



**Original: English**

**No. ICC-02/05-01/20 OA9  
Date: 27 August 2021**

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański, Presiding  
Judge Luz del Carmen Ibáñez Carranza  
Judge Marc Perrin de Brichambaut  
Judge Solomy Balungi Bossa  
Judge Gocha Lordkipanidze

**SITUATION IN DARFUR, SUDAN**

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

**Public document**

**Judgment**

**on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s  
“Decision on the review of detention” of 5 July 2021**

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan, Prosecutor  
Ms Helen Brady

**Counsel for the Defence**

Mr Cyril Laucci

**Legal Representatives of Victims**

Ms Amal Clooney  
Mr Nasser Mohamed Amin Abdalla

**The Office of Public Counsel for victims**

Ms Paolina Massidda

**REGISTRY**

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**Registrar**

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II entitled “Decision on the review of detention” of 5 July 2021 (ICC-02/05-01/20-430),

After deliberations,

Unanimously,

*Delivers* the following

## **JUDGMENT**

The “Decision on the review of detention” of 5 July 2021 is confirmed.

### **REASONS**

#### **I. KEY FINDING**

1. When read in context, the Appeals Chamber considers that the “hearing” under rule 118(3) of the Rules is intended to be a hearing on the circumstances justifying continued detention in article 58(1) of the Statute. This interpretation is consistent with the practice in the chambers of this Court. The Appeals Chamber also finds that this interpretation of the text actualises the intention of its drafters in designating an annual hearing in order to strike a compromise about the scope of the right to a hearing on interim release.

#### **II. INTRODUCTION**

2. This is an appeal of the third decision of Pre-Trial Chamber II (the “Pre-Trial Chamber”) on the periodic review of the circumstances justifying Ali Muhammad Ali Abd-Al-Rahman’s (“Mr Abd-Al-Rahman”) detention pending trial. In this appeal, the Defence challenges the procedure taken by the Pre-Trial Chamber leading to its decision maintaining Mr Abd-Al-Rahman’s detention. The Appeals Chamber is called upon to determine whether the Pre-Trial Chamber erred in finding that the main purpose of the hearing under rule 118(3) of the Rules of Procedure and Evidence (the “Rules”)

is to evaluate the detained person's wellbeing and the conditions in the detention centre. The Prosecutor and victims oppose the appeal, and the Prosecutor submits that the appeal as a whole is inadmissible as it does not relate to the decision to maintain detention.

### III. PROCEDURAL HISTORY

3. On 27 April 2007, Pre-Trial Chamber I decided to issue a warrant of arrest against Mr Abd-Al-Rahman for his alleged responsibility for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas, in Darfur, Sudan, between August 2003 and March 2004.<sup>1</sup>

4. Once the case was transferred to the current Pre-Trial Chamber, on 16 January 2018 the Chamber granted the Prosecutor's application to amend the first warrant of arrest pursuant to article 58(6) of the Statute,<sup>2</sup> by issuing a second warrant of arrest against Mr Abd-Al-Rahman for his alleged responsibility for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas between on or about 5 to 7 March 2004.<sup>3</sup>

5. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the detention centre of the Court.<sup>4</sup>

6. On 14 August 2020, the Pre-Trial Chamber, Judge Rosario Salvatore Aitala acting as Single Judge, issued a decision pursuant to article 60(2) of the Statute, finding grounds to detain Mr Abd-Al-Rahman pending trial<sup>5</sup> (the "First Decision on

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<sup>1</sup> [Decision on the Prosecution Application under Article 58\(7\) of the Statute](#), dated 27 April 2007 and registered on 15 May 2007, ICC-02/05-01/07-1-Corr, pp. 43-56; [Prosecutor's Application under Article 58\(7\)](#), 27 February 2007, ICC-02/05-56.

<sup>2</sup> [Prosecution's application pursuant to article 58\(6\) of the Rome Statute to amend the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN \("ALI KUSHAYB"\) by adding new crimes](#), 26 June 2020, ICC-02/05-01/20-6-Red2 (original confidential version filed on 3 November 2017).

<sup>3</sup> [Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman \("Ali Kushayb"\)](#), 11 June 2020, ICC-02/05-01/20-80-Red, p. 13 (formerly, ICC-02/05-01/07-74-Red. Pursuant to Pre-Trial Chamber II's Decision ICC-02/05-01/07-87 from 15 June 2020, this document was transferred in the case file ICC-02/05-01/20 and re-stamped as ICC-02/05-01/20-80-Red; original confidential version filed on 16 January 2018).

<sup>4</sup> See Pre-Trial Chamber II, [Decision on the review of detention](#), 5 July 2021, ICC-02/05-01/20-430, para. 2.

<sup>5</sup> [Decision on the Defence Request for Interim Release](#), 14 August 2020, ICC-02/05-01/20-115, p. 11.

Detention”). The Appeals Chamber confirmed the First Decision on Detention<sup>6</sup> (the “*Abd-Al-Rahman* OA2 Judgment”).

