



Original: **English**

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

Date: **22 January 2021**

APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public with confidential annex A

Public Redacted Version of Prosecution Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-230-RED” (ICC-02/05-01/20-247)

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INTRODUCTION

1. On 11 December 2020, Pre-Trial Chamber II reviewed its previous ruling on Mr Abd-Al-Rahman's detention as required by article 60(3) of the Rome Statute and ordered his continued detention to ensure that he does not obstruct or endanger the investigation or court proceedings ("Decision").¹ In reaching its Decision, the Chamber found that: there was no change in circumstances underlying its findings under article 58(1)(a) in its first decision on interim release;² the conditions for article 58(1)(b)(ii) were still met;³ and interim release on humanitarian grounds was not warranted as Mr Abd-Al-Rahman's medical condition in detention had improved.⁴

2. Mr Abd-Al-Rahman's appeal against the Decision should be rejected.⁵ He misunderstands the limited nature of the Pre-Trial Chamber's assessment under article 58(1)(a); repeats arguments previously rejected by the Appeals Chamber regarding the Prosecutor's ability to protect witnesses and its impact on article 58(1)(b)(ii); and disagrees with the Chamber's decision not to grant him release on humanitarian grounds. Critically, he fails to properly substantiate his arguments or to address the impact of the alleged errors. In any event, the three grounds of appeal advanced do not identify any error.⁶

CONFIDENTIALITY

3. This response is classified as "confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court as it refers to the contents of confidential material. The Prosecution will file a public redacted version of this response in due course.

SUBMISSIONS

4. In the previous ruling on detention in this case ("First Interim Release Decision"),⁷ the Single Judge of Pre-Trial Chamber II ordered the Appellant's continued detention on the basis that the requirements of articles 58(1)(a) and 58(1)(b)(ii) were met.⁸ In its review of the

¹ ICC-02/05-01/20-230-Conf (public redacted version: ICC-02/05-01/20-230-Red) ("[Decision](#)").

² [Decision](#), paras. 23, 25-27.

³ [Decision](#), paras. 24, 28-33.

⁴ [Decision](#), para. 34.

⁵ ICC-02/05-01/20-247-Conf (public redacted version: ICC-02/05-01/20-247-Red) ("[Appeal](#)").

⁶ [Appeal](#), paras. 11-21 (Ground 1), 22-25 (Ground 2), 26-29 (Ground 3).

⁷ ICC-02/05-01/20-115 ("[First Interim Release Decision](#)").

⁸ [First Interim Release Decision](#), paras. 26, 27-29, p. 11.

Appellant's detention in the Decision, the Pre-Trial Chamber recalled that it may only modify its previous ruling on detention "if there has been a change in some or all of the facts underlying its previous decision".⁹ In that context, the Chamber found that the Appellant's continued detention remains justified on three bases. *First*, it found that there have been no change in circumstances that alter its assessment under article 58(1)(a) that there are reasonable grounds to believe the Appellant has committed the alleged crimes.¹⁰ In reaching this finding, the Chamber rejected the Defence's claim that there are two new relevant circumstances, *i.e.* that the Prosecution relied on two categories of evidence that were inadmissible ("the contested evidence") and which therefore deprived the arrest warrants of a proper evidentiary basis.¹¹ *Second*, the Chamber found that there are still grounds for concern regarding risks to witnesses and the investigation under article 58(1)(b)(ii).¹² *Third*, it found that there are no reasons to release the Appellant on humanitarian grounds as his health condition was reported to have improved.¹³

5. The Pre-Trial Chamber's Decision is reasonable and correct.¹⁴ The Appellant advances three grounds of appeal challenging each of the three bases of the Decision. The Appellant's

⁹ [Decision](#), para. 21. See Article 60(3), Rome Statute; ICC-02/11-01/11-548-Red ("[Gbagbo Detention AD](#)"), para. 51 ("While a review of detention pursuant to article 60(2) entails a decision *de novo* in which the Pre-Trial Chamber must decide whether the conditions of article 58(1) are met, the Pre-Trial Chamber may modify its ruling on release or detention under article 60(3) if "it is satisfied that changed circumstances so require"); ICC-01/05-01/08-1019 ("[Bemba 19 November 2010 Interim Release AD](#)"), para. 51 ("[T]he 'requirement of 'changed circumstances' [in article 60(3) of the Statute] imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary"); see also ICC-01/05-01/08-631-Red ("[Bemba 2 December 2009 Interim Release AD](#)"), para. 60; ICC-01/04-01/07-572 ("[Ngudjolo Interim Release AD](#)"), para. 14.

¹⁰ [Decision](#), paras. 26-27.

¹¹ [Decision](#), paras. 25-27.

¹² [Decision](#), paras. 28-33.

¹³ [Decision](#), para. 34.

