in law by considering, in paragraph 17, that a hearing could be held under rule 118(3) of the Rules without addressing the matter of continued detention or release. The Defence respectfully submits that the Honourable Pre-Trial Chamber II and/or the Single Judge of that Chamber were negligent by rejecting three times<sup>51</sup> the Defence's requests<sup>52</sup> to convene a hearing under rule 118(3) of the Rules and by not convening a hearing between the date on which the Honourable Appeals Chamber delivered its OA7 judgment, 2 June 2021, and the anniversary of Mr Ali Muhammad Ali Abd-Al-Rahman's first appearance, 15 June 2021. The Honourable Pre-Trial Chamber II could and should have convened that hearing between those two dates, either *proprio motu* or pursuant to the Defence's third hearing request. The Oral Decision of 26 May 2021 in fact only partially rejected the third hearing request for the reason that "it is not known when the Appeals Chamber will issue its judgment".<sup>53</sup> However, once that date was known – that is to say, on 28 May 2021<sup>54</sup> – and the OA7 judgment delivered – that is to say, on 2 June 2021<sup>55</sup> –, that reason no longer obtained and the hearing under rule 118(3) of the Rules could and should have taken place before 15 June 2021.

28. By not convening that hearing, the Honourable Pre-Trial Chamber II therefore erred in law. The resulting violation of rule 118(3) of the Rules means that the continuation of Mr Ali Muhammad Ali Abd-Al-Rahman's detention from 16 June 2021 is unlawful. The Defence alerted the Honourable Pre-Trial Chamber II to that unlawfulness in its Observations<sup>56</sup> and signalled the consequences it understood should flow from his unlawful continued detention beyond that date.<sup>57</sup> As of the date

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<sup>51</sup> [ICC-02/05-01/20-402](#), para. 19 and p. 17 (First and Second Hearing Requests);

[ICC-02/05-01/20-T-009-Red-FRA](#), p 1, line 26 to p. 3, line 11.

<sup>52</sup> [ICC-02/05-01/20-317-Red](#), para. 29; [ICC-02/05-01/20-336](#), para. 9; [ICC-02/05-01/20-408](#).

<sup>53</sup> [ICC-02/05-01/20-T-009-Red-ENG](#), p. 3, line 4.

<sup>54</sup> [ICC-02/05-01/20-414 OA7](#).

<sup>55</sup> [ICC-02/05-01/20-415 OA7](#).

<sup>56</sup> [ICC-02/05-01/20-423](#), para. 23.

<sup>57</sup> [ICC-02/05-01/20-423](#), paras. 24-25.

of this filing, Mr Ali Muhammad Ali Abd-Al-Rahman's unlawful detention is in its 30<sup>th</sup> day. The Defence requests the Honourable Appeals Chamber to end that detention immediately, lest it aggravate the prejudice thereby caused to Mr Ali Muhammad Ali Abd-Al-Rahman and the Court's responsibility under article 85(1) of the Statute.

## **2<sup>nd</sup> GROUND OF APPEAL: ERROR OF FACT AND LAW**

29. In paragraph 19,<sup>58</sup> the Decision under Appeal refers to the Defence's arguments in paragraph 4 of its third hearing request on the fact that it considered itself unable to address the issue of Mr Ali Muhammad Ali Abd-Al-Rahman's continued detention at the Hearing of 27 May 2021 because the matter was being deliberated by the Honourable Appeals Chamber.<sup>59</sup> In paragraph 20, the Decision under Appeal concludes in consequence that "even if the Chamber had adopted the Pre-Trial Chamber I's approach, the Defence would clearly have refused to make substantive submissions". The Decision under Appeal thereby makes a twofold error of fact and law.

30. That conclusion is vitiated by an error of fact since the Defence at no time signalled, or intended to signal, that it would object to a direction by the Honourable Pre-Trial Chamber II to make observations on Mr Ali Muhammad Ali Abd-Al-Rahman's release at the Hearing of 27 May 2021 or at any other hearing convened to ventilate that matter. The quotation taken from the third hearing request suggested nothing of the kind and merely laid bare the difficulty facing the Defence as a result of the ongoing deliberations on Appeal OA7.<sup>60</sup> In actual fact the Defence was at no time directed to make oral submissions on release and was even barred from doing so by the Oral Decision<sup>61</sup> and at the Hearing of 27 May 2021.<sup>62</sup> The Defence therefore scrupulously complied with the repeated instructions of the Honourable

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<sup>58</sup> [ICC-02/05-01/20-430](#), para. 19.

