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No.: ICC-02/05-01/20  
Date: **16 November 2021**

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański, Presiding Judge  
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-02/05-01/20-502**

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

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

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## INTRODUCTION

1. The present brief (“Brief”) is registered in support of the Notice of Appeal against Decision ICC-02/05-01/20-502 (“Decision under Appeal”)<sup>1</sup> submitted on 5 November 2021 (“Notice of Appeal”)<sup>2</sup> by the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”). It is submitted within the time limit prescribed by the Honourable Appeals Chamber.<sup>3</sup> The purpose of the Brief is to expound upon the four grounds of appeal introduced in the Notice of Appeal (“Grounds of Appeal”).<sup>4</sup>

## FIRST GROUND OF APPEAL: ERRORS OF FACT

2. At paragraphs 22 and 23, the Decision under Appeal states, on the basis of decisions rendered in other cases before the Court, that the confirmation of the charges increases the risk of Mr Abd-Al-Rahman’s absconding.<sup>5</sup> The Defence submits that the reference to decisions in the other cases of the Court discounts certain essential factual particulars specific to the instant case – namely, particulars related to the circumstances of Mr Abd-Al-Rahman’s voluntary surrender and to the risks he faces in the event of his return to Sudan – and therefore makes two errors of fact.

3. First, Mr Abd-Al-Rahman had to flee Sudan in order to place himself under the authority and protection of the Court. He made contact with the Court for the first time in December 2019 with a view to surrendering.<sup>6</sup> At that time, as confirmed by the Office of the Prosecutor (“OTP”), he was the subject of a warrant of arrest issued on 2 December 2019 by the Sudanese authorities.<sup>7</sup>

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<sup>1</sup> [ICC-02/05-01/20-502](#).

<sup>2</sup> [ICC-02/05-01/20-510 OA10](#).

<sup>3</sup> [ICC-02/05-01/20-515 OA10](#).

<sup>4</sup> [ICC-02/05-01/20-510 OA10](#), para. 7(e).

<sup>5</sup> [ICC-02/05-01/20-502](#), paras. 22-23.

<sup>6</sup> ICC-02/05-01/20-495-Conf-AnxA: Document DAR-OTP-0215-7063-R01.

<sup>7</sup> [ICC-02/05-01/20-95](#), para. 17.

He therefore fled from the Sudanese authorities to surrender himself to the Court. The Sudanese authorities' persistent refusal to transfer the other suspects charged by the Court – Mr Haroun, Mr Hussein and Mr Al Bashir, whom they have been detaining since April 2019<sup>8</sup> – is a reasonable ground to believe that, had Mr Abd-Al-Rahman not absconded to surrender himself to the Court and had he been arrested, he would be languishing in Sudanese prisons to this day and would never have been transferred. It is therefore because of his initiative alone that he is now available to the Court.

4. By absconding, Mr Abd-Al-Rahman took the risk of exposing himself to criminal charges, under Sudanese law, for cooperation with the Court, i.e. espionage and/or treason pursuant to articles 50, 52, 53, 55 and/or 56 of the Penal Code of 1991.<sup>9</sup> Irrespective of the Defence's submissions on whether cooperation is still criminalized,<sup>10</sup> the Sudanese authorities have themselves confirmed that cooperation with the Court was a criminal offence in Sudan at the time of Mr Abd-al-Rahman's flight and surrender and at least until July 2020.<sup>11</sup> The fact that people have been arrested, detained, tortured and convicted for their suspected cooperation with the Court is amply documented<sup>12</sup> and had been brought to the notice of the Honourable Trial

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<sup>8</sup> <https://www.un.org/press/en/2019/sc13849.doc.htm>; <https://www.reuters.com/article/us-sudan-politicsidUSKCN1RW09C>; <https://www.reuters.com/article/uk-sudan-politics-idUKKCN1RN0AU>

<sup>9</sup> Sudan, [Criminal Act, 1991](#), Articles 50 (Undermining the Constitutional System), 52 (Dealing with an Enemy State), 53 (Espionage against the Country), 55 (Disclosure and Obtaining Information and Official Documents), 56 (Disclosure of Military Information).