7. On 11 December 2020 and 12 April 2021, the Pre-Trial Chamber reviewed Mr Abd-Al-Rahman’s detention and rejected the requests of the Defence for Mr Abd-Al-Rahman’s interim release, finding no change in the circumstances underlying the First Decision on Detention<sup>7</sup> (the “First Review Decision” and the “Second Review Decision”, respectively). The Appeals Chamber confirmed both decisions<sup>8</sup> (the “*Abd-Al-Rahman* OA6 Judgment” and the “*Abd-Al-Rahman* OA7 Judgment”).

8. On 5 May 2021, the Pre-Trial Chamber issued an order setting a schedule for the confirmation hearing and included, at the end of the schedule, a hearing for oral submissions on the “review of detention”. The Pre-Trial Chamber explained that the one-year period referred to in rule 118(3) of the Rules would expire on 15 June 2021, and it set oral submissions for 27 May 2021.<sup>9</sup>

9. On 24 May 2021, the Defence requested that the Pre-Trial Chamber postpone the annual hearing on detention pursuant to rule 118(3) of the Rules on the basis that the Appeals Chamber had not yet ruled on the Defence’s appeal against the Second Review Decision.<sup>10</sup> In an oral decision delivered on 26 May 2021 (the “Decision of 26 May 2021”), the Pre-Trial Chamber rejected the Defence’s request to reschedule the hearing,

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<sup>6</sup> [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled “Decision on the Defence Request for Interim Release”](#), 8 October 2020, ICC-02/05-01/20-177 (OA2). *See also* [Separate concurring opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled “Decision on the Defence Request for Interim Release”](#), 8 October 2020, ICC-02/05-01/20-177-Anx (OA2).

<sup>7</sup> [Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118\(2\) of the Rules of Procedure and Evidence](#), ICC-02/05-01/20-230-Red (original confidential version filed on the same date), para. 7, p. 10; [Decision on the review of detention](#), ICC-02/05-01/20-338, para. 37, p. 14.

<sup>8</sup> [Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s “Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 \(2\) of the Rules of Procedure and Evidence”](#), 5 February 2021, ICC-02/05-01/20-279-Red (OA6); [Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s “Decision on the review of detention”](#), 2 June 2021, ICC-02/05-01/20-415 (OA7).

<sup>9</sup> [Order setting the schedule for the confirmation of charges hearing and convening an annual hearing on detention](#), ICC-02/05-01/20-378, paras 20-23.

<sup>10</sup> [Demande d’ajournement de l’audience relative à la détention](#), ICC-02/05-01/20-408 (registered on 25 May 2021).

explaining, *inter alia*, that “the main purpose of the annual hearing on detention is to ascertain the conditions of detention”.<sup>11</sup>

10. During the hearing (the “Annual Hearing”), held the next day, the Pre-Trial Chamber explained that “the main purpose of this hearing is for the Chamber to ascertain if Mr Abd-Al-Rahman’s conditions of detention are fine, as it is mandated by Rule 118(3)”.<sup>12</sup> It clarified that “this is not a hearing about whether pre-trial detention should continue or not. This will be done in due course”.<sup>13</sup> The Pre-Trial Chamber proceeded by giving Mr Abd-Al-Rahman, who attended in person, the opportunity to speak directly to the Chamber about the conditions of his detention.<sup>14</sup> Later, the Pre-Trial Chamber addressed the schedule for written submission regarding the review of pre-trial detention under rule 118(2) of the Rules, and indicated that a decision following those submissions would be taken “in due course”.<sup>15</sup>

11. On 11 June 2021, submissions on the review of Mr Abd-Al-Rahman’s detention were filed by the Prosecutor,<sup>16</sup> the Office of Public Counsel for victims (the “OPCV”),<sup>17</sup> and the legal representatives of victims (the “LRV”).<sup>18</sup> The Defence submitted its response on 16 June 2021<sup>19</sup> (the “Defence Response”).

12. On 5 July 2021, the Pre-Trial Chamber issued the third decision on the review of Mr Abd-Al-Rahman’s detention pursuant to article 60(3) of the Statute (the “Impugned Decision”).<sup>20</sup> The Pre-Trial Chamber did not hold another hearing after the Annual Hearing and prior to the Impugned Decision.

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<sup>11</sup> [ICC-02/05-01/20-T-009-Red-ENG](#), pp. 1-3.

<sup>12</sup> Transcript of hearing, [ICC-02/05-01/20-T-010-ENG](#), p. 3, lines 3-5. *See also* [Order setting the schedule for the confirmation of charges hearing and convening annual hearing on detention](#), 5 May 2021, ICC-02/05-01/20-378, paras 20-23.

<sup>13</sup> [Annual Hearing](#), p. 3, lines 5-6.

<sup>14</sup> [Annual Hearing](#), p. 3, lines 7-25 and p. 4, lines 1-2.

<sup>15</sup> [Annual Hearing](#), p. 4, lines 9-15.

<sup>16</sup> [Prosecution’s observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman \(“ALI KUSHAYB”\)](#), ICC-02/05-01/20-419.

