

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: French

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

Date: 1 January 2021

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański, Presiding Judge  
Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.* MR ALI MUHAMMAD ALI ABD-AL-RAHMAN  
("ALI KUSHAYB")**

**Public Document**

**Public Redacted Version of the Appeal Brief against  
Decision ICC-02/05-01/20-230-RED**

**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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## PROCEEDINGS PREVIOUS TO THIS APPEAL

1. By an email of 16 November 2020, the Honourable Pre-Trial Chamber II instructed the Office of the Prosecutor (OTP) and the Defence to file their observations for the first review of Mr Ali Muhammad Ali Abd-Al-Rahman’s detention (“Review”) pursuant to rule 118(2) of the Rules of Procedure and Evidence (RPE).<sup>1</sup>

2. Accordingly, as instructed, the OTP filed its observations on the Review on 20 November 2020 under the classification “Confidential”. A public redacted version thereof was registered on 25 November 2020 (“OTP Observations”).<sup>2</sup> In essence, the OTP objected to Mr Ali Muhammad Ali Abd-Al-Rahman’s release and sought his continued detention.

3. The Defence, in turn, filed its observations on 26 November 2020 (“Defence Observations”).<sup>3</sup> In essence the Defence submitted that, in the Review, regard needed to be had to two new circumstances, *viz.* (i) the discovery of the absence of an agreement between Sudan and the Court authorizing the latter to carry out its activities on the territory of Sudan;<sup>4</sup> and (ii) the discovery of the OTP’s violation of confidentiality rules with respect to records of witness interviews.<sup>5</sup> The Defence argued that those two circumstances directly affected the admissibility of the evidence relied on to issue the two warrants for Mr Ali Muhammad Ali Abd-Al-Rahman’s arrest; that that evidence had to be excluded from the holistic approach prescribed by the Honourable Appeals Chamber in its first judgment on Mr Ali Muhammad Ali Abd-Al-Rahman’s detention (“First Judgment on Detention”);<sup>6</sup> and that the exclusion of the evidence affected by those two new circumstances meant that the criterion for detention under article 58(1)(a) of the Statute – reasonable grounds to believe that Mr Ali Muhammad Ali Abd-Al-Rahman is in any way responsible for the crimes described in the warrants of arrest – could no longer be met. The Defence concluded that the criterion for Mr Ali Muhammad Ali Abd-Al-Rahman’s detention under

<sup>1</sup> Email, 16 November 2020, 14.16.

<sup>2</sup> [ICC-02/05-01/20-209-Red](#).

<sup>3</sup> [ICC-02/05-01/20-213-Red](#).

<sup>4</sup> [ICC-02/05-01/20-213-Red](#), paras. 18-29.

<sup>5</sup> [ICC-02/05-01/20-213-Red](#), paras. 30-37.

<sup>6</sup> [ICC-02/05-01/20-177 OA2](#), paras. 26, 35.

article 58(1)(a) of the Statute was no longer met and that he must therefore be released. The Defence also drew ample attention to new circumstances related to health and safety at the Court's Detention Centre.<sup>7</sup>

4. By way of a decision of 11 December 2020, the Honourable Pre-Trial Chamber II conducted the first review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention pursuant to rule 118(2) of the RPE ("Decision under Appeal").<sup>8</sup> The Honourable Pre-Trial Chamber II affirmed his continued detention on the main ground that the two new circumstances advanced by the Defence – on whose merits the Honourable Pre-Trial Chamber II is silent – concern only a limited and "relatively insignificant" amount of evidence compared to the entirety of the evidence, and such evidence therefore fails to cast doubt on the validity of the warrants of arrest and/or the fulfilment of the article 58(1)(a) criterion.<sup>9</sup> Moreover, the Honourable Pre-Trial Chamber II rejects the Defence's submissions relating to the humanitarian ground for the release sought.<sup>10</sup>

5. By a notice of appeal of 16 December 2020 ("Notice of Appeal"),<sup>11</sup> the Defence appealed, pursuant to article 82(1)(b) of the Statute, rule 154(1) of the RPE and regulation 64(5) of the Regulations of the Court (RoC), against the Decision under Appeal.

6. By an order of 18 December 2020,<sup>12</sup> the Honourable Appeals Chamber instructed the Defence to file its appeal brief by 4 January 2021. This brief is filed in accordance with that instruction.