<sup>10</sup> [ICC-02/05-01/20-438-Red](#), para. 5; ICC-02/05-01/20-485-Conf (public redacted version [ICC-02/05-01/20-485-Red](#)), paras. 4(i)-(ii), 6, 8, 10, 17; [ICC-02/05-01/20-501-Red](#), para. 15.

<sup>11</sup> ICC-02/05-01/20-397-Conf, para. 9 (mentioned publicly in [ICC-02/05-01/20-402](#), para. 40); ICC-02/05-01/20-496, para. 23; ICC-02/05-01/20-496-AnxV (despite being classified as public, the latter two documents have not yet been published online on either the Court's website or Legal Tools; no link is therefore available to date).

<sup>12</sup> African Commission on Human and Peoples' Rights, Communication 379/09, [Case Monim Elgak, Osman Hummeida and Amir Suliman \(represented by FIDH and OMCT\) v. Sudan](#), 14 March 2014; United Nations, Security Council, [doc. S/2009/211](#), Report of the Secretary-General on the Sudan, 17 April 2009, para. 58.

Chamber I by the Defence in the course of the review of detention.<sup>13</sup> The established fact that Mr Abd-Al-Rahman risked arrest, detention, torture and the death sentence in his country for his cooperation with the Prosecutor by surrendering himself to the Court constituted a highly relevant circumstance to the Honourable Trial Chamber I's determination. That particular circumstance is, to the Defence's knowledge, unique before the Court and it alone called for a distinction to be drawn between Mr Abd-Al-Rahman's case and the other cases before the Court. By disregarding that circumstance and indiscriminately applying the solution adopted in the other cases before the Court, the Honourable Trial Chamber I therefore erred in fact.

5. Second, the Honourable Trial Chamber I also erred in fact by disregarding information available on the risk faced by Mr Abd-Al-Rahman in the event of his return to Sudan. The Defence had argued that, contrary to the Sudanese authorities' claims, cooperation with the Court is still, to this day, a criminal offence under Sudanese law; that the risk of arrest, detention, torture and the death penalty is still present; and that, were he to evade the Court's authority, Mr Abd-Al-Rahman would be at significant risk of being returned to Sudan, where he would be arrested, tortured and/or executed.<sup>14</sup> This submission is *sub judice*. The Honourable Trial Chamber I has expressed its wish not make a ruling at this stage.<sup>15</sup> It was nonetheless apprised of this particular circumstance in the course of the review of detention and it should have taken a decision on this matter, at least for the limited needs of that review. By refusing to do so and by refusing to draw the attendant conclusions, the Honourable Trial Chamber I therefore erred in fact.

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<sup>13</sup> ICC-02/05-01/20-495, para. 8 (despite being classified as public, this document has not yet been published online on either the Court's website or Legal Tools; no link is therefore available to date).

<sup>14</sup> ICC-02/05-01/20-495, para. 8.

<sup>15</sup> ICC-02/05-01/20-T-017-Conf-FRA, 12 November 2021, p. 7, line 13 to p. 8, line 5.

6. This double error of fact invalidates the Decision under Appeal since, had the Honourable Trial Chamber I given consideration to these two facts in its determination, it would have found that Mr Abd-Al-Rahman's situation was clearly different from that of the other detained persons before the Court and that the jurisprudence on increased risk of flight resulting from confirmation of charges was offset by the specific factual circumstances of the case at bar. Mr Abd-Al-Rahman took the utmost risk to place himself voluntarily under the Court's protection and certainly not to evade it, at a time when none of the circumstances giving rise to such risks has changed and the coup d'état of 25 October 2021 compounds even further the risk that those who cooperate with the Court, as he has, will be prosecuted. The Defence therefore prays the Honourable Appeals Chamber to invalidate the Decision under Appeal on this First Ground.