¹⁴ ICC-02/05-01/20-177 ("[First Interim Release AD](#)"), para. 13 ("With regard to the applicable standard of review, 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'"), 14 ("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'"), 15 ("Regarding an alleged error of fact, the Appeals Chamber has held in the context of an appeal against a decision on 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"). See also ICC-

arguments reveal a fundamental misunderstanding of the Pre-Trial Chamber's findings, the Court's legal framework for assessing the conditions for release under article 58 of the Statute and the limited nature of an assessment of interim release. Moreover, throughout his Appeal, the Appellant fails to properly substantiate the legal and factual errors that he alleges, and to address—let alone demonstrate—the material impact of the alleged errors on the Pre-Trial Chamber's decision to maintain him in detention.¹⁵ As the Appeals Chamber has held in this and other cases, the Appellant is required to substantiate the reasons why he believes the Pre-Trial Chamber erred and how this impacted its decision to keep him in detention.¹⁶ His repeated failure to do so warrants the dismissal of those arguments *in limine*, as shown below.¹⁷

A. Ground 1: The Pre-Trial Chamber reasonably found that the contested evidence has no impact on its assessment under article 58(1)(a) of the Statute

6. The Pre-Trial Chamber did not err in rejecting the Defence's claim that two new circumstances regarding purportedly inadmissible evidence impact article 58(1)(a) and warrant his immediate release.¹⁸ Nor did the Chamber require the Appellant to provide submissions regarding the totality of the evidence underpinning the two arrest warrants even if all of it had not yet been disclosed to the Appellant.¹⁹ The two new circumstances alleged by the Defence were that the Prosecution sought to rely upon evidence supporting the first arrest warrant that: (i) was obtained purportedly in the absence of an agreement with the Government of Sudan and therefore in violation of article 4(2) of the Statute, and (ii) was disclosed allegedly in violation of the Court's Information Protection Policy.²⁰ The Chamber found that it did not need to rule on the merits of these allegations as: (i) the evidence allegedly obtained in violation of article 4(2) was not the "bulk of the evidence relied on in support of the warrants of arrest", which was obtained outside of Sudan and thus not affected

01/04-02/06-271-Red ("[Ntaganda Interim Release AD](#)"), para. 29; ICC-01/05-01/08-2151-Red ("[Bemba 5 March 2012 Interim Release AD](#)"), para. 16.

¹⁵ See below paras. 19-25, 32.

¹⁶ [First Interim Release AD](#), para. 16 ("[...] [F]or 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"); see also [Judge Ibanez Carranza Separate Concurring Opinion](#), paras. 2, 15 (stating that the Appellant failed to substantiate a ground of appeal as an error of law and to show a material impact in the decision, and that she would have rejected the ground for lack of substantiation). See also ICC-01/04-01/06-3121-Red ("[Lubanga AJ](#)"), para. 31.

¹⁷ See below paras. 19-25, 32.

¹⁸ Contra [Appeal](#), paras. 8, 11-21; see [Decision](#), paras. 26-27.

¹⁹ Contra [Appeal](#), paras. 8, 16, 18-21.

²⁰ ICC-02/05-01/20-213-Red ("[Defence Response](#)"), paras. 16-37.

by the Appellant's arguments concerning article 4(2); and (ii) the evidence allegedly violating the Court's Information Protection Policy was "relatively insignificant compared to the entirety of the evidence in support of the warrants of arrest."²¹ Accordingly the Chamber found that there is no change in circumstance that alters its assessment that there are reasonable grounds to believe that the Appellant has committed crimes within the Court's jurisdiction under article 58(1)(a).²² Even if the Appellant argues that the Pre-Trial Chamber committed both a factual and legal error, he identifies none,²³ nor does he address the impact that the alleged errors had on the decision to keep him in detention. The Appellant's first ground of appeal should be rejected.

i. The Appellant misconprehends the nature of the Chamber's article 58(1)(a) assessment

a. The Pre-Trial Chamber properly reviewed the Appellant's detention in accordance with the principles relevant to article 58(1)

7. The Appellant erroneously premises his first ground of appeal on the view that the Pre-Trial Chamber need only be concerned with a *quantitative* analysis of the evidence when assessing article 58(1)(a). That this is his view is apparent from the way in which the Appellant has developed his submissions regarding the contested evidence, both before the Pre-Trial Chamber and now in his Appeal. His submissions are almost entirely devoted to quantifying the contested evidence and calculating it as a percentage of the evidence relied upon in the arrest warrants;²⁴ provide no information regarding the substance, nature, content or relevance of the contested evidence (except for broadly alleging that it relates to the evidence implicating him in the First Arrest Warrant);²⁵ do not explain how the exclusion of this evidence would undermine the Pre-Trial Chamber's finding under article 58(1)(a);²⁶ and conclude that once the contested evidence is removed from the Chamber's holistic evaluation of evidence, article 58(1)(a) is no longer fulfilled.²⁷ The Appellant therefore interprets the 'holistic' analysis as consisting of an evaluation of only the volume of evidence in the case.

²¹ [Decision](#), para. 26.

²² [Decision](#), para. 26.

²³ *Contra* [Appeal](#), paras. 8, 15-16, 18-19.

²⁴ [Appeal](#), paras. 12-17. *See also* [Defence Response](#), paras. 25, 27, 35, 37.

²⁵ [Appeal](#), paras. 11, 18.

²⁶ *See generally* [Defence Response](#), paras. 16-37; [Appeal](#), paras. 11-21

²⁷ [Appeal](#), para. 3; [Defence Response](#), paras. 29, 37.

The Appellant's approach evinces a fundamental misunderstanding of the assessment undertaken by the Pre-Trial Chamber under article 58(1)(a).

8. Article 58(1)(a) requires the Pre-Trial Chamber to assess whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court on the basis of the evidence presented to it.²⁸ The reasonable grounds to believe standard is lower than the standards required for the confirmation of charges (substantial grounds to believe) or for conviction (beyond reasonable doubt).²⁹ Accordingly, for the purposes of reviewing pre-trial detention, the Pre-Trial Chamber does not have to be certain that a suspect has committed crimes.³⁰ This however does not mean that the Pre-Trial Chamber's assessment is reduced only to a quantitative assessment of the evidence. Rather, evidence is to be assessed holistically in terms of substance and volume to determine whether it reaches the threshold of the 'reasonable grounds to believe' standard. While the Appellant has previously confirmed his understanding of this holistic approach (which was affirmed by the Appeals Chamber in its judgement on the first interim release appeal),³¹ he now contradicts the Appeals Chamber's guidance and his understanding of it in this appeal.

