

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: ICC-02/05-01/20
Date: 25 September 2020

THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN***

Public Document

Request under Articles 38(3)(a), 43(2) and 115(b)

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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Mr Marc Dubuisson, Director,
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BACKGROUND TO THE REQUEST

1. On 31 March 2005, the United Nations Security Council adopted resolution 1593 (2005).¹ Paragraph 1 of that resolution refers the situation in Darfur, Sudan since 1 July 2002 to the Prosecutor of the International Criminal Court. Paragraph 7 of resolution 1593, moreover, reads:

Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.

2. On the basis of the referral effected by resolution 1593, the Office of the Prosecutor (OTP) initiated an investigation into the situation in Darfur on 1 June 2005.² In the context of that investigation, a first warrant for the arrest of Mr Ali Muhammad Ali Abd-Al-Rahman was issued on 27 April 2007.³ A second warrant of arrest, dated 16 January 2018, was made public on 11 June 2020.⁴

3. The United Nations has not made any contribution to the budget of the Court in respect of the funding of its activities in the situation in Darfur, Sudan, including case ICC-02/05-01/07 and the case *sub judice*, ICC-02/05-01/20. None of the successive resolutions of the Assembly of States Parties relating to the budget of the Court⁵ record the receipt of any such financial contribution from the United Nations, be it to fund the Court's activities in relation to the situation in Darfur, Sudan, the case *sub judice* or any other activity. In 2018, the Court laid before the Assembly of States Parties a first "Report of the Registry on the approximate costs allocated so far within the Court in relation to referrals by the Security Council".⁶ The 2018 report put at

¹ United Nations, Security Council, [Resolution 1593 \(2005\)](#), 31 March 2005.

² [ICC-02/05-2](#): "Decision by the Prosecutor to initiate an investigation", 1 June 2005.

³ [ICC-02/05-01/07-3](#): "Warrant of Arrest for Ali Kushayb", 27 April 2007. Although the title of the warrant of arrest names "Ali Kushayb", the warrant states at page 17 that it is in fact directed at Mr Ali Muhammad Ali Abd-Al-Rahman. Lead Counsel refers to decision [ICC-02/05-1/20-8](#) of 26 June 2020 for further particulars in this regard.

⁴ [ICC-02/05-01/07-74-Red](#): "Public redacted version of 'Second Warrant of Arrest for Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')", 16 January 2018, ICC-02/05-01/07-74-Secret-Exp", 11 June 2020.

⁵ [Documents ICC-ASP/4/Res. 8](#); [ICC-ASP/5/Res. 4](#); [ICC-ASP/6/Res. 4](#); [ICC-ASP/7/Res. 4](#); [ICC-ASP/8/Res. 7](#); [ICC-ASP/10/Res. 4](#); [ICC-ASP/11/Res. 1](#); [ICC-ASP/12/Res. 1](#); [ICC-ASP/13/Res. 1](#); [ICC-ASP/14/Res. 1](#); [ICC-ASP/15/Res. 1](#); [ICC-ASP/16/Res. 1](#); [ICC-ASP/17/Res. 4](#).

⁶ [Document ICC-ASP/17/27](#): "Report of the Registry on the approximate costs allocated so far within the Court in relation to referrals by the Security Council", 29 October 2018.

€47,510,100 the total cost of the Court's activities in relation to the situation in Darfur since 2006, specifically €31,301,600 for OTP activities and €16,159,000 for Registry activities, whereas the only active judicial proceedings thus far had been the initial appearances and confirmation hearings in cases ICC-02/05-02/09 and ICC-02/05-03/09. An updated version of that report was submitted to the Assembly of States Parties in 2019, bringing the total cost of the Court's activities solely in relation to the situation in Darfur since 2006 to €49,001,200, specifically €32,462,100 for OTP activities and €16,462,500 for Registry activities.⁷ That the Assembly of States Parties has asked the Registry to report to it annually on changes to these expenditures shows that its concerns in this regard have substance.