<sup>7</sup> [ICC-02/05-01/20-213-Red](#), para. 38.

<sup>8</sup> ICC-02/05-01/20-230-Conf. A public redacted version of the Decision under Appeal was also registered: [ICC-02/05-01/20-230-Red](#). Wherever possible, reference is made herein to the public redacted version of the Decision under Appeal.

<sup>9</sup> [ICC-02/05-01/20-230-Red](#), para. 26.

<sup>10</sup> [ICC-02/05-01/20-230-Red](#), para. 34.

<sup>11</sup> [ICC-02/05-01/20-234-tENG OA6](#).

<sup>12</sup> [ICC-02/05-01/20-240 OA6](#).

## CLASSIFICATION

7. Pursuant to regulation 23 *bis*(1) of the RoC, this brief is registered under the classification level “Confidential”, which accords with the original classification of the Decision under Appeal. Also filed on this day is a public version of this brief, from which confidential information has been redacted.

## SUMMARY OF GROUNDS OF APPEAL AND RELIEF SOUGHT

8. The Defence, acting pursuant to article 82(1)(b) of the Statute, respectfully raises the following three grounds of appeal: (i) error of fact and law in that, at paragraph 26 of the Decision under Appeal, it was considered that the portion of the evidence referred to by the Defence in its submissions and affected by the two new circumstances adverted to in the Defence Observations represented only an insignificant part of the evidence presented in the warrants of arrest (error of fact) and in that submissions were required of the Defence on the entirety of the evidence referred to in the warrants of arrest (error of law); (ii) error of fact and law in that, at paragraph 31 of the Decision under Appeal, regard was not had to the absence of an agreement between Sudan and the Court (error of fact), which makes it impossible to protect witnesses on the territory of Sudan, in violation of articles 4(2) and 68(1) of the Statute (error of law); and (iii) error of fact and law in that, at paragraph 34 of the Decision under Appeal, regard was not had to the risks inherent to Mr Ali Muhammad Ali Abd-Al-Rahman’s advanced age and continued detention in the particular context described at paragraph 38 of the Defence Observations<sup>13</sup> (error of fact) and no order was made for the minimum measures which respect for his right to life demanded (error of law). A showing of each of these three errors of law and/or fact forms the basis of the three grounds of appeal set out in this brief. The three grounds of appeal are pleaded in the alternative: the Defence humbly prays the Honourable Appeals Chamber to reverse the Decision under Appeal if it determines that any one of the three grounds has merit.

<sup>13</sup> [ICC-02/05-01/20-213-Red](#), para. 38.

9. Should the Honourable Appeals Chamber allow this appeal and reverse the Decision under Appeal, the Defence humbly prays it to order the interim release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the host State, on any conditions which the Court and/or the host State may consider it necessary to impose pursuant to rule 119 of the RPE and/or article 38(3) of the Headquarters Agreement.

#### **SCOPE OF THIS APPEAL**

10. The present appeal places before the Honourable Appeals Chamber only the three grounds of appeal set out below in respect of the Decision under Appeal, to the exclusion of any other issues. The issues of the wider legal consequences of the absence of an agreement between the Court and Sudan, in violation of article 4(2) of the Statute, and of the OTP's non-compliance with the Information Protection Policy of the Court exceed the ambit of this appeal. Reference is made to those issues in connection with the first and second grounds of appeal below solely to gauge their possible bearing on the review of detention and, in particular, on the issue as to whether the portion of the relevant evidence that might be affected was or was not "relatively insignificant" in relation to the rest of the evidence (first ground of appeal) and the issue as to whether the OTP was in a position to give effect to the Honourable Pre-Trial Chamber II's witness protection instructions (second ground of appeal). The merits of the issues of the absence of an agreement between the Court and Sudan, in violation of article 4(2) of the Statute, and of the OTP's non-compliance with the Information Protection Policy of the Court are not before the Honourable Appeals Chamber, and it is asked not to decide those issues at this time. This clarification is provided here to pre-empt any temptation on the part of the Honourable Appeals Chamber to decide those issues which are not before it, as it likewise did in Judgment OA4. In that judgment the Honourable Appeals Chamber saw fit to rule on the merits of the additional principles of reparations to victims, which were not before it, without hearing the observations of the parties and without hearing the observations on the views and concerns of the victims whose interests were directly affected within the meaning of article 68(3) of the Statute, and without even having the Defence's submissions in support of the