9. Critically, the Appellant erroneously conflates the review of pre-trial detention with the confirmation of the charges in seeking to invalidate the arrest warrants in the manner that he contends. The Pre-Trial Chamber rightly observed that challenges to the admissibility of the evidence relating to the case against the Appellant are to be heard in the confirmation hearing.³² This is consistent with the confined purpose of the review of pre-trial detention, in relation to which the Appeals Chamber has held:

“[T]he Appeals Chamber does not consider that substantive considerations around admissibility of evidence can be appropriately addressed in the context of a decision taken on interim release, in the absence of obvious *male fides*. Conducting such an assessment would overload article 58(1)(a) of the Statute with the burdensome requirement to adjudicate issues relating to article 69(7) of the Statute at a very early stage of proceedings, in which the proper focus ought to be confined to be reviewing a suspect's detention and the conditions underpinning the same. Therefore, in the present circumstances, the Appeals Chamber does not consider that it was

²⁸ ICC-01/04-169 (“[Ntaganda Arrest Warrant AD](#)”), para. 45 (“[A]rticle 58 of the Statute [...] foresees that the Pre-Trial Chamber takes its decision on the application for a warrant of arrest on the basis of the information and evidence provided by the Prosecutor”).

²⁹ ICC-02/05-01/09-73 (“[Bashir Arrest Warrant AD](#)”), para. 30; ICC-01/05-01/13-558 (“[Kilolo Interim Release AD](#)”), para. 55; ICC-01/05-01/13-559 (“[Babala Interim Release AD](#)”), paras. 57, 58; ICC-01/05-01/13-560 (“[Mangenda Interim Release AD](#)”), para. 76.

³⁰ [Bashir Arrest Warrant AD](#), para. 31.

³¹ [Defence Response](#), para. 7.

³² [Decision](#), para. 26.

unreasonable for the Pre-Trial Chamber to defer admissibility issues to be adjudicated “in the context of determinations to be made for the purposes of deciding whether the charges will have to be confirmed”.³³

10. The Appellant has not alleged any “obvious *male fides*” in relation to the contested evidence, nor does any concern arise in that respect regarding the contested evidence.³⁴ In the circumstances, it was not incumbent on the Pre-Trial Chamber to assess the Appellant’s arguments regarding the admissibility of the contested evidence when determining his request for interim release.

11. Rather, the Pre-Trial Chamber correctly assessed the evidence holistically to find that article 58(1)(a) was met when granting the Prosecution’s two requests for warrants of arrest against the Appellant;³⁵ when determining the Appellant’s first request for interim release (which the Appellant did not challenge on appeal);³⁶ and again when finding that there had been no change in the factors underlying that finding when reviewing the Appellant’s detention.³⁷ The Appellant does not establish any legal or factual error in the Chamber’s approach.

b. The Appellant fails to establish any factual error

12. The Appellant claims the Pre-Trial Chamber erred in fact by finding that the contested evidence was only a “negligible” or “relatively insignificant” portion of the evidence supporting the arrest warrants.³⁸ He relies upon unpersuasive arguments regarding the contested evidence.³⁹

13. *First*, a quantitative analysis of the contested evidence demonstrates that the Pre-Trial Chamber was reasonable in finding that the contested evidence did not affect the “bulk of the evidence” underlying the arrest warrants (regarding the evidence allegedly obtained in violation of article 4(2)), or was “relatively insignificant” (regarding the evidence allegedly

³³ [Mangenda Interim Release AD](#), para. 73.

³⁴ See below para. 15.

³⁵ ICC-02/05-01/07-3-Corr (“[First Arrest Warrant](#)”), p. 2 (stating that it had “examined the “Prosecutor’s Application under article 58(7)” [...] and the supporting material and other information submitted by the Prosecution”); ICC-02/05-01/07-74-Red (“[Second Arrest Warrant](#)”), paras. 9 (recalling the findings of the First Arrest Warrant and confirming there was no reason to depart from those findings which remain in force and are equally applicable to the crimes described in the Second Arrest Warrant Application), 10 (confirming that it bases its findings on an analysis of the evidence supporting the Second Arrest Warrant Application).

³⁶ [First Interim Release Decision](#), para. 26 (finding that there were reasonable grounds to believe that the Appellant had committed crimes, on the basis of the findings in the two warrants of arrest issued against him).

³⁷ [Decision](#), paras. 23, 25-27.

³⁸ [Appeal](#), paras. 8, 16-17.