#### **SECOND GROUND OF APPEAL: ERROR OF LAW**

7. The double error of fact described in support of the First Ground of Appeal also led to an error of law, whereby reliance is placed, at paragraphs 22 and 23 of the Decision under Appeal, on the perception of a "consistent and longstanding jurisprudence of the Court" to state that the confirmation of charges alone is a new circumstance increasing the risk that Mr Abd-Al-Rahman will abscond. Examples of this jurisprudence are given in footnotes 36 and 37 of the Decision under Appeal. According to the Decision's interpretation of the jurisprudence, the confirmation of charges against a detained person leaves but one option: to continue his or her detention throughout the trial; detention thus becomes the rule during this phase. The Defence respectfully submits that the cited jurisprudence of the Court cannot have had the effect of inverting, once the charges have been confirmed, the principle that liberty is the rule and detention the exception. This principle has been reiterated and its

validity affirmed by the Honourable Appeals Chamber in its previous OA2<sup>16</sup> and OA7<sup>17</sup> judgments. This principle therefore remains the standard applicable before the Court, and any interpretation of its prior decisions that concludes otherwise is, therefore, necessarily erroneous.

8. The Court's instruments governing detention and interim release do not differentiate between the phase that precedes and the one that follows the confirmation of charges. Detention during those two phases is governed by the same instruments and the same criteria, which do not include the confirmation of charges.

9. The sole judgment of the Honourable Appeals Chamber on which the Decision under Appeal relies was handed down in *Bemba*.<sup>18</sup> While that judgment does refer to an increased risk of an accused's flight as a result of the confirmation of the charges and the prospect of a "lengthy sentence", it is to be noted that history subsequently proved that prediction wrong, since Mr Bemba was ultimately acquitted by the Honourable Appeals Chamber.<sup>19</sup> That precedent alone underscores the fact that a prediction of a lengthy sentence based on the confirmation of a high number of charges is highly speculative. Such speculation, which moreover is hardly compatible with the presumption of innocence, cannot serve to justify Mr Abd-Al-Rahman's continued detention. It was in the case at bar itself that the Honourable Pre-Trial Chamber II, on 15 November 2021, rejected *in limine* two requests for reconsideration, submitted by the Defence,<sup>20</sup> in respect of the decision of 21 May 2021<sup>21</sup> which alone had enabled the confirmation of charges hearing to be held, and in respect

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<sup>16</sup> [ICC-02/05-01/20-177 OA2](#), para. 51.

<sup>17</sup> [ICC-02/05-01/20-415 OA7](#), para. 56.

<sup>18</sup> [ICC-01/05-01/08-502 OA2](#), para. 70.

<sup>19</sup> [ICC-01/05-01/08-3636-Red A](#).

<sup>20</sup> [ICC-02/05-01/20-438-Red](#); [ICC-02/05-01/20-448](#).

<sup>21</sup> [ICC-02/05-01/20-402](#).

of the decision on the confirmation of charges.<sup>22</sup> Leave to appeal the decision on the confirmation of charges was also rejected.<sup>23</sup> As a result of that decision, the significant factual defects, on which both requests for reconsideration were premised, and the grounds for reversing the decision on the confirmation of charges cannot be cured before the start of the trial and cannot be considered by the Honourable Appeals Chamber before the conclusion of the trial, should an appeal be entered against the decision handed down pursuant to article 74 of the Statute. Those flaws in the confirmation of the charges therefore remain unrectified in the case at bar, making the reference to the imposition of a lengthy sentence all the more speculative.