<sup>59</sup> [ICC-02/05-01/20-408](#), para. 4.

<sup>60</sup> [ICC-02/05-01/20-408](#), para. 4.

<sup>61</sup> [ICC-02/05-01/20-T-009-Red-FRA](#), p 2, lines 27-28.

<sup>62</sup> [ICC-02/05-01/20-T-010-FRA](#), p 2, lines 27-28 and p. 4, lines 5-8.

Pre-Trial Chamber II and of the Honourable Single Judge of that Chamber by not referring to the matter of Mr Ali Muhammad Ali Abd-Al-Rahman's release. Likewise, had the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber directed it to make oral submissions on Mr Ali Muhammad Ali Abd-Al-Rahman's release, the Defence would naturally have obeyed that direction, taking the view that it was thereby released from its obligation to respect the Honourable Appeals Chamber's ongoing deliberations on Appeal OA7. By assuming that the Defence intended to object to such an instruction from the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber, the Decision under Appeal therefore erred in fact.

31. It also erred in law because compliance with instructions given by the Honourable Chambers of the Court is not optional for the Defence but rather a legal obligation under, for example, article 7(3) of the Code of Professional Conduct for counsel: "Counsel shall comply at all times with [...] such rulings as to conduct and procedure as may be made by the Court". The Defence therefore had no discretion to object to instructions from the Honourable Pre-Trial Chamber II. By assuming that it would have done so, the Decision under Appeal therefore also erred in law.

### **3<sup>rd</sup> GROUND OF APPEAL: ERROR OF LAW**

32. The Decision under Appeal states lastly in paragraph 20:

In the event, the Defence was able to make fully informed written submissions after the Appeals Chamber's Third Review Judgment was rendered. The 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. There was therefore no need to convene another hearing after the Appeals Chamber rendered its Third Review Judgment.<sup>63</sup>

33. As the Defence has already indicated in paragraph 26 above in relation to the 1<sup>st</sup> Ground of Appeal, the obligation to hold a hearing on continued detention "at least once every year" is absolute and it is not necessary to demonstrate any specific prejudice in order to find non-compliance to be unlawful. The failure to hold a hearing

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<sup>63</sup> [ICC-02/05-01/20-430](#), paras. 19-20.

under rule 118(3) of the Rules did however cause prejudice in this case since Mr Ali Muhammad Ali Abd-Al-Rahman has been kept in detention for over a year without being able to participate in a legal exchange of arguments on the matter before his judges. Had the hearing under rule 118(3) of the Rules taken place, he would have been able to demonstrate, *inter alia*, that there was no factual basis for the assertion that his release to the territory of the host State would constitute a threat to the witnesses, victims and/or the OTP's investigations in Sudan. He would also have been able to demonstrate that there is no factual and/or legal basis for the Registry's assertion that since July 2020 cooperating with the Court has no longer incurred the death penalty in Sudan<sup>64</sup> and to draw the appropriate conclusions. The foregoing two topics are merely – non-exhaustive – examples of the observations that Mr Ali Muhammad Ali Abd-Al-Rahman and his Defence could have made at the hearing under rule 118(3) of the Rules had it but taken place.

34. The Decision under Appeal therefore erred in law by finding that the alleged lack of prejudice and/or the fact that the filing of written observations in place of a hearing on continued detention compensated for the absence of a hearing were sufficient to mean that Mr Ali Muhammad Ali-Abd-Al Rahman's continued detention remained lawful notwithstanding the absence of a hearing. Even assuming – for the purposes of argument only – that Mr Ali Muhammad Ali-Abd-Al Rahman did not suffer any prejudice as a result of there being no hearing on his continued detention, the violation of rule 118(3) of the Rules is sufficient to render his detention unlawful from 16 June 2021 and is sufficient justification to require his unconditional release and compensation for his continued unlawful detention from that date.