³⁹ *Contra* [Appeal](#), paras. 12-17.

disclosed in violation of the Court's Information Protection Policy).⁴⁰ The Prosecution had relied upon 278 items of evidence in support of its application for a summons to appear or alternatively an arrest warrant ("First Arrest Warrant Application") and application to amend the arrest warrant by adding additional charges ("Second Arrest Warrant Application")—both of which led to the issuance of the first and second arrest warrants.⁴¹ In his submissions before the Pre-Trial Chamber, the Appellant listed 52 items as being obtained in violation of article 4(2) of the Statute,⁴² and 6 items allegedly disclosed in violation of the Court's Information Protection Policy.⁴³ However, only 36 of those items are in fact cited in the First Arrest Warrant Application.⁴⁴ Of these 36 items: 30 were allegedly obtained in violation of article 4(2) of the Statute; 3 were allegedly disclosed in violation of the Court's Information Protection Policy; and 3 allegedly fall within both categories of purported violations. Quantitatively, these numbers are a fraction of the total evidence relied upon in support of the arrest warrants, as the Chamber reasonably found.⁴⁵

14. *Second*, while the Appellant provides new details in his Appeal regarding the contested evidence following the further disclosure he has received since his submissions before the Pre-Trial Chamber,⁴⁶ his quantitative assessment is selective as it is based on an artificially narrow reading of the First Arrest Warrant Application. In particular, the Appellant now states that his arguments about the contested evidence relate only to evidence that directly implicates him, as contained in five paragraphs of the First Arrest Warrant Application,⁴⁷ and that he has not canvassed the other evidence cited in the First Arrest Warrant Application as it relates « *au contexte, à la commission de crimes et/ou à l'implication de Mr Ahmad Harun, également visé par le BdP dans sa Requête en vertu de l'Article 58 de 2007, de très loin plus*

⁴⁰ [Decision](#), para. 26; *contra* [Appeal](#), paras. 12-17; [Defence Response](#), paras. 25-29, 35, 37.

⁴¹ ICC-02/05-55-US-Exp (confidential redacted version ICC-02/05-55-Conf-Red; public redacted version ICC-02/05-56) ("[First Arrest Warrant Application](#)"); ICC-02/05-01/20-6-Conf-Red (public redacted version ICC-02/05-01/20-6-Red2) ("[Second Arrest Warrant Application](#)"). In its ninth progress report to the Pre-Trial Chamber on disclosure and other matters, the Prosecution confirmed that it relied upon 278 items of evidence in both arrest warrant applications: ICC-02/05-01/20-249, paras. 4-5.

⁴² [Defence Response](#), para. 25.

⁴³ [Defence Response](#), para. 35.

⁴⁴ Of the 52 items listed by the Appellant in the [Defence Response](#) at para. 25, 18 items beginning with the ERN "[REDACTED]-" are not in fact cited in the First Arrest Warrant Application. In any event these items are only the transcriptions of audio-visual recordings of interviews which are cited in the First Arrest Warrant Application and are included in the Appellant's count of contested evidence. The Prosecution also subtracts the final document listed by the Appellant (DAR-OTP-0273-0092) which appears to bear an incorrect ERN as it does not correspond to the ERN of any document in e-court. Finally the Prosecution subtracts the three documents listed in para. 35 which are also listed in para. 25, to avoid double-counting.

⁴⁵ *Contra* [Appeal](#), para. 11.

⁴⁶ [Appeal](#), paras. 11-17.

⁴⁷ [Appeal](#), paras. 11-12 (referring to paras. 36 and 161-164 of the [First Arrest Warrant Application](#)).

nombreux ».⁴⁸ The Appellant did not provide these explanations to the Pre-Trial Chamber.⁴⁹ In any event, his explanations on appeal are unsatisfactory. He ignores the relevance of the allegations regarding the contextual elements of the crimes in the case against him, and the numerous other paragraphs in that Application which name the Appellant and discuss his alleged role, responsibility and involvement in specific crimes, citing additional evidence in support.⁵⁰ The Appellant's computations, including his conclusion that the contested evidence amounted to 50% (or 78% if including material disclosed after the Appellant filed his submissions before the Pre-Trial Chamber)⁵¹ of the evidence underlying the arrest warrants, are thus based on an arbitrarily narrow reading of the First Arrest Warrant Application and are thus incapable of demonstrating any factual error by the Pre-Trial Chamber.

15. *Third*, the Appellant's computations also lack any real *qualitative* significance.⁵² The Appellant cannot simply interpret the percentages he has calculated as being any meaningful demonstration of the error of the Pre-Trial Chamber's article 58(1)(a) assessment, without advancing any arguments regarding the substance of the contested evidence. In that regard, even a cursory review of the contested evidence demonstrates that they lack any characteristics showing the violations that the Appellant contends. Specifically:

- a. Of the 52 items that the Appellant identified in his submissions before the Pre-Trial Chamber as being evidence allegedly obtained by the Prosecution without an agreement with the Government of Sudan and therefore in violation of article 4(2) of the Statute:⁵³ (i) 3 are [REDACTED] documents provided to the Prosecution by the UN International Commission of Inquiry ("UNCOI")⁵⁴ relating to the UNCOI's own work regarding the Darfur conflict;⁵⁵ (ii) 1 does not exist in the

⁴⁸ [Appeal](#), para. 18.

⁴⁹ See generally [Defence Response](#), paras.16-37.

⁵⁰ See e.g. [First Arrest Warrant Application](#), paras. 37, 56, 79, 106, 117-118, 120, 123, 130, 134-135, 142, 186, 192, 194-195, 201, 203, 221, 223-224, 228-230, 235, 239, 242, 246.

⁵¹ [Appeal](#), paras. 12, 16, 17.

⁵² *Contra* [Appeal](#), para. 16.

⁵³ [Defence Response](#), para. 25 (listing 52 items).