4. The Court is currently facing an unprecedented level of arrears on assessed contributions from States Parties. In 2019, total outstanding assessed contributions at the end of the period amounted to an unprecedented €37,970,200 or 25.6 per cent of the Court's overall budget for the year 2019, including €18,661,800 for 2019 alone.⁸ What was already a worrying state of affairs appears to be deteriorating further in 2020. In its report ICC-ASP/19/5 of 24 August 2020, the Committee on Budget and Finance (CBF) of the Court expressed deep concern at the fact that, as at 31 May 2020, unpaid assessed contributions amounted to an unprecedented 70.45 million euros or 47 per cent of the Court's approved budget for 2020. It remarked that failure by States Parties to pay their assessed contributions would result in a cash flow shortfall which would impede the Court's core activities and operations.⁹

5. No head of expenditure remains unaffected; not even the compensation of the Honourable Judges of the Court, to such an extent that, in order to protect their level

⁷ [Document ICC-ASP/18/28](#): "Report of the Registry on the Approximate Costs Allocated so far within the Court in Relation to Referrals by the Security Council", 15 November 2019.

⁸ [Document ICC-ASP/18/15](#): "Report of the Committee on Budget and Finance on the work of its thirty-third session", 13 November 2019, p. 35, para. 167, Table 6 and Graph 2. Information on the level of arrears on assessed contributions in 2020 has not yet been made public by the Court. The level of arrears in 2020 may form the subject matter of an addendum to the present submissions if it is made public before the decision of the Single Judge.

⁹ [Document ICC-ASP/19/5](#): "Report of the Committee on Budget and Finance on the work of its thirty-fourth session", 24 August 2020, para. 37.

of compensation, including their pension entitlement, some were left with no choice but to avail themselves of the administrative redress procedures ordinarily intended for Court staff. Complaints lodged by two Honourable Judges of the Court have resulted in two judgments handed down by the International Labour Organization Administrative Tribunal (ILOAT).¹⁰

6. The Court's financial independence thus finds itself buffeted, on the one side, by the arrears on assessed contributions from States Parties in breach of article 115(a) – 70.45 million euros as at 31 May 2020 – and, on the other, by the costs not funded by the United Nations – €49,001,200 in 2019 in respect of the situation in Darfur, Sudan, alone – giving a sum-total, but not the present value, of over 119 million euros, i.e. more than 79.8% of the Court's overall budget for the year 2020. The cumulative effect of the arrears on assessed contributions from States Parties and the breach of article 115(b) of the Statute by the United Nations, therefore, is that the Court has to carry out all of its activities in 2020 with what amounts, in fact, to scarcely more than 20% of its approved budget for the year.

7. The trend has reached a point where it is legitimate to fear that it might potentially affect the Court's financial independence and ability to conduct judicial proceedings irrespective of the financial circumstances that beset it, including in the case *sub judice*. The instant Request is not intended to address this particular point, which may, depending on how the Presidency treats it, form the subject matter of subsequent applications before the Honourable Pre-Trial Chamber II.

HISTORY TO THE FILING OF THE REQUEST

8. On 26 June 2020, the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman put before the Honourable Single Judge in charge of the pre-trial proceedings in the case a first request under article 115(b) ("First Request").¹¹ The First Request was very much akin to the instant Request in subject matter and relief sought,¹² save that it was put to the Honourable Single Judge and suggested, in the alternative, that he refer it

¹⁰ International Labour Organization Administrative Tribunal, Judgments Nos. [3359](#) and [3859](#).

¹¹ [ICC-02/05-01/20-10](#): "Requête en vertu de l'Article 115-b", 26 June 2020.