10. Some excerpts from the other decisions cited in footnotes 36 and 37 refer to the *Bemba* precedent.<sup>24</sup> Other excerpts come from decisions issued in cases which also culminated in the acquittal of at least one accused.<sup>25</sup> The decision handed down in *Lubanga* is alone in belonging to a case in which the accused was ultimately convicted and it does not refer to *Bemba* because it dates too far back.<sup>26</sup> That decision might have lent support to the Decision under Appeal had it not since been contradicted by the aforementioned precedents in *Bemba*, *Gbagbo* and *Ngudjolo*.

11. Far from supporting the assertion in the Decision under Appeal that the confirmation of numerous charges and the prospect of a lengthy sentence warrant continued detention, the jurisprudence cited hence lays emphasis on the highly speculative nature of that assertion. The Honourable Appeals

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<sup>22</sup> [ICC-02/05-01/20-433](#).

<sup>23</sup> [ICC-02/05-01/20-517](#).

<sup>24</sup> [ICC-01/04-02/06-335](#), para. 34 (which makes reference to judgment [ICC-01/05-01/08-323 OA](#), para. 53); [ICC-01/12-01/18-786-Red](#), para. 58 (which makes reference to judgment [ICC-01/05-01/08-502 OA2](#), para. 70).

<sup>25</sup> [ICC-02/11-01/11-668](#), para. 41 (which makes reference to judgment [ICC-01/05-01/08-502 OA2](#), para. 70); [ICC-01/04-01/07-794-tENG](#), paras. 9-10 (Germain Katanga's co-accused was acquitted, [ICC-01/04-02/12-3-tENG](#)).

<sup>26</sup> [ICC-01/04-01/06-826](#), p. 6.

Chamber, drawing on its unfortunate experience of keeping, on that basis, accused persons in detention only for them to be subsequently acquitted,<sup>27</sup> cannot, once again, approve Mr Abd-Al-Rahman's continued detention on the basis of such speculation.

12. Furthermore, even assuming *arguendo* that the confirmation of charges increases the flight risk, that assertion disregards the specific factual particulars of the instant case, discounted by the Honourable Trial Chamber I and referred to in the First Ground of Appeal above, to wit, the risk that if Mr Abd-Al-Rahman were to abscond, he might be returned to Sudan, arrested, detained, tortured and potentially executed for having evaded the Sudanese authorities and being placed under the Court's protection. This fundamental factual particular sets the instant case apart from all the other cases before the Court. Even if the jurisprudence developed in the other cases on which the Decision under Appeal relies were to lend support to the assertion that the confirmation of charges warrants continued detention – which it does not – it cannot be transplanted wholesale into the case *sub judice* by ignoring the specific factual particular that is the risk incurred by Mr Abd-Al-Rahman were he to abscond. That risk deprives the reference to the Court's jurisprudence in the other cases of the essence of its relevance to a determination on whether Mr Abd-Al-Rahman's detention should be continued.

13. The Decision under Appeal therefore committed a double error of law by concluding, on the basis of the jurisprudence cited, that the confirmation of the charges warrants continued detention and by applying that jurisprudence to the case *sub judice*, without taking into account the specific factual particulars of the case that deprive that jurisprudence of the essence of its relevance. The

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<sup>27</sup> [ICC-01/05-01/08-323 OA](#), para. 53; [ICC-01/05-01/08-502 OA2](#), para. 70.

Decision under Appeal must therefore also be invalidated on this Second Ground.