additional principles translated into a working language in which its Honourable Judges were proficient.<sup>14</sup> Although the Defence accepts that Appeal Judgment OA4 is *res judicata*, it believes that the scope of the present appeal needs to be underscored so as to ensure that the Bench does not once again rule on the two aforesaid issues without an opportunity for the Defence to set out its observations on them in full. The Honourable Appeals Chamber is, therefore, requested to confine its consideration of this appeal strictly to the three grounds set out below, to the exclusion of any other issues. It is not asked to rule, at the time of this appeal, on the legality of the Court's activities on the territory of Sudan absent an agreement, or on the consequences of the OTP's violation of the Information Protection Policy.

**FIRST GROUND OF APPEAL – ERROR OF FACT AND/OR LAW:  
REJECTION OF THE NEW CIRCUMSTANCES RAISED BY THE DEFENCE  
ON THE GROUND THAT THEY CONCERN ONLY AN INSIGNIFICANT  
PORTION OF THE RELEVANT EVIDENCE (PARAGRAPH 26)**

11. At paragraphs 18-37 of its observations regarding the Review, the Defence relied on two circumstances which had recently come to its attention to challenge the admissibility of the evidence available in the record of the case as to whether Mr Ali Muhammad Ali Abd-Al-Rahman and the person by the name of “Ali Kushayb” are one and the same and, more generally, as to reasonable grounds to believe he might be responsible for the crimes described in the warrants of arrest. The first of those circumstances was the absence of an agreement between the Court and Sudan, which rendered all of the Court's activities unlawful under the Statute and, accordingly, compromised the admissibility of the evidence unlawfully collected in Sudan.<sup>15</sup> The second circumstance was that OTP witness statements were not marked as confidential, in violation of the Information Protection Policy of the Court,<sup>16</sup> which compromised the confidentiality and therefore the reliability and admissibility

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<sup>14</sup> [ICC-02/05-01/20-237](#).

<sup>15</sup> [ICC-02/05-01/20-213-Red](#), paras. 18-29.

<sup>16</sup> [ICC/AI/2007/001: ICC Information Protection Policy](#), 19 June 2007, section 7.

of that information.<sup>17</sup> Within each of those two categories of evidence, the Defence identified the items of evidence which had been adverted to in the OTP's article 58 application of 2007<sup>18</sup> and which directly implicated Mr Ali Muhammad Ali Abd-Al-Rahman, whom the OTP identifies by the alternative name "Ali Kushayb". The Defence also made clear that the two lists of inadmissible evidence were not exhaustive and would be completed as the OTP continued to disclose material.<sup>19</sup>

12. That notwithstanding, of the 22 items of evidence referred to at paragraphs 36 and 161-164 of the OTP's 2007 application to show that Mr Ali Muhammad Ali Abd-Al-Rahman and/or "Ali Kushayb" was involved in the crimes described,<sup>20</sup> the Defence identified 11 items – that is to say 50 per cent of the evidence – which had already been disclosed and which were affected by one or both of the circumstances brought to the notice of the Honourable Pre-Trial Chamber II in its observations.<sup>21</sup> Also identified were a further 25 relevant items which had been disclosed to the Defence by the date of its observations and which were not referred to in the OTP's article 58 application of 2007.<sup>22</sup>

<sup>17</sup> [ICC-02/05-01/20-213-Red](#), paras. 30-37.

<sup>18</sup> ICC-02/05-55-Conf-Red.

<sup>19</sup> [ICC-02/05-01/20-213-Red](#), paras. 25, 35.

<sup>20</sup> DAR-OTP-0037-0016; DAR-OTP-0037-0037; DAR-OTP-0037-0042; DAR-OTP-0086-0586; DAR-OTP-0088-0085; DAR-OTP-0088-0129; DAR-OTP-0088-0150; DAR-OTP-0088-0219; DAR-OTP-0095-0002; DAR-OTP-0097-0328; DAR-OTP-0110-0054; DAR-OTP-0111-0054; DAR-OTP-0111-0061; DAR-OTP-0111-0063; DAR-OTP-0112-0142; DAR-OTP-0112-0175; DAR-OTP-0119-0503; DAR-OTP-0122-0002; DAR-OTP-0122-0007; DAR-OTP-0122-0021; DAR-OTP-0122-0024; DAR-OTP-0122-0034; DAR-OTP-0122-0037.