¹² [ICC-02/05-01/20-10](#): *op. cit.*, para. 14.

to the Presidency of the Court for prompt consideration pursuant to article 38(3) of the Rome Statute.¹³

9. The OTP did not take issue with the First Request, electing not to respond.

10. By a decision of 23 July 2020 (“Decision of 23 July 2020”), the Honourable Single Judge rejected the First Request on the principal grounds that (i) the filing thereof exceeded the remit of the Defence, which lacked standing to evaluate or make recommendations on the financial management of the Court; and (ii) the Pre-Trial Chamber did not have competence to rule on the financial matters raised in the First Request or to refer them to the Presidency of the Court.¹⁴

11. On 27 July 2020,¹⁵ the Defence applied to the Honourable Pre-Trial Chamber II for leave to appeal against the Decision of 23 July 2020 (“Request for Leave to Appeal”).

12. The Honourable Pre-Trial Chamber II denied the Request for Leave to Appeal by a decision of 13 August 2020, on the principal ground that it did not clearly identify the issue involved in the Decision of 23 July 2020 which the Defence wished to submit to the consideration of the Honourable Appeals Chamber (“Decision of 13 August 2020”).¹⁶

13. On that same day, the Defence sought reconsideration of the Decision of 13 August 2020 by the Honourable Pre-Trial Chamber II.¹⁷

14. The Honourable Pre-Trial Chamber II denied reconsideration on 23 September 2020.¹⁸

15. Having exhausted all available remedies to secure consideration of its request under article 115(b) of the Statute by the Honourable Chambers, the Defence brings

¹³ [ICC-02/05-01/20-10](#): *op. cit.*, para. 15.

¹⁴ [ICC-01/05-01/20-101](#): “Decision on the Defence Request under article 115(b) of the Rome Statute” (French version not available), 23 July 2020, paras. 7-8.

¹⁵ [ICC-02/05-01/20-105](#): “Demande d’autorisation d’interjeter appel de la ‘Decision on the Defence Request under article 115(b) of the Rome Statute’ (ICC-02/05-01/20-101)”, 27 July 2020.

¹⁶ [ICC-02/05-01/20-110](#): “Decision on the Defence Request for Leave to Appeal the ‘Decision on the Defence Request under article 115(b) of the Rome Statute’” (French version not available), 13 August 2020, paras. 12-14.

¹⁷ [ICC-02/05-01/20-113](#): “Demande de reconsidération de la Décision ICC-02/05-01/20-110”, 13 August 2020.

¹⁸ [ICC-02/05-01/20-163](#): “Décision relative à la demande aux fins de réexamen de la décision ICC-02/05-01/20-110 présentée par la Défense (ICC-02/05-01/20-113)”, 23 September 2020.

that request now, by way of the instant Request, before the Presidency of the Court, inasmuch as the Honourable Single Judge held in his Decision of 23 July 2020 that he lacked competence to refer it to the Presidency.¹⁹

LEGAL BASIS FOR APPLICATION TO THE PRESIDENCY

16. The instant Request under article 115(b) is addressed to the Presidency of the Court on the principal basis of article 38(3)(a) of the Statute, which provides that the Presidency of the Court is responsible for “the proper administration of the Court, with the exception of the Office of the Prosecutor”. On the basis of that article alone and without reliance on any other provision expressly vesting the Presidency with competence to determine particular matters,²⁰ the Presidency has intervened, at the request of parties,²¹ in judicial proceedings in cases being heard before the Honourable Chambers. The Honourable Chambers have also on occasion dismissed an application, addressed to them, on the ground that it fell within the competence of the Presidency under article 38(3)(a) of the Statute.²² The Presidency is, therefore, empowered to exercise its competence in a case being heard before an Honourable Chamber of the Court, not least in respect of a matter over which that Honourable Chamber has held itself to be without competence.

17. In addition to article 38(3)(a) of the Statute, the legal basis for the Presidency’s competence to adjudicate the instant Request may be found in article 43(2), which provides that the Registrar of the Court “shall be the principal administrative officer of the Court” and “shall exercise his or her functions under the authority of the President of the Court”. The function of “administrative officer of the Court” encompasses the financial administration of the Court and aspects relating to its

¹⁹ [ICC-01/05-01/20-101](#): *op. cit.*, para. 8.