<sup>17</sup> [Victims’ observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman \(“ALI KUSHAYB”\)](#), ICC-02/05-01/20-420.

<sup>18</sup> [Observations on Behalf Of the Victims on the review of the Pre-Trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman \(“Ali Kushayb”\)](#), ICC-02/05-01/20-421; [Victims’ observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman \(“Ali Kushayb”\)](#), ICC-02/05-01/20-422.

<sup>19</sup> [Réponse aux Observations relatives à la Mise en Liberté](#), ICC-02/05-01/20-423.

<sup>20</sup> [Decision on the review of detention](#), ICC-02/05-01/20-430.

13. On 7 July 2021, the Defence filed its notice of appeal against the Impugned Decision.<sup>21</sup> Pursuant to an order of the Appeals Chamber,<sup>22</sup> the Defence filed its appeal brief on 16 July 2021,<sup>23</sup> and the Prosecutor, the OPCV, and the LRV filed responses on 23 July 2021.<sup>24</sup>

#### IV. STANDARD OF REVIEW

14. With regard to the applicable standard of review for appeals against decisions under article 60 of the Statute, the Appeals Chamber recalls that

[i]n considering appeals in relation to decisions granting or denying interim release, the Appeals Chamber has previously held that it “will not review the findings of the Pre-Trial Chamber *de novo*, instead, it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision”.<sup>25</sup>

15. With respect to errors of law, the Appeals Chamber has held that it

will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.<sup>26</sup>

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<sup>21</sup> [Acte d’Appel de la décision ICC-02/05-01/20-430](#), ICC-02/05-01/20-431.

<sup>22</sup> [Order on the conduct of the appeal proceedings](#), 9 July 2021, ICC-02/05-01/20-434.

<sup>23</sup> [Appeal Brief against Decision ICC-02/05-01/20-430](#), ICC-02/05-01/20-436-tENG (the “Appeal Brief”).

<sup>24</sup> [Prosecution Response to the Defence “Mémoire d’appel de la décision ICC-002/05-01/20-430” \(ICC-02/01-01/20-436\)](#), ICC-02/05-01/20-443 (the “Prosecutor’s Response”); [Victims’ Response to the Defence’s Appeal against the “Decision on the review of detention” \(ICC-02/05-01/20-430\)](#), ICC-02/05-01/20-444 (the “OPCV’s Response”); [Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-430”](#), ICC-02/05-01/20-445 (the “LRV’s Response”).

<sup>25</sup> *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”](#), 19 July 2017, ICC-02/11-01/15-992-Red (OA10) (the “*Gbagbo / Blé Goudé* OA10 Judgment”), para. 14, referring to Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60\(3\) of the Rome Statute”](#), 29 October 2013, ICC-02/11-01/11-548-Red (OA4), para. 18. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”](#), 2 December 2009, ICC-01/05-01/08-631-Red (OA2), para. 62.

<sup>26</sup> [Gbagbo / Blé Goudé OA10 Judgment](#), para. 15 and references cited therein.

16. Regarding an alleged error of fact, the Appeals Chamber has held in the context of an appeal against a decision concerning interim release that

its review is corrective and not *de novo*. It has explained that “[i]t will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”. As regards the “misappreciation of facts” the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber’s findings.<sup>27</sup>

17. For a ground of appeal to be considered by the Appeals Chamber, the appellant must properly substantiate the alleged error and demonstrate how it materially affected the impugned decision. Failure to comply with these requirements may therefore entail the dismissal *in limine* of any ground of appeal or underlying argument that does not comply with these requirements.<sup>28</sup>

18. The above standard of review will guide the analysis of the Appeals Chamber.

## V. RELEVANT PART OF THE IMPUGNED DECISION

19. In the Impugned Decision, the Pre-Trial Chamber recalled that, in the Defence Response, the Defence “did not address the criteria of article 58(1) of the Statute for continued detention and did not allege there are changed circumstances” despite being invited to do so.<sup>29</sup> The Pre-Trial Chamber noted that, instead, the Defence submitted that the Chamber violated rule 118(3) of the Rules by limiting the purpose of the Annual

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<sup>27</sup> [Gbagbo / Blé Goudé OA10 Judgment](#), para. 16 (footnotes omitted). The Appeals Chamber recalls what it stated in recent judgments in appeals under article 81 of the Statute, on the applicable standard of review for errors of fact. In particular, it noted that “[i]n assessing the reasonableness of factual findings, the Appeals Chamber will consider [among other things] whether the trial chamber [...] was mindful of the pertinent principles of law [...]”. See [The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A), para. 68; [The Prosecutor v. Bosco Ntaganda, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled “Judgment”](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A A2), para. 39.

<sup>28</sup> [Abd-Al-Rahman OA2 Judgment](#), para. 16.

<sup>29</sup> [Impugned Decision](#), para. 14.