### **THIRD GROUND OF APPEAL: ERROR OF LAW RESULTING IN THREE ERRORS OF FACT**

14. At paragraphs 24, 26 and 27, the Decision under Appeal rejects, in turn, three factual submissions advanced by the Defence in support of the request for release, relating to (i) the fact that Annex A to its Observations<sup>28</sup> confirmed that Mr Abd-Al-Rahman had already made contact with the Court, in order to come forward as a witness, by the alleged date of the event reported in Annex 3 from the Office of the Prosecutor (“OTP”), which remains the only evidence upon which the OTP relies to argue that Mr Abd-Al-Rahman’s release would endanger the witnesses and/or investigations<sup>29</sup> (paragraph 24); (ii) the fact that the content of the video included in Annex 3 from the OTP<sup>30</sup> does not reflect, and refutes, the information alleged in that annex (paragraph 26); and (iii) the risk of Mr Abd-Al-Rahman facing criminal prosecution and the death sentence for his voluntary surrender to the Court (paragraph 27). Each of these factual considerations is rejected; no reasoning is provided except that the Honourable Trial Chamber I is unable to accept the first (paragraph 24), that it is not persuaded by the second (paragraph 26) and that it considers the third (paragraph 27) irrelevant. No reason is given for any one of these three conclusions.

15. In its OA5 judgment, the Honourable Appeals Chamber recalled the principle that “Chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions.”<sup>31</sup> The only permissible exception

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<sup>28</sup> ICC-02/05-01/20-495-Conf-AnxA.

<sup>29</sup> [ICC-02/05-01/20-95-Anx3](#).

<sup>30</sup> DAR-OTP-0215-2697.

<sup>31</sup> [ICC-02/05-01/20-236 OA5](#), para. 1.

to this principle is confined to relatively minor procedural decisions<sup>32</sup> – a category to which decisions on the review of detention, such as the Decision under Appeal, plainly do not belong. Therefore, it could not suffice for the Honourable Trial Chamber I to state that it was unable to accept, was unpersuaded or was of the view that the Defence’s factual submissions lacked relevance. It still had the duty to provide the reasoning for each of those three statements, so as to enable the Defence to understand its deliberation and assess the reasonableness thereof.

16. In this instance, each of the three factual submissions in question was based on solid evidence entered into the case record by the OTP or the Registry and whose full relevance to the review of detention the Defence had clearly specified.

17. As to the first factual consideration dismissed, at issue was the lack of probative value of the only evidence adduced by the OTP of the fact that Mr Abd-Al-Rahman’s release could put the victims, witnesses or investigations at risk (“Annex 3”).<sup>33</sup> In its submissions on the review of detention,<sup>34</sup> the Defence argued that the event alleged in Annex 3, *viz.* a speech that Mr Abd-Al-Rahman – referred to by the alias “Ali Kushayb” – purportedly delivered on 23 January 2020,<sup>35</sup> could not easily be reconciled with other information and evidence in the record. Among that information and evidence were (i) information provided by the OTP on the issuance, by the Sudanese authorities on 2 December 2019, of a warrant of arrest for Mr Abd-Al-Rahman;<sup>36</sup> (ii) the fact that Mr Abd-Al-Rahman had been at large since December 2019,

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<sup>32</sup> [ICC-02/05-01/20-236 OA5](#), para. 15.

<sup>33</sup> [ICC-02/05-01/20-95-Anx3](#).

<sup>34</sup> [ICC-02/05-01/20-500](#), para. 11.

<sup>35</sup> [ICC-02/05-01/20-95-Anx3](#), p. 2.

<sup>36</sup> [ICC-02/05-01/20-95](#), para. 17.