²⁰ Such as regulations 72 and 85 of the Regulations of the Court or regulations 56 and 221 of the Regulations of the Registry.

²¹ [ICC-01/04-01/06-874](#): “Decision of the Presidency upon the document entitled ‘Clarification’ filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007”, 2 May 2007, paras. 1-3. This decision of the Presidency disposed of the Defence’s applications [ICC-01/04-01/06-860-tEN](#) and [ICC-01/04-01/06-869-tEN](#) and the Registry’s observations [ICC-01/04-01/06-863-tEN](#).

²² [ICC-02/04-01/05-147](#): “Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005” (French version not available), 9 March 2006, paras. 73-74.

budget, for which the Registrar is responsible under the Financial Regulations and Rules (FRR) of the Court, *inter alia* in respect of “other income”, which includes funds received from the United Nations pursuant to article 115(b) of the Statute.²³ Although article 43(2) refers to the authority of the “President” alone, who is one of the three Honourable Judges who make up the Presidency pursuant to article 38(3) of the Statute, the Honourable Appeals Chamber has not ruled out the possibility that the President might exercise that authority with the Presidency sitting *en banc*:

Under the Statute, the “Registrar shall exercise his or her functions under the authority of the President of the Court”, as laid down in article 43 (2) of the Statute. The Registrar may therefore have recourse to the President of the Court for necessary advice and guidance. Whether the Presidency, the authority having responsibility for the proper administration of the Court with the exception of the Office of the Prosecutor (article 38 (3) of the Statute), may have any say in the transaction of the affairs of the Registry, need not be explored by the Appeals Chamber in this case.²⁴

18. The external relations of the Court at the highest level are, with the exception of the OTP, the province of the Presidency, which takes the lead, assisted by the competent services of the Registry. Involvement in the Court’s diplomatic relations is one of the Presidency’s key performance indicators in furtherance of strategic objective no. 6: “Strengthened trust, commitment and support among the Court’s external stakeholders through information-sharing at meetings, conferences, etc. regarding the Court’s efforts and commitment to provide high-quality justice in an expeditious manner”.²⁵ Foremost among those “external stakeholders” is the United Nations.

19. Were the Presidency, sitting *en banc*, to hold that it is without competence to rule on the instant Request on the basis of article 38(3)(a) and/or article 43(2), the Defence would, therefore, pray the Presidency, in the further alternative, to refer the Request to the authority of the Honourable President, sitting alone, for adjudication on the basis of article 43(2) of the Statute. Article 13(1) of the

²³ Regulation 7.1(b) of the Financial Regulations of the Court.

²⁴ [ICC-01/04-01/06-873](#): “Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007”, 27 April 2007, para. 6.

²⁵ [ICC-ASP/18/10](#): “Proposed Programme Budget for 2020 of the International Criminal Court”, 25 July 2019, Annex IV(d), p. 173.

Relationship Agreement between the Court and the United Nations (“Relationship Agreement”) specifies, moreover, that

[t]he United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements.

Whereas the Registrar of the Court is responsible for informing the Assembly of States Parties of the making of such arrangements, regulation 107(1) of the Regulations of the Court (RoC) lays down that the negotiation thereof must take place “under the authority of the President”. Authority to negotiate an arrangement necessarily includes the authority to decide on the initiation of such negotiations. If competence does not vest in the Presidency, sitting *en banc*, under articles 38(3)(a) and/or 43(2) of the Statute, the competence of the Honourable President of the Court sitting alone may, therefore, be founded on the authority of article 43(2) of the Statute read with article 13(1) of the Relationship Agreement and regulation 107(1) of the RoC.

INTEREST ENTITLING THE APPLICANT TO INSTITUTE A CLAIM

20. By filing the instant Request the Defence institutes a claim to ensure respect for the right of Mr Ali Muhammad Ali Abd-Al-Rahman to be tried “in accordance with the applicable law” as provided by article 66(1) of the Statute and “having regard to the provisions of this Statute, to a fair hearing conducted impartially” as provided by article 67(1), including but not limited to his rights to have “adequate [...] facilities for the preparation of the defence”, “[t]o be tried without undue delay” and “[t]o have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness” as provided by subparagraphs b, c and f thereof.