Hearing to a discussion of the conditions of detention and Mr Abd-Al-Rahman's wellbeing, and by failing to convene a new hearing under rule 118(3) of the Rules.<sup>30</sup>

20. As regards the Defence's submissions, the Pre-Trial Chamber held that "it is not the case that rule 118(3) hearings must be devoted to discussing the continued lawfulness of detention".<sup>31</sup> Furthermore, the Pre-Trial Chamber determined that

its obligation to periodically review the continued lawfulness of the detention is independent of its obligation to hold at least one hearing with the detained person every year. Although Chambers have in the past often combined the two, there is no obligation to do so. Unless there is a need to hear witnesses, there is generally no reason why it would be necessary to hold a hearing to discuss whether or not the criteria of article 58(1) of the Statute are still met. Accordingly, the main purpose of holding a hearing in the presence of the detained person once a year is to evaluate his or her state and conditions of detention.<sup>32</sup>

21. The Pre-Trial Chamber further determined that the Defence had not identified any prejudice suffered as a result of the Chamber's decision to receive written submissions on interim release in lieu of oral submissions.<sup>33</sup> Thus, it concluded that there was no need to convene another hearing devoted to the review of the circumstances underpinning detention. The Pre-Trial Chamber then proceeded to assess the circumstances justifying Mr Abd-Al-Rahman's detention, finding that there was no change in those circumstances since the last review.<sup>34</sup>

## **VI. ADMISSIBILITY OF THE APPEAL**

22. The Prosecutor submits that the question of whether the Pre-Trial Chamber erred in limiting the Annual Hearing to a discussion of the conditions of Mr Abd-Al-Rahman's detention is one that arose from the Decision of 26 May 2021 and not from the Impugned Decision.<sup>35</sup> He argues that, following the Decision of 26 May 2021, the Defence did not raise any objection at the hearing and it failed to exercise its right to seek leave to appeal that oral decision.<sup>36</sup> It follows that the Defence's arguments about the interpretation of rule 118(3) of the Rules prior to the Impugned Decision were out

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<sup>30</sup> [Impugned Decision](#), para. 14.

<sup>31</sup> [Impugned Decision](#), para. 17.

<sup>32</sup> [Impugned Decision](#), para. 17 (footnotes omitted).

<sup>33</sup> [Impugned Decision](#), para. 20.

<sup>34</sup> [Impugned Decision](#), paras 22-28.

<sup>35</sup> [Prosecutor's Response](#), para. 5.

<sup>36</sup> [Prosecutor's Response](#), para. 7.

of time, and while the Pre-Trial Chamber considered and rejected the Defence's arguments in the Impugned Decision, the Chamber's findings had "no impact on the ultimate conclusion under article 60(3) that Mr Abd-Al-Rahman should remain in detention".<sup>37</sup> Thus, according to the Prosecutor, the appeal as a whole is inadmissible.

23. The Appeals Chamber recalls that errors that occur in the proceedings leading to the decision impugned on appeal are procedural in nature.<sup>38</sup> In its interlocutory judgment in *Joseph Kony et al.*, the Appeals Chamber had occasion to rule on the Prosecutor's argument that the Defence's appeal was inadmissible due to the fact that it arose out of a decision taken in the proceedings leading to the decision impugned on appeal.<sup>39</sup> In that context, the Appeals Chamber determined such alleged errors to be admissible where they "may be germane to the legal correctness or procedural fairness of the Chamber's decision [impugned on appeal]".<sup>40</sup> Moreover, the Appeals Chamber has, in the past, heard appeals alleging procedural errors leading to decisions on interim release.<sup>41</sup>

24. Here, the Appeals Chamber notes that the Defence does not purport to challenge the Decision of 26 May 2021 per se but, rather, the procedure employed by the Pre-Trial Chamber leading to the Impugned Decision. This includes the decision of the Pre-Trial Chamber not to hold a hearing on interim release following the Appeals Chamber's *Abd-Al-Rahman* OA7 Judgment and prior to the one year anniversary of Mr Abd-Al-Rahman's initial appearance. In this respect, the instant appeal relates directly

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<sup>37</sup> [Prosecutor's Response](#), para. 8.

<sup>38</sup> *The Prosecutor v. Joseph Kony et al.*, [Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 \(1\) of the Statute" of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408 (OA3) ("*Kony et al.* OA3 Judgment"), para. 46. See also, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red (A5), para. 20.

<sup>39</sup> [Kony et al. OA3 Judgment](#), paras 25-26, 33, 46.

<sup>40</sup> [Kony et al. OA3 Judgment](#), paras 46-47. See also, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges"](#), 19 October 2010, ICC-01/05-01/08-962-Corr (OA 3), paras 79-81, 83-88, 100-101.

<sup>41</sup> E.g., *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release"](#), 19 August 2011, ICC-01/05-01/08-1626-Red (OA7), paras 55-56; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aime Kilolo Musamba'"](#), 11 July 2014, ICC-01/05-01/13-558 (OA 2), paras 46-48.

to the Pre-Trial Chamber’s decision not to hold an additional hearing after the Annual Hearing – a decision that could only be challenged after the issuance of the Impugned Decision itself.