⁵⁴ The Appellant cited the following documents as being amongst the items of contested evidence: [REDACTED]

⁵⁵ In October 2004, following Security Council Resolution 1564, the United Nations Secretary General appointed members of a commission of inquiry to "investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable": International Commission of Inquiry on Darfur, [Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General](#), 25 January 2005.

record;⁵⁶ and (iii) the remaining 48 items are [REDACTED]. As the Prosecution has previously indicated, [REDACTED] were undertaken *with the agreement of the Government*.⁵⁷ Indeed, the Government's agreement [REDACTED];

- b. Of the six items allegedly disclosed by the Prosecution in violation of the Court's Information Protection Policy, the Appellant is incorrect regarding all six in claiming that they were not marked as 'confidential' when disclosed.⁵⁸ To the contrary, and in accordance with the Court's Information Protection Policy,⁵⁹ the Prosecution clearly indicated the confidentiality of each of the six items in their metadata in e-court (as shown in Annex A), where the Appellant receives disclosure of the material.⁶⁰ The Appellant was also expressly notified of their confidential status when the material was disclosed to him.⁶¹ There has accordingly been no violation of the policy, nor can there be any doubt as to the obligations on the Parties to respect the confidentiality of the material, especially as the Appellant has acknowledged the confidentiality of the material in his submissions before the Pre-Trial Chamber.⁶²

16. Qualitatively, it is also relevant that [REDACTED] was only one of several categories of evidence that the Prosecution relied upon in support of the arrest warrants. In total, the Prosecution relied upon: (i) statements taken by the Prosecution from victims and other eyewitnesses to rebel attacks and attacks by Armed Forces and Militia/Janjaweed in the Darfur region; (ii) statements taken by the Prosecution from individuals who possess knowledge of the activities of the officials and representatives of the Sudanese Government and of the Militia/Janjaweed in conducting the counterinsurgency campaign in Darfur; (iii) documents and other information provided by the Sudanese Government upon request of the Prosecution; (iv) the UNCOI Report and other materials provided by the UNCOI; (v) the Report of the Sudanese National Commission of Inquiry and other materials provided by the

⁵⁶ Document OTP-DAR-0273-0092 does not correspond to any document ERN in e-court: *contra* [Defence Response](#), para. 25.

⁵⁷ [REDACTED].

⁵⁸ *Contra* [Defence Response](#), para. 35.

⁵⁹ [ICC Information Protection Policy](#), Administrative Instruction ICC/AI/2007/001, 19 June 2007, Section 22: Exterior Marking ("Digital information can be provided with a marking through the metadata. Examples are the metadata fields in applications like CMS and TRIM").

⁶⁰ See Annex A. In the Prosecution's regular progress reports to the Pre-Trial Chamber, it confirmed that it is disclosing material to the Defence *via* the e-court system with the required metadata fields: *see e.g.* ICC-02/05-01/20-146 (["Prosecution's Second Progress Report"](#)), para. 5.

⁶¹ [REDACTED].

⁶² [Defence Response](#), paras. 32, 34.

Commission; and (vi) [REDACTED].⁶³ In this context, and particularly compared with the statements of eyewitnesses to crimes and insider witnesses, it is an unsubstantiated overreach to claim that the exclusion of the contested evidence—[REDACTED]—would be sufficient to undermine the case against the Appellant and invalidate the Pre-Trial Chamber’s finding under article 58(1)(a).⁶⁴

c. The Appellant fails to establish any legal error

17. The Appellant erroneously claims that the Pre-Trial Chamber committed a legal error by placing an “impossible burden” on him to address the substance of *all* the evidence underlying the arrest warrants, even evidence relating to his co-Accused, Ahmad Muhammad Harun, and even if he had not received full disclosure of the evidence.⁶⁵ This claim mischaracterises the Decision. The Chamber did not place any undue burden on the Appellant. It found that the new circumstances alleged by the Appellant did not warrant a change in its assessment under article 58(1)(a).⁶⁶ This does not mean it expected the Appellant to have made submissions on each and every item of evidence before the Chamber in order to change its assessment. Rather, and as a matter of logic,⁶⁷ if a suspect alleges that there has been a change of circumstances warranting a change in the assessment under article 58(1)(a), that suspect must be capable of substantiating the claim that the finding that there are reasonable grounds to believe that he or she committed a crime should be reversed.⁶⁸ It is also incongruous for the Appellant to claim that he was unduly burdened with making submissions on all of the evidence underlying the arrest warrants, when he did not provide the Chamber with *any* submissions at all regarding the relevance of the items of contested evidence and the impact of its exclusion from the article 58(1)(a) analysis.⁶⁹

18. Moreover, the Appellant had already received disclosure of at least 221 of the 278 items of evidence referred to in the Prosecution’s Arrest Warrant Applications by the time he

⁶³ [First Arrest Warrant Application](#), para. 8; [Second Arrest Warrant Application](#), para. 17.

⁶⁴ *Contra* [Appeal](#), para. 17.

⁶⁵ *Contra* [Appeal](#), paras. 18-19, 21.

⁶⁶ [Decision](#), para. 27.

⁶⁷ *See above* paras. 7-9.

⁶⁸ The test in article 58(1)(a) requires only that a reasonable conclusion that the person committed a crime within the jurisdiction of the Court can be drawn. It does not mean that this is the only reasonable conclusion that can be drawn from the evidence: C. Hall and C. Ryngaert, “Article 58: Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear”, in O. Triffterer & K. Ambos (eds.), *The Rome Statute of the International Criminal Court A Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016 (“Triffterer/Ambos”), p. 1445, mn. 11. *See also* [Bashir Arrest Warrant AD](#), para. 30; [Kilolo Interim Release AD](#), para. 55; [Babala Interim Release AD](#), paras. 57, 58; [Mangenda Interim Release AD](#), para. 76.