<sup>21</sup> DAR-OTP-0037-0016; DAR-OTP-0037-0037; DAR-OTP-0037-0042; DAR-OTP-0086-0586; DAR-OTP-0088-0219; DAR-OTP-0111-0054; DAR-OTP-0119-0503; DAR-OTP-0122-0002; DAR-OTP-0122-0007; DAR-OTP-0122-0021; DAR-OTP-0122-0024; DAR-OTP-0122-0034. All are specifically adverted to at paragraphs 25 and/or 35 of the Defence Observations.

<sup>22</sup> DAR-OTP-0202-0108 (written record) and DAR-OTP-0122-0003 (video); DAR-OTP-0202-0122 (written record) and DAR-OTP-0122-0004 (video); DAR-OTP-0202-0133 (written record) and DAR-OTP-0122-0005 (video); DAR-OTP-0202-0172 (written record) and DAR-OTP-0122-0008 (video); DAR-OTP-0202-0190 (written record) and DAR-OTP-0122-0009 (video); DAR-OTP-0202-0215 (written record) and DAR-OTP-0122-0010 (video); DAR-OTP-0202-0241 (written record) and DAR-OTP-0122-0011 (video); DAR-OTP-0273-0092 (written record) and DAR-OTP-0122-0012 (video); DAR-OTP-0202-0293 (written record) and DAR-OTP-0122-0013 (video); DAR-OTP-0202-0317 (written record) and DAR-OTP-0122-0014 (video); DAR-OTP-0202-0337 (written record) and DAR-OTP-0122-0015 (video); DAR-OTP-0202-0358 (written record) and DAR-OTP-0122-0016 (video); DAR-OTP-0122-017 (video); DAR-OTP-0202-0396 (written record) and DAR-OTP-0122-0018 (video); DAR-OTP-0122-019 (video); DAR-OTP-0202-0450 (written record) and DAR-OTP-0122-0022 (video); DAR-OTP-0122-025 (video); DAR-OTP-0122-026 (video); DAR-OTP-0202-0549 (written record) and DAR-OTP-0122-0027 (video); DAR-OTP-0122-028 (video); DAR-OTP-0122-029 (video); DAR-OTP-



13. The Defence would add that, of the 11 documents referred to in the OTP's article 58 application of 2007 but not yet disclosed to the Defence at the time of its observations<sup>23</sup> – and on which the Defence was not, therefore, in a position to take a view – six were disclosed before the Honourable Pre-Trial Chamber II delivered the Decision under Appeal.<sup>24</sup> Five of those six were disclosed after redaction of the site of their collection and so the Defence could not ascertain the impact of the absence of an agreement with Sudan, but the Honourable Pre-Trial Chamber II had that information and should have taken it into account. The same five items of evidence are also not marked “confidential”,<sup>25</sup> in violation of the Court's Information Protection Policy,<sup>26</sup> bringing to 16 out of 22 – that is to say 72 per cent – the number of items of evidence affected by one or both of the circumstances brought to light in the Defence Observations. Another of the 22 documents is merely a scanned photograph of a compact disc which is of no relevance or probative value to a determination of Mr Ali Muhammad Ali Abd-Al-Rahman's involvement in the commission of the crimes described in the warrants of arrest.<sup>27</sup> To date, the OTP has not disclosed to the Defence the last five documents<sup>28</sup> despite having given an undertaking, concerning solely the parties to the case [*inter partes*], that it would disclose them as a matter of priority at the express request of the Defence for the review of detention.<sup>29</sup>

14. Of all 17 items of evidence disclosed to the Defence on which the OTP relied in 2007 to apply for a summons to appear to be issued against Mr Ali Muhammad Ali Abd-Al-Rahman, the only item not affected by one or both of the circumstances

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0122-030 (video); DAR-OTP-0122-031 (video); DAR-OTP-0202-0693 (written record) and DAR-OTP-0122-0032 (video); and DAR-OTP-0122-035 (video).

<sup>23</sup> DAR-OTP-0088-0085; DAR-OTP-0088-0129; DAR-OTP-0088-0150; DAR-OTP-0095-0002; DAR-OTP-0097-0328; DAR-OTP-0110-0054; DAR-OTP-0111-0061; DAR-OTP-0111-0063; DAR-OTP-0112-0142; DAR-OTP-0112-0175; DAR-OTP-0122-0037.