21. Insofar as article 115(b) is part of the Statute, the right to be tried “in accordance with the applicable law”, as article 66(1) provides, and “having regard to the provisions of this Statute”, as article 67(1) provides, includes the right to be tried by a Court operating in accordance with the financial conditions specifically laid down by article 115(b) of the Statute.

22. Insofar as the non-contribution by the United Nations to the funding of the Court's activities in relation to the situation referred by Security Council resolution 1593, in breach of article 115(b) of the Statute, has a direct, overall impact on the funding of the Court's operations and leaves no head of expenditure, not even the compensation of the Honourable Judges of the Court, unaffected, this state of affairs has the potential to impact directly on Mr Ali Muhammad Ali Abd-Al-Rahman's right under article 67(1) of the Statute "to a fair hearing conducted impartially".

23. Insofar as the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman is being denied the facilities to which it is entitled for its preparation, specifically such language services as are necessary to further its task, on the ground, among others, of their financial impact,²⁶ the calamitous budget position which the Court is now facing as a result of the absence of funding for its operations under article 115(b) of the Statute has a direct and concrete impact on his right under article 67(1)(b) and (f) of the Statute to have "adequate [...] facilities for the preparation of the defence" and "[t]o have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness".

24. Lastly, insofar as the OTP finds itself compelled to seek postponement of the confirmation hearing until a year after the first appearance of Mr Ali Muhammad Ali Abd-Al-Rahman on the ground, among others, that it lacks the resources to prepare its case,²⁷ the absence of United Nations funding for the activities of the Court, including those of the OTP, in breach of article 115(b) of the Statute, has a direct and concrete impact on his right under article 67(1)(c) of the Statute "[t]o be tried without undue delay".

25. In filing the instant Request the Defence is, therefore, acting in accordance with its remit to ensure that Mr Ali Muhammad Ali Abd-Al-Rahman's rights are respected.

²⁶ [ICC-02/05-01/20-136 OA](#): "Registrar's Observations on the 'Mémoire d'appel de la décision ICC-02/05-01/20-94', (ICC-02/05-01/20-111)" (French version not available), 27 August 2020, paras. 20-21.

²⁷ [ICC-02/05-01/20-157-Corr-Red](#): "Public Redacted Version of 'Corrected Version of 'Prosecution's Request to Postpone the Confirmation Hearing'", 17 September 2020" (French version not available), 17 September 2020, paras. 4, 29, 34, 36, 51, 53-54.

SUBJECT MATTER OF THE REQUEST

26. Article 115 – Funds of the Court and of the Assembly of States Parties – provides that

[t]he expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: (a) Assessed contributions made by States Parties; (b) **Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.** [Emphasis added].

27. Article 13(1) of the Relationship Agreement provides that

[t]he United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations **pursuant to article 115 of the Statute** shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements. [Emphasis added].

As underscored by the most authoritative scholarship,²⁸ this provision is worded so as to open a door for financial contributions from the United Nations to the Court other than when the Security Council refers a situation. It does not call into question the obligation of the United Nations to contribute financially to the activities of the Court in respect of situations referred by the Security Council.

28. The Court has not, to date, made any request to the United Nations for payment of its financial contribution under article 115(b) of the Rome Statute in relation to the situation in Darfur, Sudan, referred by Security Council resolution 1593. No public arrangement has been made or even put to negotiation pursuant to article 13(1) of the Relationship Agreement. And no contribution has been received pursuant to article 115(b) in respect of the situation in Darfur.