⁶⁹ *See generally* [Defence Response](#), paras. 16-37; [Appeal](#), paras. 11-21.

made his submissions before the Pre-Trial Chamber,⁷⁰ and was therefore in a position to make substantial submissions on the contested evidence before the Pre-Trial Chamber,⁷¹ yet chose not to do so. The Appellant also did not raise the issue of adequacy of disclosure before the Pre-Trial Chamber, nor has disclosure been inadequate.⁷² His claim that the Decision be invalidated on this basis⁷³ should be dismissed summarily.

ii. The Appellant fails to show any impact of the alleged errors on the Decision

19. Even if, *arguendo*, the Pre-Trial Chamber had committed a legal or factual error in failing to consider the merits and ‘materiality’ of the Appellant’s arguments regarding the contested evidence,⁷⁴ the Appellant fails to articulate—let alone establish—how such errors materially impacted the Chamber’s assessment under article 58(1)(a).⁷⁵ The Appellant’s submissions on appeal have the same deficiencies as his submissions before the Pre-Trial Chamber in this regard, and while the Appellant requests the Appeals Chamber to refrain from assessing the merits of his arguments on the contested evidence,⁷⁶ the Appellant cannot attempt to shield his arguments from scrutiny in this manner. In order to demonstrate that the arrest warrants would be invalidated due to the purported inadmissibility of the contested evidence, the Appellant should at least (i) establish the relevance of the contested evidence and the impact of its exclusion on the article 58(1)(a) assessment; and (ii) demonstrate the correctness of his arguments regarding the Prosecution’s alleged violations and how they render the evidence inadmissible. The Appellant failed to demonstrate this before the Pre-Trial Chamber, and fails to do so again on appeal. His failure to substantiate the impact of the errors alleged in his first ground of appeal warrants its dismissal *in limine*.

⁷⁰ ICC-02/05-01/20-200 (“[Prosecution’s Fifth Progress Report](#)”), para. 5 (confirming that 200 items have been disclosed to the Appellant that were referred to in the arrest warrant applications); ICC-02/05-01/20-207 (“[Prosecution’s Sixth Progress Report](#)”), para. 4 (confirming that an additional 21 video files relied upon in the arrest warrant applications and their related translations had been disclosed).

⁷¹ *Contra* [Appeal](#), paras. 18-21.

⁷² *See above* para. 17.

⁷³ [Appeal](#), paras. 19-21.

⁷⁴ [Appeal](#), para. 15.

⁷⁵ [First Interim Release AD](#), para. 14 (stating that the Appeals Chamber will only interfere if, in relation to an error of law, the error materially affected the Impugned Decision), 15 (stating that regarding errors of fact, the Appeals Chamber will not interfere “unless it is shown that the Pre-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”).

⁷⁶ [Appeal](#), para. 10.

20. *First*, the Appellant did not advance *any* argument before the Pre-Trial Chamber as to the relevance of the contested evidence.⁷⁷ On appeal he explains that the contested evidence was cited in five paragraphs in the First Arrest Warrant Application.⁷⁸ But this explanation is unsatisfactory and still provides no specific details of the contested evidence to assess whether its exclusion would have led the Pre-Trial Chamber to vary its article 58(1)(a) assessment.

21. *Second*, as for demonstrating the correctness of his arguments regarding the violations in obtaining and disclosing evidence, the Appellant failed to advance any compelling arguments in this respect. The Appellant's factual allegations regarding the violations were patently incorrect,⁷⁹ and his legal arguments regarding the violations had not merit.

22. The lack of a formal agreement between the Court and the Government of Sudan did not preclude the Prosecution from conducting investigations on the territory of Sudan,⁸⁰ much less in circumstances where it had secured the Government's agreement and participation.⁸¹ But even in circumstances where there was no agreement, the Court was entitled to operate in Sudan. The Appellant relies on article 4(2) but ignores Part 9 of the Statute which comprehensively sets out the Court's competence in seeking the cooperation of States,⁸² and United Nations Security Council Resolution 1593 adopted under Chapter VII of the Charter of the United Nations ("Charter") which referred the Darfur situation to the Court ("Resolution 1593").⁸³ Together, these establish Sudan's obligation to comply with the Court's cooperation requests, even in the absence of an agreement or arrangement.

23. Specifically, Part 9 provides that the Court may request the cooperation of a State Party, which is under an obligation to comply.⁸⁴ For a non-party State, the Court may request the State's assistance "on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis". In addition, Sudan, while a non-party State, is under an obligation to cooperate with the Court, even in the absence of an "ad hoc arrangement" or

⁷⁷ See above paras. 7, 14.

⁷⁸ [Appeal](#), para. 12; see above para. 14.

⁷⁹ See above para. 15.

⁸⁰ *Contra* [Appeal](#), para. 13; [Defence Response](#), paras. 16-29.

⁸¹ See above para. 15.a.

⁸² *Contra* [Appeal](#), paras. 8, 23. Article 4(2) primarily concerns the recognition of the Court's legal personality on a State's territory, and not the exercise of the Court's jurisdiction or the issuance of cooperation requests: R. Rastan, "Testing Co-operation: The International Criminal Court and National Authorities", *Leiden Journal of International Law*, Vol. 21 (2008) ("Rastan"), fn. 46.

⁸³ United Nations Security Council, [Resolution 1593](#) (2005), U.N. Doc. S/RES/1593 (2005).