<sup>24</sup> DAR-OTP-0088-0150; DAR-OTP-0097-0328; DAR-OTP-0110-0054; DAR-OTP-0112-0142; DAR-OTP-0112-0175; DAR-OTP-0122-0037.

<sup>25</sup> DAR-OTP-0088-0150; DAR-OTP-0097-0328; DAR-OTP-0110-0054; DAR-OTP-0112-0142; DAR-OTP-0112-0175.

<sup>26</sup> [ICC/AI/2007/001: ICC Information Protection Policy](#), 19 June 2007, section 7.

<sup>27</sup> DAR-OTP-0122-0037.

<sup>28</sup> DAR-OTP-0088-0085; DAR-OTP-0088-0129; DAR-OTP-0095-0002; DAR-OTP-0111-0061; DAR-OTP-0111-0063.

<sup>29</sup> Defence request sent to OTP by email of 15 October 2020, 16.08, and OTP response sent by email of 20 October 2020, 19.03.

brought to the attention of the Honourable Pre-Trial Chamber II in the Defence Observations is a scanned photograph of a compact disc that is of no relevance or probative value.<sup>30</sup> The five remaining items were never disclosed, in breach of the OTP's undertaking. Twenty-five other items of evidence not referred to in the article 58 application of 2007 but disclosed to the Defence were also affected by one or both of the circumstances.

15. In the Decision under Appeal, Pre-Trial Chamber II does not dispute the existence of the new circumstances brought to its notice by the Defence, but rejects the submissions made by the Defence on that basis on the ground that their bearing on the validity of the warrants of arrest is limited:

The Chamber is not persuaded that the arguments put forward by the Defence, even if accepted in their entirety, would rise to the level that they could lead to the annulment of the warrants of arrest. Indeed, the Chamber observes that the bulk of the evidence relied on in support of the warrants of arrest was obtained outside Sudan and is thus not affected by the Defence's arguments concerning article 4(2) of the Statute. Similarly, the amount of evidence that is claimed to be inadmissible on the basis of the alleged violation of the Court's Information Protection Policy is relatively insignificant compared to the entirety of the evidence in support of the warrants of arrest.<sup>31</sup>

16. The Honourable Pre-Trial Chamber II's conclusion – that the portion of the evidence affected by the two circumstances brought to light by the Defence was “relatively insignificant compared to the entirety of the evidence in support of the warrants of arrest” – is affected by error of fact. Whereas the portion of the evidence at issue in the Defence Observations was quantitatively limited, it was qualitatively substantial in that it represented 50 per cent of the evidence which went to the alleged involvement of Mr Ali Muhammad Ali Abd-Al-Rahman referred to in the OTP's article 58 application of 2007<sup>32</sup> and relied upon to issue the first warrant of arrest. The status of disclosure of evidence by the OTP was such that the Defence was not in a position at the date of its observations to make an overall survey of the impact, on the entirety of the OTP's evidence, of the two circumstances brought to the Honourable Pre-Trial Chamber II's attention. It was, however, in a position to show that at least

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<sup>30</sup> DAR-OTP-0122-0037.

<sup>31</sup> [ICC-02/05-01/20-230-Red](#), para. 26.

<sup>32</sup> [ICC-02/05-56](#).

50 per cent of the evidence of Mr Ali Muhammad Ali Abd-Al-Rahman’s alleged involvement in the crimes described in the first warrant of arrest – a portion that could not be characterized as “relatively insignificant” without committing an error of fact – was affected by one or both of those two circumstances.

17. Continued disclosure following the filing of the Defence Observations and preceding the issuance of the Decision under Appeal brought from 50 per cent to 78 per cent the proportion of the evidence which was referred to in the OTP’s article 58 application of 2007 to lend support to Mr Ali Muhammad Ali Abd-Al-Rahman’s involvement in the commission of the crimes alleged and which is affected by one or both of the two circumstances raised by the Defence. As regards the other 5 of the 22 items, which have not been disclosed,<sup>33</sup> the fact that the OTP did not honour its undertaking *inter partes*<sup>34</sup> to disclose them to the Defence as a matter of priority, and that the Honourable Pre-Trial Chamber II never ordered them to be disclosed despite their central relevance to the matter of continued detention, cannot be blamed on the Defence. By concluding that the portion of the evidence affected by the circumstances brought to its notice by the Defence was “relatively insignificant”, when the entirety of the relevant evidence was at issue, the Chamber therefore clearly erred in fact.