29. Nonetheless, the United Nations General Assembly, the body responsible for approving contributions to the Court's activities under article 115(b) of the Statute,

²⁸ William A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 1147 (French version not available); Luigi Condorelli and Annalisa Ciampi, "Comments on the Security Council Referral of the Situation in Darfur to the ICC" (2005), 3 *Journal of International Criminal Justice*, p. 594 (French version not available); Maarten Halff and David Tolbert, "Article 115", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed., Beck/Hart/Nomos, 2008, p. 1712 (French version not available); Juan Antonio Yáñez-Barnuevo and Concepción Escobar Hernández, "The International Criminal Court and the United Nations: A Complex and Vital Relationship", in Flavia Lattanzi and William Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court – Vol. II*, Il Sirente, 2004, pp. 59-62 (French version not available).

has stated itself to be in favour of funding the Court's activities in situations referred to it by the Security Council: "Noting the need for funding of expenses related to investigations or prosecutions of the International Criminal Court, including in connection with situations referred to the Court by the Security Council".²⁹ The Court's authorities at the time, however, were negligent in not taking immediate action to fulfil the United Nations General Assembly's wish and enter into an arrangement under article 13(1) of the Relationship Agreement. That negligence has had severe consequences for the Court's current financial position and its ability to prosecute cases from Sudan, including the case *sub judice*. The instant Request is also an opportunity for the Presidency in its current composition to undo the disastrous consequences of that negligence on the part of its predecessors.

30. The Assembly of States Parties was troubled by the state of affairs in its Resolution ICC-ASP/16/Res.6 of 14 December 2017.³⁰ At paragraphs 41-43 of that resolution, the Assembly

41. *Notes with concern* that, to date, expenses incurred by the Court due to referrals by the Security Council continue to be borne exclusively by States Parties and notes that, to date, the approved budget allocated so far within the Court in relation to the referrals made by the Security Council amount to approximately €58 million; 42. *Stresses* that, **if the United Nations is unable to provide funds for the Court to cover the expenses incurred due to referrals by the Security Council, this will, among other factors, continue to exacerbate resource pressure on the Court**; 43. *Urges* States Parties to pursue, within the General Assembly of the United Nations, **the implementation of article 115, paragraph (b), of the Rome Statute** also taking into account that article 13, paragraph 1, of the Relationship Agreement between the Court and the United Nations states that the conditions under which any funds may be provided to the Court by a decision of the General Assembly shall be subject to separate arrangements. [Emphasis added].

Yet the only concrete measures that have come of that resolution have been (i) the aggravation of the already high level of arrears on assessed contributions from States Parties and (ii) the request to the Court to make its "Report of the Registry on the approximate costs allocated so far within the Court in relation to referrals by the Security Council" to the 17th and 18th sessions of the Assembly of States Parties.³¹

²⁹ United Nations, General Assembly, [Resolution A/RES/67/295](#), 13 September 2013, p. 2.

³⁰ [Document ICC-ASP/16/Res. 6](#): "Strengthening the International Criminal Court and the Assembly of States Parties", 14 December 2017, para. 41.

³¹ [Document ICC-ASP/17/27](#): "Report of the Registry on the approximate costs allocated so far within the Court in relation to referrals by the Security Council", 29 October 2018; [Document ICC-ASP/18/28](#):

No concrete request for financial support for the Court's activities in the situation in Darfur and/or the related cases has, to date, been put to the United Nations on the basis of article 115(b) of the Rome Statute.

31. Mr Ali Muhammad Ali Abd-Al-Rahman, who reminded the Honourable Single Judge at his first appearance hearing that he had surrendered himself voluntarily to the Court in order to find justice before it,³² has a legitimate interest in the Court's being able to avail itself of financial conditions that are satisfactory and consistent with what the Rome Statute prescribed, so as to ensure that his trial is properly conducted with impartiality and independence. The difficulties encountered in respect of the Registry's making available the interpretation services for which article 67(1)(f) of the Rome Statute nonetheless provides in plain and unambiguous terms – difficulties which lie before the Honourable Appeals Chamber for consideration – are just one more reason to fear that the proper conduct of the judicial proceedings being embarked upon in case ICC-02/05-01/20 in accordance with the Rome Statute may be considerably affected by the budgetary deficit described above. Prompt resolution of the problem set out in the instant Request at the earliest stage of the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman therefore appears essential to fostering respect for his right to a fair trial.

