

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

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

Date: **7 May 2021**

**THE APPEALS CHAMBER**

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

**SITUATION IN DARFUR, SUDAN**

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

**Public Document**  
**Notice of Appeal against Decision ICC-02/05-01/20-430**

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

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

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**Victims Participation and Reparations  
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**Other**

Mr Marc Dubuisson, Director, Division  
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## PROCEDURAL HISTORY RELATING TO MR ALI MUHAMMAD ALI ABD-AL-RAHMAN'S DETENTION

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

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

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

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

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

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

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

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

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

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

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

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

21 May 2021.<sup>9</sup> The request for leave to appeal that decision<sup>10</sup> is currently pending before the Honourable Pre-Trial Chamber II.

5. The Defence again repeated its request for release on the occasion of the second review of Mr Ali Muhammad Ali Abd-Al-Rahman's detention, on 1 April 2021 ("2<sup>nd</sup> Review").<sup>11</sup> On 9 April 2021, the Defence supplemented its observations on the 2<sup>nd</sup> Review with a second application for a hearing under rule 118(3) of the Rules ("2<sup>nd</sup> Rule 118(3) Application").<sup>12</sup> The 2<sup>nd</sup> Review was rejected without a hearing, on the basis of the parties' written submissions only, on 12 April 2021 by the Honourable Pre-Trial Chamber II<sup>13</sup> and on 2 June 2021 by the Honourable Appeals Chamber.<sup>14</sup> On 21 May 2021, the Honourable Pre-Trial Chamber II rejected the 2<sup>nd</sup> Rule 118(3) Application.<sup>15</sup> The request for leave to appeal that decision<sup>16</sup> is currently pending before the Honourable Pre-Trial Chamber II.

6. On 5 May 2021, the Honourable Pre-Trial Chamber II convened a hearing on the review of detention pursuant to rule 118(3) of the Rules on Thursday, 27 May 2021.<sup>17</sup>

7. By a request of 24 May 2021, the Defence requested an adjournment of the detention hearing pursuant to rule 118(3) of the Rules ("3<sup>rd</sup> Rule 118(3) Application"). The ground for the 3<sup>rd</sup> Rule 118(3) Application was that since Appeal OA7 on the 2<sup>nd</sup> Review of detention was still being deliberated by the Honourable Appeals Chamber, the parties were not in a position to submit observations on Mr Ali Muhammad Ali Abd-Al-Rahman's release or continued detention without prejudicing the ongoing deliberations of the Honourable Appeals Chamber.<sup>18</sup> The Defence therefore sought an adjournment of the hearing pursuant to rule 118(3) of the

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

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

<sup>11</sup> [ICC-02/05-01/20-329-Red](#).

<sup>12</sup> [ICC-02/05-01/20-336](#), para. 9.

<sup>13</sup> [ICC-02/05-01/20-338](#).

<sup>14</sup> [ICC-02/05-01/20-415 OA7](#).

<sup>15</sup> [ICC-02/05-01/20-402](#), para. 19 and p. 17.

<sup>16</sup> [ICC-02/05-01/20-413](#).

<sup>17</sup> [ICC-02/05-01/20-378](#), paras. 20-22.

<sup>18</sup> [ICC-02/05-01/20-408](#).

Rules to a later date, once the Honourable Appeals Chamber had rendered its judgment in Appeal OA7.

8. By email of 25 May 2021, the Office of the Prosecutor (“OTP”) signalled that it would not oppose the 3<sup>rd</sup> Rule 118(3) Application, but recalled the statutory obligation to hold a hearing on release or continued detention under rule 118(3) of the Rules within one year of Mr Ali Muhammad Ali Abd-Al-Rahman’s first appearance, that is to say, before 15 June 2021.<sup>19</sup>

9. By an oral decision of 26 May 2021 (“Oral Decision”), the Honourable Pre-Trial Chamber II partially granted the 3<sup>rd</sup> Rule 118(3) Application by maintaining the hearing on 27 May 2021 but limiting the matters to be discussed at the hearing to an assessment of the conditions of Mr Ali Muhammad Ali Abd-Al-Rahman’s detention instead of a review of his continued detention.<sup>20</sup> The OTP did not appeal that oral decision.