18. The Defence Observations referred solely to the category of evidence going to Mr Ali Muhammad Ali Abd-Al-Rahman’s alleged involvement in the commission of the crimes stated in the first warrant of arrest. That choice was dictated by (i) the status of disclosure and (ii) the fact that the other, by very far more copious, evidence – going to the context, the commission of crimes and the involvement of Mr Ahmad Harun, against whom the OTP’s article 58 application of 2007 was also directed – was not directly relevant to showing reasonable grounds to believe that Mr Ali Muhammad Ali Abd-Al-Rahman might have committed one of the crimes stated in the warrant of arrest. The other evidence was therefore irrelevant to the review of

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<sup>33</sup> DAR-OTP-0088-0085; DAR-OTP-0088-0129; DAR-OTP-0095-0002; DAR-OTP-0111-0061; DAR-OTP-0111-0063.

<sup>34</sup> Defence request sent to OTP by email of 15 October 2020, 16.08, and OTP response sent by email of 20 October 2020, 19.03.

Mr Ali Muhammad Ali Abd-Al-Rahman's detention. If the Honourable Pre-Trial Chamber II's conclusion – that the portion of the evidence affected by the circumstances brought to its notice was “relatively insignificant” – was reached on the ground that the other evidence of the context, the commission of crimes and the involvement of Mr Ahmad Harun was not referred to in the Defence Observations, it also erred in fact and law, since those other factors had no basis in reality as far as the issue of the review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention was concerned.

19. To require from the Defence submissions on the entirety of the evidence, whereas the disclosure process is still ongoing and the Defence has not received the evidence in its entirety, was irrelevant and cast on the Defence a burden that cannot be discharged. By requiring the Defence to make a showing which encompassed the evidence in its entirety, the Honourable Pre-Trial Chamber II also, therefore, erred in law by rendering it in reality impossible to make a showing for the limited needs of the release.

20. On the subject of the periodic review of detention, the Honourable Appeals Chamber has held that

[i]n order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case. [...] The Pre-Trial Chamber should ensure that in the disclosure process priority is given to those documents that are essential for the person to receive in order effectively to challenge the lawfulness of detention.<sup>35</sup>

21. In the light of that authority, the fact that the status of disclosure precluded submissions from being made on the entirety of the relevant evidence could not be used against Mr Ali Muhammad Ali Abd-Al-Rahman to keep him detained on the ground that only a “relatively insignificant” portion of the evidence of his alleged involvement in the crimes described in the warrants of arrest was at issue in the observations of his Defence. The Defence was judicious in focusing its submissions on only that evidence which went to Mr Ali Muhammad Ali Abd-Al-Rahman's alleged involvement in the crimes and which had been disclosed to it by the date of

<sup>35</sup> [ICC-01/05-01/08-323 OA](#), paras. 1, 4.

its observations. The fact that other relevant evidence had not yet been disclosed to it is either the fault of the Honourable Pre-Trial Chamber II, for not having clearly ordered its disclosure in sufficient time despite its manifest relevance to the matter of continued detention, or the fault of the OTP for not having honoured the undertaking *inter partes*<sup>36</sup> to prioritize disclosure of the evidence on which it had based its article 58 applications. The fault cannot in any event be laid at the door of the Defence, which acted with utmost diligence. Mr Ali Muhammad Ali Abd-Al-Rahman cannot be made to suffer the consequences of the Honourable Pre-Trial Chamber II's and/or the OTP's contravention of the Honourable Appeals Chamber's previous ruling, quoted above, by remaining in custody. The Decision under Appeal must, therefore, be set aside on this first ground.