35. Mr Ali Muhammad Ali Abd-Al-Rahman has in fact suffered prejudice as the result of the absence of a hearing on his continued detention because it infringed his right to appear before a judge on that specific matter, which is protected by rule 118(3) of the Rules and is one aspect of his "right to a public hearing, having regard to the

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<sup>64</sup> [ICC-02/05-01/20-402](#), para. 40, referring to document ICC-02/05-01/20-397-Conf-Exp.

provisions of this Statute, [and] to a fair hearing conducted impartially” under article 67(1) of the Statute. In paragraph 26 above, the Defence cited merely by way of illustration some of the oral submissions that could have been made at a hearing given over to a review of his detention. Rule 118(3) of the Rules requires a hearing on continued detention “at least once every year” precisely because the oral submissions that can be made at a public hearing disseminated worldwide, including in Sudan, and with simultaneous interpretation into Arabic are different – in their nature, content and impact, the interaction between them and the forms they can take – from the written submissions that can be exchanged in a limited number of pages and in the working languages of the Court only, even where those submissions are public.

36. The Defence’s written observations therefore neither replaced nor compensated for the absence of a public hearing on Mr Ali Muhammad Ali Abd-Al-Rahman’s release. They were even less capable of compensating for or replacing such a hearing because they had to deal exclusively with the violation of rule 118(3) of the Rules. Since under regulation 37 of the RoC the number of pages was limited to 20, the Defence Observations were not able to address other points relating to the conditions for detention under article 58(1) of the Statute over and above the 10 pages devoted to the violation of rule 118(3) of the Rules. For information, the Defence’s earlier observations, in relation to the earlier reviews of Mr Ali Muhammad Ali Abd-Al-Rahman’s detention and confined to examining the conditions under article 58(1) of the Statute – with no discussion of rule 118(3) of the Rules - of themselves filled all the 20 pages allocated under regulation 37 of the RoC.<sup>65</sup> Likewise for information, the single request for an extension of the page limit filed by the Defence with the Honourable Pre-Trial Chamber II during the pre-trial stage<sup>66</sup> was rejected by the Honourable Single Judge of that Chamber.<sup>67</sup> A request for an extension of the page limit in order to file Defence Observations on the 3rd Review of Detention arguing the need to draw attention to the Honourable Pre-Trial Chamber II’s violation of

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<sup>65</sup> [ICC-02/05-01/20-213-Red](#) (20 pages); [ICC-02/05-01/20-329-Red](#) (20 pages).

<sup>66</sup> ICC-02/05-01/20-205-Conf.

<sup>67</sup> [ICC-02/05-01/20-210](#).



rule 118(3) of the Rules therefore had no reasonable prospect of success. The other submissions on the conditions under article 58(1) of the Statute would in any event become redundant and irrelevant once it was found that rule 118(3) of the Rules had been violated and that Mr Ali Muhammad Ali Abd-Al-Rahman's continued detention was unlawful. The Defence's written observations on the violation of rule 118(3) of the Rules therefore could neither replace nor compensate for the oral observations on the conditions for detention under article 58(1) of the Statute that the Defence would have been able to make if the hearing due under rule 118(3) of the Rules had taken place. The Decision under Appeal therefore makes a twofold error in law when it claims that the written submissions could replace or compensate for the absence of oral submissions: (i) oral submissions made at an annual hearing under rule 118(3) cannot appropriately be replaced by written submissions; and (ii) oral submissions at a hearing held under rule 118(3) of the Rules would have concerned the conditions for detention under article 58(1) of the Statute rather than the violation of rule 118(3) of the Rules.

## RELIEF SOUGHT

37. In the light of the foregoing three alternative Grounds of Appeal, the Defence moves the Honourable Appeals Chamber to reverse the Decision under Appeal and order the immediate and unconditional release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the host State. As has already been held on that point by the Honourable Appeals Chamber, under regulation 51 of the RoC, release to the territory of the host State does not require the agreement in advance of the authorities of that State.<sup>68</sup> That finding applies all the more to the present case since the release will be the direct consequence of the violation of rule 118(3) of the Rules which renders Mr Ali Muhammad Ali Abd-Al-Rahman's continued detention unlawful, and cannot be subject to conditions under rule 119(1) of the Rules. There is therefore no requirement to consult with the authorities of the host State on such conditions.

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<sup>68</sup> [ICC-02/05-01/20-177 OA2](#), para. 61.

**FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE  
APPEALS CHAMBER:**

- **TO** uphold this appeal and **REVERSE** the Decision under Appeal; **AND**
- **TO** order Mr Ali Muhammad Ali Abd-Al-Rahman's immediate and unconditional release to the territory of the host State.

**[Signed]**

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

Dated this 16 July 2021

At The Hague, Netherlands