25. Therefore, the Appeals Chamber rejects the Prosecutor’s argument that the appeal is inadmissible because it is an appeal of “the wrong decision”.<sup>42</sup> To the contrary, the Appeals Chamber finds that the appeal challenges the procedural correctness of the Impugned Decision. In so finding, the Appeals Chamber considers relevant the ambiguity evident in the hearing transcripts about what would take place during the Annual Hearing and thereafter. In the 26 May 2021 Decision, the Pre-Trial Chamber indicated in its oral reasons for rejecting the adjournment request that, among other reasons, the purpose of the hearing under rule 118(3) of the Rules was “to ascertain the conditions of detention”.<sup>43</sup> This, on its own, is not sufficiently clear so as to put the Defence on notice of the Pre-Trial Chamber’s reasons underpinning its interpretation of rule 118(3) of the Rules – an interpretation that was fully explained only in the Impugned Decision. Moreover, it appears that the Defence may have reasonably been under the impression that the Pre-Trial Chamber would, in fact, hold a hearing on interim release, as it stated at the Annual Hearing that that hearing was “not a hearing about whether pre-trial detention should continue or not. This will be done in due course”.<sup>44</sup>

26. The Prosecutor also argues that the appeal is inadmissible given that the Defence challenges the procedure for the detention review, which is not a decision granting or denying release for which there is a right to appeal directly to the Appeals Chamber under article 82(1)(b) of the Statute.<sup>45</sup> Referring back to the Appeals Chamber’s jurisprudence in *Joseph Kony et al.*, the Appeals Chamber recalls its finding that an appeal under article 82(1)(a) of the Statute may be admissible notwithstanding that it does not directly challenge substantive findings in, but rather the procedure taken leading to, the decision impugned on appeal.<sup>46</sup> The Appeals Chamber finds that the same reasons apply in appeals under article 82(1)(b) of the Statute, and that the

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<sup>42</sup> [Prosecutor’s Response](#), para. 5.

<sup>43</sup> [Decision of 26 May 2021](#), p. 3, lines 1-2.

<sup>44</sup> [Annual Hearing](#), p. 3, lines 5-6

<sup>45</sup> [Prosecutor’s Response](#), para. 10.

<sup>46</sup> [Kony et al. OA3 Judgment](#), paras 46-47.

Defence's appeal is admissible notwithstanding that it does not directly challenge the Pre-Trial Chamber's ultimate reasons for denying interim release.

27. Thus, the Appeals Chamber concludes that the Prosecutor's arguments regarding the inadmissibility of the appeal are rejected.

## VII. MERITS

### A. Submissions of the parties and participants

#### 1. *The Defence's submissions before the Appeals Chamber*

28. The Defence raises three grounds of appeal, all connected to the Pre-Trial Chamber's reasons for refusing to convene a hearing on interim release. First, the Defence alleges that the Pre-Trial Chamber erred in law by finding that the main purpose of the hearing under rule 118(3) of the Rules was to evaluate the conditions of detention rather than the issue of continued detention or release.<sup>47</sup> Second, the Defence argues that the Pre-Trial Chamber erred in fact and law by assuming that at the Annual Hearing the Defence would refuse to make submissions on continued detention had it been invited to do so.<sup>48</sup> And third, the Defence argues that the Pre-Trial Chamber erred in law by finding that the Defence's written submissions filed after the *Abd-Al-Rahman* OA7 Judgment could stand in place of holding a hearing under rule 118(3) of the Rules and that no prejudice results from its failure to hold one.<sup>49</sup> As a result of these errors, the Defence requests that the Appeals Chamber reverse the Impugned Decision and order the immediate and unconditional release of Mr Abd-Al-Rahman.<sup>50</sup>

29. The Defence explains that its appeal does not concern the part of the Impugned Decision in which the Pre-Trial Chamber considered that a periodic review of detention could be conducted while an appeal against a previous decision on detention is still pending.<sup>51</sup>

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<sup>47</sup> [Appeal Brief](#), paras 22-28.

<sup>48</sup> [Appeal Brief](#), paras 29-31.

<sup>49</sup> [Appeal Brief](#), paras 32-36.

<sup>50</sup> [Appeal Brief](#), para. 37.

<sup>51</sup> [Appeal Brief](#), para. 20.

## 2. *The Prosecutor's submissions before the Appeals Chamber*

30. The Prosecutor responds by arguing both that the Defence has not demonstrated an error and that it has not demonstrated that any of the alleged errors may have had a material impact on the Impugned Decision. Regarding the first ground of appeal, the Prosecutor argues that the practice of chambers varies in their approach as to how they will receive submissions at the annual detention hearing under rule 118(3) of the Rules.<sup>52</sup> Furthermore, the Prosecutor argues that it cannot “be said that rule 118(3) of the RPE mandates the questions to be addressed at the oral hearing”.<sup>53</sup> Nor does human rights jurisprudence instruct that a hearing on interim release is essential in the review of detention.<sup>54</sup>