⁸⁴ Articles 87(1)(a) and 86, [Statute](#)

“agreement” with the Court. Its obligation stems from Resolution 1593, read in conjunction with article 13(b) of the Statute, and Sudan’s duty under the UN Charter.⁸⁵ Unlike the voluntary mechanisms through which a non-party State may assume an obligation to cooperate with the Court,⁸⁶ the obligation imposed by Resolution 1593 obviates the need for Sudan’s consent to cooperate.⁸⁷ Thus, as the Appeals Chamber has held, the effect of Resolution 1593 is to require Sudan’s cooperation “on the basis of the regime established for States Parties to the Statute”.⁸⁸ As such, an agreement or arrangement is not required in order for Sudan to provide assistance to the Court. This effect also applies to the Prosecution’s authority to conduct investigations on the territory of a State in accordance with Part 9 the Statute.⁸⁹ As a result of Resolution 1593, an arrangement or agreement is not a precondition to the Prosecution conducting investigations on the territory of Sudan, and there would be no violation of the Statute in that event, contrary to the Appellant’s contention.

24. Regarding the purported violation of the Court’s Information Protection Policy, the Appellant did not advance any reason before the Pre-Trial Chamber as to how a purported violation of an “administrative rule[] on information security”⁹⁰ would render evidence inadmissible. The Appellant simply alleges a superficial—and incorrect—violation of the

⁸⁵ [Resolution 1593](#), para. 2 (deciding that “the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”). Pursuant to article 25 of the UN Charter, Sudan as a UN Member State must accept and carry out the obligations imposed on it by a Security Council resolution adopted under Chapter VII of the UN Charter.

⁸⁶ A non-party State is required to cooperate with the Court as a result of: (i) the State’s voluntary agreement under Part 9 of the [Statute](#) to cooperate, when requested to do so; or (ii) its declaration under article 12(3) of the Statute accepting the Court’s jurisdiction and assuming the same cooperation obligations as those of States Parties as set out in Rule 44 of the Rules of Procedure and Evidence. In both cases, the State voluntarily accepts to cooperate with the Court.

⁸⁷ W. Rückert, “Article 4” in Triffterer/Ambos, p. 108, mn. 12 (“Security Council decisions referring situations to the ICC contained an obligation of the territorial State concerned to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor. Since cooperation includes allowing for the exercise of functions and powers of the Court on one’s own territory, *the binding Security Council decisions in these cases legally also replaced the consent requirement with regard to cooperation*”); Rastan, p. 442 (“In the case of a Security Council referral, the Chapter VII resolution directing a state to co-operate with the ICC would form the relevant ‘appropriate basis’ for the Court to issue its requests—that is, *the conclusion of an ad hoc agreement or arrangement with the non-party state would not be a prerequisite*”). (emphases added)

⁸⁸ ICC-02/05-01/09-397-Corr (“[Bashir Jordan Referral AD](#)”), para. 141; cf. ICC-01/11-01/11-577 (“[Libya Non-Compliance Decision](#)”), paras. 21-22 (equating Libya to a State Party for the purposes of article 87(7) and deciding to refer its non-compliance to the Security Council pursuant to article 87(7) on the basis of its duty to cooperate with the Court in accordance with resolution 1970(2011)). It may also be argued that Resolution 1593 forms the “appropriate basis” under article 87(5) of the [Statute](#) on which the Court may seek Sudan’s cooperation and with which Sudan is required to comply. Whether taking this view, or the view that Sudan’s obligations are equated to that of a State Party as the Appeals Chamber has held, the outcome is the same: Sudan is required to comply with the Court even in the absence of an agreement or arrangement.

⁸⁹ Article 54(2)(a), [Statute](#).

⁹⁰ [Decision](#), para. 25.

Policy while failing to address, let alone demonstrate, the impact of such a violation on the Pre-Trial Chamber's determination under article 58(1)(a).

25. Even if the alleged violations were found to have any factual or legal merit, the Appellant has failed to substantiate how the violations meet the criteria for the exclusion of the evidence under article 69(7), namely, whether “the violation[s] cast[] substantial doubt on the reliability of the evidence”, or whether “the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings”. The Appellant only broadly alleged before the Pre-Trial Chamber that the contested evidence was of doubtful credibility, *«puisqu'ils ont été exposés à toutes les interférences graves [...] (Art. 69-7-a du Statut) et où leur admission compromettrait gravement la procédure, en particulier le droit de Mr Ali Muhammad Ali Abd-Al-Rahman à ce que sa cause soit entendue équitablement conformément aux dispositions du Statut en vertu de l'Article 67-1, et porterait gravement atteinte à son intégrité (Art. 69-7-b du Statut)»*.⁹¹ The Appellant merely speculates without citing any specific incident of interference, nor does he explain how such interference undermines the Pre-Trial Chamber's assessment under article 58(1)(a).

26. The Appellant's failure to address—or establish—the impact of the purported errors alleged in his first ground of appeal warrant the dismissal of this ground *in limine*.

B. Ground 2: The Chamber did not err in rejecting the Appellant's arguments regarding the protection of witnesses in its assessment under article 58(1)(b)(ii)

27. The Appellant argues that the Pre-Trial Chamber erred in law and fact by taking into account the Prosecution's efforts to protect witnesses while purportedly ignoring the lack of agreement between the Court and the Government of Sudan under article 4(2) of the Statute, which renders the protection of witnesses impossible. The Appellant further argues the Decision is not consistent with a subsequent decision, where the Prosecution was found to have violated the Chamber's previous instructions on witness protection.⁹² He repeats submissions that were already considered and rejected by the Pre-Trial Chamber and Appeals Chamber, and erroneously conflates the Pre-Trial Chamber's instructions to the Prosecution on witness protection with its instructions on requests for extensions of time for disclosure. His arguments in this Appeal do not demonstrate any error and merely reflect his

⁹¹ [Defence Response](#), para. 24.