seeking to place himself under the protection of the Court;<sup>37</sup> and (iii) the [video](#) presented in support of Annex 3,<sup>38</sup> whose text includes a hyperlink to the video, which shows, at 00:05 seconds, two uniformed individuals attending the speech of the person filmed delivering it. According to Annex 3, those two uniformed individuals were a “Chief Executive Officer” and the “Director of Police Chief in the Locality”.<sup>39</sup> If, as alleged in Annex 3, the person filmed giving a speech is Mr Abd-Al-Rahman and if this [video](#) was shot on 23 January 2020, while he was the subject of a warrant of arrest issued on 2 December 2019 by the Sudanese authorities and was at large, the two uniformed individuals seen at 00:05 seconds in the [video](#) would not have merely listened calmly to him but would have arrested him. Mr Abd-Al-Rahman, at large since December 2019, would therefore never have been able, as Annex 3 alleges, to deliver a speech in public on 23 January 2020 in the presence of the local police chief. The OTP’s submissions on the warrant issued for his arrest on 2 December 2019,<sup>40</sup> document DAR-OTP-0215-7063-R01<sup>41</sup> and the presence of two uniformed individuals who can be seen at 00:05 seconds in the [video](#) therefore all served to show that the event reported in Annex 3 is extremely unlikely and that it lacks probative value. The Honourable Trial Chamber I’s conclusion that it was unable to accept the incompatibility between Annex 3 and the proven fact that Mr Abd-Al-Rahman was at large on the alleged date of the event described in that document was therefore unreasonable. This conclusion was manifestly affected by an error of fact. This first error of fact would not have reasonably been committed had the Honourable Trial Chamber I taken the trouble to

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<sup>37</sup> ICC-02/05-01/20-495-Conf-AnxA: Document DAR-OTP-0215-7063-R01, referred to in the Defence’s submissions relating to the review of detention ICC-02/05-01/20-495, para. 7.

<sup>38</sup> Video: DAR-OTP-0215-2697. Arabic transcript: DAR-OTP-0215-7145; English translation: DAR-OTP-0215-7148.

<sup>39</sup> [ICC-02/05-01/20-95-Anx3](#), p. 2.

<sup>40</sup> [ICC-02/05-01/20-95](#), para. 17.

<sup>41</sup> ICC-02/05-01/20-495-Conf-AnxA: Document DAR-OTP-0215-7063-R01.

provide its reasoning for its conclusion on that point. The error of law consisting of a lack of reasoning for its conclusion therefore gave rise to a first error of fact.

18. The same error of fact was repeated at paragraph 26 of the Decision under Appeal. There, the Honourable Trial Chamber I states that it is unpersuaded that the content of the [video](#) included in the OTP's Annex 3 does not reflect the information alleged in the annex: that the person filmed spoke of the possibility of killing human rights defenders. The transcript of the [video](#)<sup>42</sup> reveals, however, that the person speaking is in fact giving praise to the teaching staff and the district of Rehed al-Birdi by frequent use of hyperbole and religious and poetic references. The only passage of the speech that could be viewed as potentially threatening is where the speaker talks of stabbing and killing those who denigrate Rehed al-Birdi or its teaching staff. However, it is articulated in terms that are overly vague ("any individual") and temporally undefined, does not refer to anyone specific, does not appear to express anything more than strong disapproval of those who denigrate Rehed al-Birdi and/or its teaching staff and could be seen as another rhetorical device of the ilk employed, moreover, by the author of the speech.<sup>43</sup> This transcript therefore refutes the description of the speech in Annex 3: it makes no mention of "Ali Kushayb", allegations of corruption or human rights activists; in it the speaker does not allude to any personal power whatsoever that he might enjoy and nowhere does he speak of killing anyone in front of the Prime Minister. By stating that it was unpersuaded by the incompatibility between, on the one hand, the video and its transcript, and on the other hand, the description of that video in Annex 3, the Honourable Trial Chamber I manifestly erred in fact. This second error of fact also would not have reasonably been committed had the Honourable

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<sup>42</sup> DAR-OTP-0215-7148.

<sup>43</sup> DAR-OTP-0215-7148, lines 3-8, 10-14, 25.

Trial Chamber I taken the trouble to provide the reasoning for its conclusion on that point. The error of law consisting of a lack of reasoning for its conclusion therefore gave rise to this second error of fact.