31. In response to the Defence's second ground of appeal, the Prosecutor argues that the Pre-Trial Chamber's assumption regarding the Defence's willingness to make submissions at the Annual Hearing had no impact on the Impugned Decision.<sup>55</sup> And in response to the Defence's third ground of appeal, the Prosecutor argues that the alleged procedural error did not cause prejudice to the Defence. In particular, he submits that the Defence is merely speculating when it argues that an oral hearing would have led to a result materially different from that in the Impugned Decision.<sup>56</sup> Finally, the Prosecutor illustrates several examples of how “the Defence's own strategy in this case is incompatible with its claim that Mr Abd-Al-Rahman has suffered any prejudice as a result of the procedure adopted by the Pre-Trial Chamber”.<sup>57</sup>

## 3. *The observations of the OPCV and the LRV before the Appeals Chamber*

32. The OPCV opposes the appeal and submits that the Pre-Trial Chamber i) correctly interpreted rule 118(3) of the Rules when finding that the main purpose of a hearing pursuant to that provision is to evaluate the conditions of detention,<sup>58</sup> ii) properly took note that the Defence did not wish to make substantive oral submissions on the review

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<sup>52</sup> [Prosecutor's Response](#), para. 15.

<sup>53</sup> [Prosecutor's Response](#), para. 16.

<sup>54</sup> [Prosecutor's Response](#), para. 17.

<sup>55</sup> [Prosecutor's Response](#), paras 23-27.

<sup>56</sup> [Prosecutor's Response](#), paras 30-31.

<sup>57</sup> [Prosecutor's Response](#), para. 32.

<sup>58</sup> [OPCV's Response](#), paras 16-21.

of detention pending a decision on an appeal on the previous review of detention,<sup>59</sup> and iii) correctly concluded that presenting written – instead of oral – submissions on the issue of detention does not prejudice the rights of the Defence.<sup>60</sup>

33. The LRV also opposes the appeal, arguing that the Defence does not demonstrate that the Pre-Trial Chamber committed an error that materially affected the Impugned Decision.<sup>61</sup> Furthermore, the LRV argues that there are no mandatory requirements as to the format of submissions pursuant to rule 118(3) of the Rules.<sup>62</sup> The LRV also argues specifically that the Defence does not demonstrate that the relief requested is appropriate under the circumstances.<sup>63</sup>

## **B. Determination by the Appeals Chamber**

### *1. First and third grounds of appeal*

34. The Appeals Chamber will address the first and third grounds of appeal together. Those grounds of appeal are inextricably linked, as they relate to an alleged legal error and the resulting prejudice to the Defence. The Defence argues that the Pre-Trial Chamber misinterpreted the purpose of the hearing required by rule 118(3) of the Rules and that, as a result, the Defence was deprived of an opportunity to present submissions about interim release orally during a hearing.<sup>64</sup> For the following reasons, the Appeals Chamber finds that the Pre-Trial Chamber erred.

35. Rule 118(3) of the Rules states as follows:

After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year.

36. The Appeals Chamber observes that the first three sentences of this provision all expressly relate to the procedure for written submissions on the subject of interim release. While, when read in isolation, the fourth and fifth sentences appear to be

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<sup>59</sup> [OPCV's Response](#), paras 22-26.

<sup>60</sup> [OPCV's Response](#), paras 27-31.

<sup>61</sup> [LRV's Response](#), para. 21.

<sup>62</sup> [LRV's Response](#), para. 21.

<sup>63</sup> [LRV's Response](#), paras 22-24.

<sup>64</sup> See [Appeal Brief](#), paras 26, 33, 35.

agnostic as to the required content of the “hearing” mentioned therein, it would seem illogical to sever those two sentences from the rest of the paragraph and to find that the “hearing” should concern something other than interim release.

37. The Appeals Chamber also observes that the first two paragraphs in rule 118 of the Rules relate to the procedure regarding requests for interim release and the subsequent decisions thereon. The first paragraph explains that an initial request for interim release may be made either during the first appearance or subsequently. The second paragraph sets out the procedure for the pre-trial chamber’s periodic review of the circumstances justifying detention. Consistent with this framework, the Appeals Chamber finds that the third paragraph of rule 118 of the Rules governs the manner in which submissions on interim release may be made after the initial appearance, whether orally or in writing.

38. Also worth noting is that rule 118 is located in Section IV of the Rules, entitled “Procedures in respect of restriction and deprivation of liberty”. This set of rules largely relates back to articles 58, 59, and 60 of the Statute, which govern the arrest proceedings, the initial appearance, and requests for interim release. Furthermore, there is a direct relationship between rule 118 of the Rules and the right to liberty and to due process of law.<sup>65</sup> The requirement that a detained person’s detention be reviewed periodically reflects these internationally recognised human rights.

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<sup>65</sup> See Article 9 of the International Covenant on Civil and Political Rights:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. [...]

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. [...]