**SECOND GROUND OF APPEAL – ERROR OF FACT AND/OR LAW:  
REGARD HAD TO OTP WITNESS PROTECTION EFFORTS (PARAGRAPH 31)**

22. At paragraph 31 of the Decision under Appeal, the Honourable Pre-Trial Chamber II erred in fact and/or law by having regard to the OTP's efforts to protect its witnesses in concluding that "it is not correct, as is argued by the Defence, that the Prosecutor is somehow in breach of the Interim Release Decision". Since the time of the Decision under Appeal, the Honourable Pre-Trial Chamber II has, in any event, at paragraph 25 of the Decision of 18 December 2020 ordering a second postponement of the confirmation hearing, backtracked on that conclusion and stated the exact opposite: "the Prosecutor has violated the Chamber's instructions" regarding the protection of her witnesses.<sup>37</sup> Between the Honourable Pre-Trial Chamber II's conclusion of 11 December 2020 in the Decision under Appeal – that the OTP had not violated its witness protection instructions – and its conclusion of 18 December 2020 – that it had violated them – the Honourable Pre-Trial Chamber II was not made aware of any new or significant development capable of accounting for this about-turn other

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<sup>36</sup> Defence request sent to OTP by email of 15 October 2020, 16.08, and OTP response sent by email of 20 October 2020, 19.03.

<sup>37</sup> [ICC-02/05-01/20-238](#), para. 25.

than by the shifting nature of the Chamber's determination depending on whether Mr Ali Muhammad Ali Abd-Al-Rahman's continued detention or the postponement of the confirmation hearing sought by the OTP is at issue. Where it is Mr Ali Muhammad Ali Abd-Al-Rahman's detention that is at stake, the Honourable Pre-Trial Chamber II takes the view that the OTP has not violated its witness protection instructions; where it is the Prosecutor's request for further delay of the confirmation hearing, suddenly the Chamber is of the view that the OTP has violated its instructions and the hearing must again be delayed to afford it another chance to protect its witnesses. This double standard, which calls in question the impartiality of the Honourable Pre-Trial Chamber II, establishes by itself the error of fact and law committed in this respect in the Decision under Appeal.

23. The showing of error of fact and law does not, in any event, end there. The Defence Observations treated at length the absence of an agreement between Sudan and the Court, or the OTP, that would allow the OTP to undertake its activities, witness protection included, on the territory of Sudan, as required by article 4(2) of the Statute.<sup>38</sup> In the Defence's submission, "[TRANSLATION] the absence of an agreement concluded under article 4(2) of the Statute makes it impossible to protect victims and witnesses pursuant to article 68(1) of the Statute on the territory of Sudan."<sup>39</sup> In its discussion of whether the OTP has taken the necessary steps to protect its witnesses, the Honourable Pre-Trial Chamber II makes no mention of the absence, in violation of article 4(2) of the Statute, of an agreement with Sudan. The issue is considered only in relation to its possible bearing on the admissibility of evidence,<sup>40</sup> whereas it was directly relevant to an appraisal of the OTP's purported efforts to protect its witnesses. By not having regard to the Defence's submissions founded on the violation of article 4(2) of the Statute, the Honourable Pre-Trial Chamber II erred in fact and law in concluding that "there is no indication that the Prosecutor did not take all feasible steps under the circumstances to comply with this instruction"<sup>41</sup> to protect her witnesses.

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<sup>38</sup> [ICC-02/05-01/20-213-Red](#), paras. 18-29.

<sup>39</sup> [ICC-02/05-01/20-213-Red](#), para. 23.

<sup>40</sup> [ICC-02/05-01/20-230-Red](#), para. 26.

<sup>41</sup> [ICC-02/05-01/20-230-Red](#), para. 31.

Proof that the OTP could not have taken any concrete steps to protect its witnesses on the territory of Sudan had been adduced by the Defence, and that proof was the absence of an agreement with Sudan. By disregarding it, the Honourable Pre-Trial Chamber II erred in fact (there was no agreement) and in law (it was impossible to protect witnesses on the territory of Sudan absent an agreement).

24. In respect of other witnesses, located outside Sudan, the Honourable Pre-Trial Chamber II also erred in law by not drawing the logical conclusions from the fact, as found at paragraph 25 of its Decision of 18 December 2020 on the second postponement of the confirmation hearing, that the OTP had violated its instructions.<sup>42</sup>

25. The Decision under Appeal must, therefore, be set aside on this second ground as well.

**THIRD GROUND OF APPEAL – ERROR OF FACT AND/OR LAW:  
DISREGARD FOR THE PARTICULAR CIRCUMSTANCES OF MR ALI  
MUHAMMAD ALI ABD-AL-RAHMAN’S DETENTION AND ITS IMPACT ON  
HIS HEALTH (PARAGRAPH 34)**