19. Lastly, the Decision under Appeal errs in fact for a third time at paragraph 27, in which it considers irrelevant the information on the risk of Mr Abd-Al-Rahman's facing criminal prosecution and the death sentence for his voluntary surrender to the Court. The Decision under Appeal refers to a mere "submission" from the Defence on that point, whereas the series of Registry reports on cooperation, conveying information received directly from the Sudanese authorities, has confirmed that cooperation with the Court was a criminal offence in Sudanese law at the time of Mr Abd-Al-Rahman's surrender.<sup>44</sup> As to whether the offence still stands in Sudanese penal law, that was the subject of the Defence submissions which were put before the Honourable Trial Chamber I in the course of the review of detention<sup>45</sup> and in respect of which the lack of a ruling by the Chamber is one of the two errors of fact stated under the First Ground of Appeal at paragraph 5 above. At paragraph 27 of the Decision under Appeal, the Honourable Trial Chamber I remains silent on the validity of this submission and on the evidence in support thereof.<sup>46</sup> It simply dismisses it as irrelevant. Yet, no reasonable trier of fact would have questioned the relevance, to an assessment of flight risk, of the fact that, were he to decide to escape and then succeed, Mr Abd-Al-Rahman would risk being returned to Sudan where he would face arrest, detention, torture and potentially the death penalty. By rejecting it as lacking relevance, the

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<sup>44</sup> ICC-02/05-01/20-397-Conf, para. 9 (mentioned publicly in document [ICC-02/05-01/20-402](#), para. 40); ICC-02/05-01/20-496, para. 23; ICC-02/05-01/20-496-AnxV.

<sup>45</sup> ICC-02/05-01/20-495, para. 8 (which refers at footnote 23 to [ICC-02/05-01/20-438-Red](#), paras. 4-5, 11-19 and ICC-02/05-01/20-485-Conf, para. 5); African Commission on Human and People's Rights, Communication 379/09, [Case Monim Elgak, Osman Hummeida and Amir Suliman \(represented by FIDH and OMCT\) v. Sudan](#), 14 March 2014, para. 77; United Nations, Security Council, [doc. S/2009/211](#), Report of the Secretary-General on the Sudan, 17 April 2009, para. 58.

<sup>46</sup> ICC-02/05-01/20-397-Conf-AnxI-tENG; ICC-02/05-01/20-496-AnxV.

Honourable Trial Chamber I thus made a manifest error of fact. This third error of fact also would not have reasonably been committed had the Honourable Trial Chamber I taken the trouble to provide the reasoning for its conclusion on that point. The error of law consisting of a lack of reasoning for its conclusion therefore gave rise to this third error of fact, in addition to the first two.

20. These three errors of fact invalidate the Decision under Appeal insofar as, had they not been committed and had the Honourable Trial Chamber I duly given the reasoning for its factual findings, it would have inevitably found that Annex 3 cannot go to proof that Mr Abd-Al-Rahman's release is a threat to the witnesses or the investigations and that the significant risks that he would be taking, should he flee, make any attempt on his part to abscond extremely unlikely. The Honourable Trial Chamber I would have thus held that there is no valid reason warranting Mr Abd-Al-Rahman's continued detention. The Decision under Appeal must therefore also be invalidated on this Third Ground.

#### **FOURTH GROUND OF APPEAL: ERRORS OF LAW**

21. At paragraph 30, the Decision under Appeal lastly errs twice in law by considering that the impossibility of respecting Abd-Al-Rahman's right to family visits is not a factor that undermines the legality of his continued detention and by considering that the arrangement of a simple video call on the basis of the new Court policy on holding video calls with family members of detained persons<sup>47</sup> – had only such a call been requested and been possible – would have sufficed for that right to be respected.

22. The Honourable Trial Chamber I confirms at paragraph 30 of the Decision under Appeal that “there is a positive obligation upon the Court to render such right [to visits from his family] effective.” The acknowledgment that there is a

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<sup>47</sup> ICC-02/05-01/20-495-Conf-AnxC.

positive right afforded to detained persons to receive family visits is consonant with the jurisprudence of the Honourable Presidency of the Court, which has, since 2009, affirmed that such a rights exists.<sup>48</sup> However, the Honourable Trial Chamber I immediately renders this right nugatory by going on to say that the right to family visits does not call into question its reasons for continuing Mr Abd-Al-Rahman’s detention. The stringing of these two statements together defies logic: if detained persons enjoy a positive right to family visits, the violation of this right necessarily affects the legality of the detention, the conditions of which can no longer be guaranteed. The Honourable Trial Chamber I therefore erred in law for a first time on that point by continuing to detain Mr Abd-Al-Rahman in conditions that have become illegal for not respecting his right to family visits.