Article 14(1) of the ICCPR:

In the determination of any criminal charge against him [...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

39. Therefore, when read in context, the Appeals Chamber considers that the “hearing” under rule 118(3) of the Rules is intended to be a hearing on the circumstances justifying continued detention in article 58(1) of the Statute. As argued by the Defence, this interpretation is consistent with the practice in the chambers of this Court.<sup>66</sup> The Appeals Chamber also finds that this interpretation of the text actualises the intention of its drafters in designating an annual hearing in order to strike a compromise about the scope of the right to a hearing on interim release.<sup>67</sup>

40. For the foregoing reasons, the Appeals Chamber finds that the Pre-Trial Chamber erred in finding that the “hearing” under rule 118(3) of the Rules may concern only the conditions in the detention centre and the wellbeing of the detained person. In general, those issues are governed by Section 2 of the Regulations of the Court, entitled “rights of a detained person and conditions of detention”. For example, the Appeals Chamber notes that in that section, under regulation 101(3), the detained person has the right to be heard on matters related to restrictions on outside contact while in detention.

41. However, in so finding, the Appeals Chamber cannot narrowly construe the text of rule 118(3) of the Rules so as to require that the “hearing” be limited only to matters concerning interim release. Indeed, such a hearing may come at an opportune time for a chamber to also invite submissions on other matters in addition to interim release. For the sake of clarity, the Appeals Chamber’s determination is limited to the finding that rule 118(3) of the Rules does indeed require that, at a minimum, a detained person be given the opportunity to be heard on the issue of interim release during at least one

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<sup>66</sup> [Appeal Brief](#), para. 23(iii), referring to, *inter alia*, Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision to Hold a Hearing pursuant to Rule 118\(3\) of the Rules of Procedure and Evidence](#), 16 June 2009, ICC-01/05-01/08-425; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on the Review of Dominic Ongwen’s Detention and on the Restriction on Communication](#), 21 July 2016, ICC-02/04-01/15-503, para. 5. See also Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Order scheduling a hearing pursuant to rule 118\(3\) of the Rules of Procedure and Evidence](#), 19 October 2012, ICC-02/11-01/11-270, paras 5-6.

<sup>67</sup> H. Friman, “Investigation and Prosecution” in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 518:

A provision requiring that all requests for interim relief must be done in writing was considered inappropriate for those who made their first appearance, and the provision was thus amended to state that only after the first appearance must a request for interim release be made in writing (sub-rule 3). The issue of hearings stirred some debate as well. It was submitted that the Court had an inherent discretionary power to hold a hearing on any issue whenever it deemed fit. Hearings should therefore not be mandatory. According to another view, there should be mandatory hearings for each request of release. However, the counter-argument was that such a principle could easily be misused and would impose an impossible burden upon the Court. In the end, it was decided that a hearing must be held at least once a year (sub-rule 3).

hearing each year following the date of the initial appearance. This accords with the framework in the Court’s legal texts for the periodic review of the lawfulness of detention as described above.

42. Nevertheless, as noted above in Section IV of this judgment, in order to interfere with the Impugned Decision, the Appeals Chamber must be satisfied not only that the Pre-Trial Chamber erred, but that the error materially affected the Impugned Decision. It is the Defence’s responsibility, as the appellant, to substantiate the alleged error as well as its materiality. In this appeal, the outcome of the Impugned Decision was, ultimately, the continued detention of Mr Abd-Al-Rahman pending trial. Therefore, the Appeals Chamber must assess whether that outcome may have been different but for the Pre-Trial Chamber’s error regarding the interpretation of rule 118(3) of the Rules.

43. The Defence argues that although the Pre-Trial Chamber gave the Defence the opportunity to make written submissions on the review of the circumstances justifying detention, those submissions do not replace oral submissions made during a hearing held under rule 118(3) of the Rules.<sup>68</sup> In the view of the Defence, had the hearing taken place,

[the Defence] would have been able to demonstrate, *inter alia*, that there was no factual basis for the assertion that [Mr Abd-Al-Rahman’s] release to the territory of the host State would constitute a threat to the witnesses, victims and/or the OTP’s investigations in Sudan. [The Defence] would also have been able to demonstrate that there is no factual and/or legal basis for the Registry’s assertion that since July 2020 cooperating with the Court has no longer incurred the death penalty in Sudan and to draw the appropriate conclusions.<sup>69</sup>

44. The Defence further argues that the hearing under rule 118(3) of the Rules is an essential part of the right to a public hearing enshrined in article 67(1) of the Statute.<sup>70</sup> It notes that a public hearing may be “disseminated worldwide, including in Sudan, and with simultaneous interpretation into Arabic”.<sup>71</sup> And finally, the Defence notes the restrictive nature of the page-limit mandated in regulation 37 of the Regulations of the Court,<sup>72</sup> suggesting that an oral hearing may have allowed for further elaboration.

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<sup>68</sup> [Appeal Brief](#), para. 36.

<sup>69</sup> [Appeal Brief](#), para. 33 (footnotes omitted).

<sup>70</sup> [Appeal Brief](#), para. 35.

<sup>71</sup> [Appeal Brief](#), para. 35.

<sup>72</sup> [Appeal Brief](#), para. 36.