10. On 27 May 2021, a hearing took place as planned before the Honourable Single Judge (“Hearing of 27 May”). From the start of the hearing, the Honourable Single Judge made clear: **“This is not a hearing about whether pretrial detention should continue or not.** This will be done in due course.” [Emphasis added].<sup>21</sup> The Honourable Single Judge limited the issue discussed at that hearing to the conditions of detention of Mr Ali Muhammad Ali Abd-Al-Rahman, whom he invited to give his views, in these unambiguous terms:

So Mr Abd-Al-Rahman, good morning. I would like to hear from you about how are you and the conditions of detentions. I’ve seen during these days likely that you look well, but I would like to hear from you. How are you, how you feel and if there’s any consideration you want to make **about the conditions of detention. Again, Mr Abd-Al-Rahman, this is not about whether you should be in pretrial detention,** let alone about your responsibilities. Those will be dealt with in due course. **It’s about your everyday living in the detention centre, how you feel and if you are in good health.** [Emphasis added].<sup>22</sup>

In reply, Mr Ali Muhammad Ali Abd-Al-Rahman introduced himself, stated his wish to “pray for mercy for all the victims who died in Darfur and we hope that Darfur lives

<sup>19</sup> Email from the OTP, 25 May 2021, 10:17.

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

<sup>21</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 3, lines 5-6.

<sup>22</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 3, lines 7-14.

in peace away from all tribal conflicts”, confirmed that his living conditions in detention were “totally fine” and thanked the Honourable Single Judge for his concern.<sup>23</sup>

11. The Honourable Single Judge then invited the parties and participants to take the floor and repeated once more: “Again, let me recall that the detention on the review of the pretrial detention within the 120-day time limit under paragraph 2 of rule 118 will be taken in due course **and this is not the moment.**” [Emphasis added].<sup>24</sup> The OTP declined the invitation to take the floor on the conditions of detention.<sup>25</sup> The Defence complied with the Honourable Single Judge’s repeated instructions by limiting its remarks strictly to the conditions of detention.<sup>26</sup>

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

13. On 2 June 2021, the Honourable Appeals Chamber delivered its judgment on Appeal OA7 concerning the 2<sup>nd</sup> Review of detention.<sup>27</sup>

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

15. The OTP filed its observations on 10 June 2021;<sup>28</sup> the LRVs on 11 June 2021;<sup>29</sup> and the Defence on 16 June 2021.<sup>30</sup> In its observations, the Defence sought a finding that rule 118(3) of the Rules had been violated and that the Chamber should in consequence declare the detention unlawful and order Mr Ali Muhammad Ali

<sup>23</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 3, line 21 to p. 4, line 2.

<sup>24</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 4, lines 9-11.

<sup>25</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 4, lines 18-19.

<sup>26</sup> [ICC-02/05-01/20-T-010-ENG](#), p. 9, lines 2-3.

<sup>27</sup> [ICC-02/05-01/20-415 OA7](#).

<sup>28</sup> [ICC-02/05-01/20-419](#).

<sup>29</sup> [ICC-02/05-01/20-420](#) ; [ICC-02/05-01/20-421](#); [ICC-02/05-01/20-422](#).

<sup>30</sup> [ICC-02/05-01/20-423](#).

Abd-Al-Rahman's immediate and unconditional release to the territory of the host State.

16. By a decision of 5 July 2021 (the "Decision under Appeal"),<sup>31</sup> the Honourable Pre-Trial Chamber II rejected the request for Mr Ali Muhammad Ali Abd-Al-Rahman's immediate and unconditional release and confirmed his continued detention. The Defence submissions were rejected essentially on the ground that the main purpose of the hearing under rule 118(3) of the Rules is to evaluate the conditions of detention rather than the matter of continued detention or release.<sup>32</sup> The Defence is bringing this appeal, under article 82(1)(b) of the Statute, rule 154(1) of the Rules and regulation 64(5) of the Regulations of the Court ("RoC"), against that decision and that ground specifically.