23. It errs in law a second time by holding the Defence for Mr Abd-Al-Rahman responsible for this violation for not having made a request to avail itself of the Court’s new policy on the holding of video calls with family members of detained persons.<sup>49</sup> At the hearing held pursuant to rule 118(3) of the Rules of Procedure and Evidence (“Rules”) on 8 September 2021, the Defence clearly explained why it had not made such a request: it was plain to see that, without a field office of the Court in Sudan and without a legal framework governing the Court’s activities on its territory, the conditions set by this policy for holding a video call with Mr Abd-Al-Rahman’s family were obviously not met and that, as a consequence, it was not even worthwhile to make a request.<sup>50</sup> Irrespective of this explanation, the holding of a video call cannot replace or satisfy the right of Mr Abd-Al-Rahman to receive a visit from his family, nor the right of his family – foremost his children – to visit him. The

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<sup>48</sup> [ICC-RoR217-02/08-8](#), paras. 26-29.

<sup>49</sup> ICC-02/05-01/20-495-Conf-AnxC.

<sup>50</sup> [ICC-02/05-01/20-T-015-FRA](#), p. 18, line 19 to p. 19, line 25.

Honourable Presidency of the Court has, in no uncertain terms, stated that the right to face-to-face family visits cannot be satisfied by the use of alternative methods of telecommunication.<sup>51</sup> That has also been confirmed in the report of the Court on family visits submitted to the Assembly of States Parties; that report even described video calls with families of detained persons as a “Pandora’s box”.<sup>52</sup> That no request was made for a video call, in addition to being fully justified, did not hold, therefore, the slightest relevance to determining whether Mr Abd-Al-Rahman’s continued detention without visits from his family was legal. The Honourable Trial Chamber I therefore committed a second error of law on that point by rejecting the Defence’s submissions on the basis that the Defence had not requested to avail itself of the Court’s new policy on the holding of video calls with families of detained persons.

24. Receiving family visits is a positive right of the detained person. Violation of that right compromises the legality of detention. These two errors of law invalidate the Decision under Appeal since, had the Honourable Trial Chamber I held that Mr Abd-Al-Rahman’s conditions of detention were illegal for want of visits from his family, it would have had no choice but to order his immediate release failing any possibility of arranging such a visit in the foreseeable future. The Defence therefore prays the Honourable Appeals Chamber to invalidate the Decision under Appeal on this Fourth Ground, in addition to on the three others.

### **RELIEF SOUGHT**

25. In the light of the four alternative grounds of appeal above, the Defence prays the Honourable Appeals Chamber to reverse the Decision under Appeal

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<sup>51</sup> [ICC-RoR217-02/08-8](#), para. 36.

<sup>52</sup> [ICC-ASP/7/24](#): “Report of the Court on family visits to indigent detained persons”, 5 November 2008, paras. 31-34.

and to order the immediate release of Mr Ali Muhammad Ali Abd-Al-Rahman on the territory of the host State, subject to any conditions necessary to ensure that he remains available to the Court.

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

- **ALLOW** the present appeal and **SET ASIDE** the Decision under Appeal; **AND**
- **ORDER** the immediate release of Mr Ali Muhammad Ali Abd-Al-Rahman on the territory of the host State, subject to any conditions necessary to ensure that he remains available to the Court.

[signed]

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Mr Cyril Laucci,

Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 16 November 2021,

At The Hague, Netherlands