45. The Appeals Chamber is not persuaded that any of the Defence's arguments demonstrate the impact of the Pre-Trial Chamber's failure to hold a hearing on interim release within one year of the initial appearance. In particular, the Defence has not presented examples of any arguments that it could have made orally but that were not appropriate for written submissions, which it did have the opportunity to file. Nor has the Defence indicated that it would have presented *viva voce* evidence and that this evidence would have had an effect on the decision to detain. Finally, the Defence has not drawn a link – nor can the Appeals Chamber infer one – between the simultaneous interpretation into Arabic of a hearing “disseminated worldwide” and the consideration of the criteria relevant to the periodic review listed in article 58(1) of the Statute.

46. Furthermore, the Appeals Chamber considers that had the Defence found the page-limit in regulation 37 of the Regulations of the Court too restrictive to address both interim release and the alleged procedural violation, it should have sought an extension under regulation 35 of the Regulations of the Court. In this regard, the Defence's choice not to avail itself of the opportunity to make written submissions on interim release prior to the Impugned Decision was purely a decision of the Defence in its assessment of Mr Abd-Al-Rahman's best interests, and it has no impact on the Appeals Chamber's analysis of the material effect of the error. The Appeals Chamber also notes that, in any event, when conducting a review of the lawfulness of detention, a chamber need not restrict its review to the arguments of the detained person.<sup>73</sup> A chamber has an obligation to consider any other information that may be relevant to whether the detention may be unlawful.

47. Therefore, the Appeals Chamber finds that the Defence has not demonstrated that the Impugned Decision would have been materially different had it come after a public hearing instead of the course of written submissions ordered by the Pre-Trial Chamber.

48. Finally, the Appeals Chamber notes that the Defence argues *en passant* that Mr Abd-Al-Rahman's right to a public hearing enshrined in article 67(1) of the Statute

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<sup>73</sup> [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence”](#), 19 November 2010, ICC-01/05-01/08-1019 (OA4), para. 52.

guarantees that a hearing be held to determine the issue of pre-trial detention.<sup>74</sup> The Appeals Chamber observes that the Defence does not refer to any jurisprudence in support of this assertion, and in any event the Appeals Chamber is not persuaded by the Defence’s argument. As noted in the Impugned Decision,<sup>75</sup> although human rights law generally requires the periodic review of pre-trial detention, there is no requirement that such a review take place only following the parties’ appearance at a hearing.<sup>76</sup>

49. For the foregoing reasons, the Defence’s first and third grounds of appeal are rejected.

## 2. *Second ground of appeal*

50. Under the second ground of appeal, the Defence challenges the finding of the Pre-Trial Chamber that even if the Chamber had invited oral submissions on interim release at the Annual Hearing, “the Defence would clearly have refused to make substantive submissions”.<sup>77</sup> Before entering into the merits of this ground of appeal, the Appeals Chamber observes that this statement of the Pre-Trial Chamber is not a “finding” per se and it is of no practical consequence. That is, the Appeals Chamber considers that the Pre-Trial Chamber made this statement in the Impugned Decision simply as *obiter dictum*, pointing to a contradiction in the Defence’s position and recalling in retrospect what may have happened had it invited oral submissions on interim release at the Annual Hearing. Importantly, the statement does not form part of the Pre-Trial Chamber’s reasons for inviting written submissions leading to the Impugned Decision in lieu of holding a hearing. Therefore, the Defence’s second ground of appeal is dismissed *in limine*.

## VIII. APPROPRIATE RELIEF

51. In an appeal pursuant to article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case, for the reasons set out above, the Appeals Chamber has found that the Pre-

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<sup>74</sup> [Appeal Brief](#), para. 35.

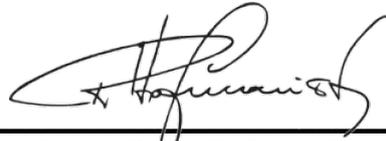
<sup>75</sup> [Impugned Decision](#), para. 17.

<sup>76</sup> See [Prosecutor’s Response](#), para. 17, referring to European Court of Human Rights, *Derungs c. Suisse*, App. No. 52089/09, Judgment, 10 May 2016, paras 69, 73-75.

<sup>77</sup> [Appeal Brief](#), para. 29, referring to [Impugned Decision](#), para. 20.

Trial Chamber erred, but that the error has no material effect on the Impugned Decision.  
Therefore, it is appropriate to confirm the Impugned Decision.

Done in both English and French, the English version being authoritative.



**Judge Piotr Hofmański**  
**Presiding**



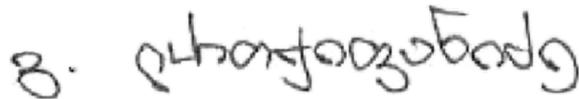
**Judge Luz del Carmen Ibáñez Carranza**



**Judge Marc Perrin de Brichambaut**



**Judge Solomy Balungi Bossa**



**Judge Gocha Lordkipanidze**

Dated this 27th day of August 2021

At The Hague, The Netherlands