26. At paragraph 38 of its observations, the Defence recalled that, as the Honourable Pre-Trial Chamber II had already been informed, [REDACTED]<sup>43</sup> and [REDACTED]. The Defence also emphasized that Mr Ali Muhammad Ali Abd-Al-Rahman was 71 years of age, making him the oldest person currently in the Court’s custody, and [REDACTED]. Lastly the Defence observed that [REDACTED]. The Defence accordingly submitted that, apart from any specific criterion under article 58 of the Statute, and [REDACTED]<sup>44</sup> [REDACTED].<sup>45</sup>

27. At paragraph 34 of the Decision under Appeal, the Honourable Pre-Trial Chamber II considers that the particular circumstances described at paragraph 38 of the Defence Observations do not warrant Mr Ali Muhammad Ali Abd-Al-Rahman’s

<sup>42</sup> [ICC-02/05-01/20-238](#), para. 25.

<sup>43</sup> ICC-02/05-01/20-205-Conf.

<sup>44</sup> [REDACTED].

<sup>45</sup> [ICC-02/05-01/20-213-Red](#), para. 38.

release on humanitarian grounds, a view which it bases exclusively on the change in his state of health.<sup>46</sup>

28. The Honourable Pre-Trial Chamber II makes no mention of, nor has any regard to, the other circumstances relevant to its determination on this point, which are Mr Ali Muhammad Ali Abd-Al-Rahman's age and particular prison environment. [REDACTED]<sup>47</sup> [REDACTED].<sup>48</sup> [REDACTED]. That these factors were disregarded in the Honourable Pre-Trial Chamber II's ponderation amounts to an error of fact, on the ground of which the Decision under Appeal must be set aside.

29. In its pondering of that aspect, the Honourable Pre-Trial Chamber II also erred in law by not ordering the minimum measures which respect for Mr Ali Muhammad Ali Abd-Al-Rahman's right to life demanded. For instance, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe in its "Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic" of 20 March 2020 has recommended that

[a]s close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to **resort to alternatives to deprivation of liberty**. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should **make greater use of alternatives to pre-trial detention**, commutation of sentences, early release and probation [...]<sup>49</sup>

and that

special attention will be required to the specific needs of detained persons with particular regard to vulnerable groups and/or at-risk groups, such as **older persons** and persons with pre-existing medical conditions [emphasis added].<sup>50</sup>

Article 21(3) of the Statute required the Honourable Pre-Trial Chamber II, in pondering the Defence Observations, to have regard to those recommendations and to the dangers inherent to Mr Ali Muhammad Ali Abd-Al-Rahman's age and

<sup>46</sup> [ICC-02/05-01/20-230-Red](#), para. 34.

<sup>47</sup> [REDACTED].

<sup>48</sup> [REDACTED].

<sup>49</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease \(COVID-19\) pandemic](#), 20 March 2020, section 5.

<sup>50</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease \(COVID-19\) pandemic](#), 20 March 2020, section 6.



[REDACTED]. By not doing so the Honourable Pre-Trial Chamber II rendered the Council of Europe's recommendation, which is applicable pursuant to article 21(3) of the Statute, nugatory. It is imperative that the Honourable Appeals Chamber correct this error of law, lest Mr Ali Muhammad Ali Abd-Al-Rahman be left with no option but to turn to the Dutch domestic courts, and if need be the European Court of Human Rights (ECtHR), to ensure that his right to life under the European Convention for the Protection of Human Rights and Fundamental Freedoms, articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment or punishment), is respected.

### **RELIEF SOUGHT**

30. Pursuant to article 83(2) of the Statute, the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman prays the Honourable Appeals Chamber to determine that the Decision under Appeal is materially affected by the three alternative errors of fact and/or law above, to reverse the Decision under Appeal and to order the immediate release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the host State, on any conditions which the Court and/or the host State may consider it necessary to impose pursuant to rule 119 of the RPE and/or article 38(3) of the Headquarters Agreement.

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

**ALLOW** this appeal and **REVERSE** the Decision under Appeal; **AND**

**ORDER** the interim release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the host State, on any conditions which the Court and/or the host State may consider it necessary to impose pursuant to rule 119 of the RPE and/or article 38(3) of the Headquarters Agreement.

[signed]

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

Dated this 1 January 2021

At The Hague, Netherlands