17. Pursuant to regulation 64(5) of the RoC, the Defence states the particulars of the appeal proceedings instituted by this notice.

a) Name and number of the case: ICC-02/05-01/20, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb");

b) Title and date of the decision under appeal: ICC-02/05-01/20-430: "Decision on the review of detention" (French version not available), 5 July 2021;

c) The appeal brief is directed against paragraphs 16 to 21 of the Decision under Appeal;

d) Provision of the Statute pursuant to which the appeal is filed: article 82(1)(b) of the Statute;

e) Grounds of appeal: the Defence will advance the two grounds of appeal hereunder:

- 1<sup>st</sup> ground of appeal – error of law: the Defence will argue that the Honourable Pre-Trial Chamber II erred in law at paragraph 17 of the Decision under Appeal by finding that the main purpose of the hearing under rule 118(3) of the Rules was to evaluate the conditions of detention rather than the issue of continued

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<sup>31</sup> [ICC-02/05-01/20-430](#).

<sup>32</sup> [ICC-02/05-01/20-430](#), para. 17.

detention or release.<sup>33</sup> The Defence will demonstrate that this legal conclusion corresponds to neither the letter nor the spirit of rule 118(3) of the Rules and is therefore vitiated by an error of law;

- 2<sup>nd</sup> ground of appeal – error of fact and law: the Defence will argue that the Honourable Pre-Trial Chamber II also made an error of fact and law at paragraphs 19 and 20 of the Decision under Appeal by assuming that at the hearing of 27 May 2021 the Defence would have refused to make submissions on continued detention had it been invited to do so by the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber.<sup>34</sup> The Defence will demonstrate that the assumption that it would have refused to make submissions on continued detention at the hearing of 27 May 2021 overlooks the authority vested in the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber to instruct the Defence to make its observations on release and the fact that the Defence respects that authority. It was in fact for the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber to confirm that the rule 118(3) hearing was being held and to instruct the Defence to make its submissions on release at that hearing notwithstanding the ongoing deliberations on Appeal OA7. The Defence would then have complied with the instruction of the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber – as it has always done – since that instruction would effectively have released it from its obligation to respect the ongoing deliberations on appeal OA7. Instead, the Honourable Pre-Trial Chamber II restricted the hearing of 27 May to the single issue of the living conditions in detention, whereby it ceased to be a hearing under rule 118(3) of the Rules. By assuming that the Defence would have objected to a direction by the Honourable Pre-Trial Chamber II or the Honourable Single Judge of that Chamber to address the issue of continued detention at the hearing of 27 May 2021, the Decision under Appeal therefore erred in fact and in law;

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<sup>33</sup> [ICC-02/05-01/20-430](#), para. 17.

<sup>34</sup> [ICC-02/05-01/20-430](#), paras. 19-20.



- 3<sup>rd</sup> ground of appeal – error of law: the Defence will argue that the Honourable Pre-Trial Chamber II lastly erred in law at paragraphs 19 and 20 of the Decision under Appeal by finding that its written submissions filed subsequently to the OA7 judgment could stand in place of the holding of a hearing under rule 118(3) of the Rules and nullify any prejudice suffered as a result of its failure to hold one.<sup>35</sup> The Defence will demonstrate that this conclusion corresponds to neither the letter nor the spirit of rule 118(3) of the Rules and is therefore vitiated by an error of law.

f) The relief sought: the Defence moves the Honourable Appeals Chamber to (i) reverse the Decision under Appeal and (ii) order the immediate and unconditional release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the host State.

5. Turning to the suitability of a hearing on the present appeal under regulation 64(6)(a) of the RoC, the Defence again defers to the infinite wisdom of the Honourable Appeals Chamber with regard to choosing the option conducive to the swiftest and most efficient resolution of this appeal.

[Signed]

Mr Cyril Laucci,

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

Dated this 7 July 2021

At The Hague, Netherlands

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<sup>35</sup> [ICC-02/05-01/20-430](#), paras. 19-20.