32. Resolution of the matter has become all the more pressing in that the OTP has filed a request to postpone the confirmation hearing until a year after Mr Ali Muhammad Ali Abd-Al-Rahman's first appearance on the ground, among others, that it lacks sufficient resources to expedite the preparation of its case.³³ That request is pending before the Honourable Pre-Trial Chamber II and the Defence has secured an extension of time, until 5 October 2020, in which to respond to it.³⁴ If available,

"Report of the Registry on the Approximate Costs Allocated so far within the Court in Relation to Referrals by the Security Council", 15 November 2019.

³² [ICC-02/05-01/20-T-001-FRA](#): record of hearing, 15 June 2020, p. 6, lines 6-7.

³³ [ICC-02/05-01/20-157-Corr-Red](#): *op. cit.*, paras. 4, 29, 34, 36, 51, 53-54.

³⁴ [ICC-02/05-01/20-164](#): "Decision on the Defence's 'Requête en vertu des normes 23bis, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red'" (French version not available), 23 September 2020, para. 8. Further time to 9 October 2020 had been sought but was unfortunately denied. The Honourable Single Judge could not have anticipated the filing of the instant Request before the Presidency. It will be for him, should he think fit, to grant further time *proprio motu*

the answer which the Presidency gives to the instant Request will, as a matter of course, be of paramount and direct relevance to the preparation of the Defence response to the OTP's request to postpone the confirmation hearing.

33. Moreover, the matter of making available to the Defence the interpretation and translation services provided for by article 67(1)(f) of the Statute is also pending before the Appeals Chamber, which may wish to know how the Presidency disposes of the instant Request in order to take that into account in its deliberation, insofar as the Registry expressly raised the issue of funding of the services requested.³⁵

34. On the basis of that legitimate interest and in the light of the foregoing observations regarding the Court's worrying financial situation, Mr Ali Muhammad Ali Abd-Al-Rahman prays the Presidency in its current composition to take whatever action it sees fit to rectify the state of affairs – a legacy of the negligence described at paragraph 29 above, which is the fault of its predecessors. Such measures may in particular include, should the Presidency see fit, ordering the Registrar, or any other authority of the Court so empowered, to address without delay a request to the United Nations for funding pursuant to article 115(b) of the Rome Statute, in an amount of no less than the total present cost of the Court's activities thus far undertaken in connection with the situation in Darfur, Sudan – put at €49,001,200 in 2019 – and to enter immediately into negotiation with the United Nations on an arrangement to that end pursuant to article 13(1) of the Relationship Agreement. Lead Counsel also prays the Presidency to direct the Registrar of the Court to make a periodic report to the Honourable Pre-Trial Chamber II and the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman on progress accomplished as regards the funding, by the United Nations, of the Court's activities in the case *sub judice*, including the sending of the request, the status of the negotiation of the arrangement pursuant to article 13(1) of the Relationship Agreement, the authorization of the expenditure by the United Nations General Assembly, the payment schedule thereof and the payment of any financial contribution to the running of the Court's activities.

to enable the Defence to acquaint itself with the Presidency's decision before responding to the request to postpone the confirmation hearing.

³⁵ [ICC-02/05-01/20-136 OA](#): *op. cit.*, paras. 20-21.

35. In the further alternative, and were the Presidency to take the view that the instant Request falls more appropriately within the competence of the President of the Court sitting alone pursuant to article 43(2) of the Rome Statute, article 13(1) of the Relationship Agreement and regulation 107(1) of the RoC, the instant Request may be referred to him for his prompt consideration.

[signed]

Mr Cyril Laucci, Lead Counsel

Dated this 25 September 2020

At The Hague, Netherlands