⁹² [Appeal](#), paras. 8, 22-25.

disagreement with the Chambers' pronouncements. The Appellant's second ground of appeal should be dismissed.

28. In his first interim release request, the Appellant argued that the Prosecution could not claim that his release posed a risk to witnesses in Sudan when the Court did not have any agreement in place with Sudan in order to investigate or have witnesses there.⁹³ The Single Judge rejected this argument and took into consideration under article 58(1)(b)(ii) the fact that the Prosecution was not yet in a position to protect witnesses in Darfur when deciding to maintain the Appellant in detention.⁹⁴ The Appeals Chamber upheld this on appeal, finding that the Single Judge acted in line with its obligation under article 68 to ensure the protection of witnesses, which applied regardless of whether the Prosecution was in a position to conduct its investigation on the territory of Sudan and implement protective measures for actual or potential witnesses located there.⁹⁵

29. In the First Interim Release Decision the Single Judge also instructed the Prosecutor to "take reasonable steps to put in place mechanisms to protect potential witnesses and/or safeguard potential evidence, and to collect more detailed information and evidence about Mr Abd-Al-Rahman's remaining position of influence in the region" ("the Witness Protection Instruction").⁹⁶ Subsequently in the Decision, the Pre-Trial Chamber rejected the Appellant's claim that the Prosecution had violated the Witness Protection Instruction, stating "[t]here is no indication that the Prosecutor did not take all feasible steps under the circumstances to comply with this instruction".⁹⁷ The Appellant alleges that two errors stem from this finding.

30. *First*, the Appellant claims that the Chamber erred legally and factually in disregarding his submissions that witness protection was not possible without an article 4(2) agreement between Sudan and the Court. As set out above, the Appellant's arguments regarding article 4(2) have no merit,⁹⁸ accordingly his arguments—which rely on the purported violation of

⁹³ ICC-02/05-01/20-100 ("[Defence Interim Release Reply](#)"), para. 10.

⁹⁴ [First Interim Release Decision](#), para. 28.

⁹⁵ [First Interim Release AD](#), para. 27 (affirming that, "when determining whether the condition for continued detention under article 58(1)(b)(ii) of the Statute is met, the safety of witnesses must be considered regardless of whether they are currently reachable by the Prosecutor").

⁹⁶ [First Interim Release Decision](#), para. 31. See [Defence Response](#), paras. 5, 14; [Appeal](#), para. 18.

⁹⁷ [Decision](#), para. 31 ("There is no indication that the Prosecutor did not take all feasible steps under the circumstances to comply with this instruction. While it is regrettable that the Court is not yet in a position to sufficiently mitigate risks to all witnesses, this reality must be taken into account for the purposes of assessing the continued need to detain Mr Abd-Al-Rahman").

⁹⁸ See *above* paras. 22-23.

article 4(2)—in the second ground of appeal should be dismissed. The Appellant has also not demonstrated the impact of the alleged error on the Decision—nor would he be able to in light of the Appeals Chamber’s finding that witnesses’ safety must be considered in determining whether the conditions for continued detention under article 58(1)(b)(ii) are met regardless of whether the Prosecutor is able to reach them.⁹⁹

31. *Second*, the Appellant claims that the Pre-Trial Chamber’s finding that the Prosecution did not violate the Witness Protection Instruction is inconsistent with the Chamber’s subsequent finding in its second decision postponing the confirmation hearing (issued on 18 December 2020) in which *he asserts* that the Chamber found that the “Prosecutor has violated the Chamber’s instructions” in relation to the protection of witnesses.¹⁰⁰ The Appellant contends that not only was this a legal and factual error (without explaining how this is the case), but that the Chamber’s inconsistency raises questions regarding its impartiality.¹⁰¹ The Appellant’s allegation is patently incorrect and his criticism of the Chamber inappropriate. The “Chamber’s instructions” that were found to have been violated were those in its first decision postponing the confirmation hearing in which it instructed the Prosecution to disclose by 7 December 2020 all witness statements intended to be relied upon in the confirmation hearing (“Disclosure Instruction”).¹⁰² It is difficult to see how the Disclosure Instruction—clearly related to overseeing the Prosecution’s ongoing disclosure—has any relationship to the protection of witnesses, as the Appellant appears to interpret it, or the Witness Protection Instruction which concerns the broad instructions to the Prosecution to secure the safety of witnesses and evidence in the case. The Appellant himself does not explain the connection between the two instructions. His arguments about an apparent contradiction must be rejected.

⁹⁹ [First Interim Release AD](#), para. 27.

¹⁰⁰ [Appeal](#), para. 22 (« *Depuis la Décision dont appel, l’Honorable Chambre Préliminaire II est d’ailleurs revenue sur cette conclusion et a formulé la conclusion exactement inverse que « the Prosecutor has violated the Chamber’s instructions » en matière de protection de ses témoins au paragraphe 25 de la Décision du 18 décembre 2020 ordonnant un second report de l’audience de confirmation des charges* »). See ICC-02/05-01/20-238 (“[Second Confirmation Postponement Decision](#)”), para. 25 (“As regards the 4 December 2020 Request, the Chamber notes that the Prosecutor should have notified the Chamber sufficiently in advance if the Prosecutor was unable to meet the deadline and should have provided concrete and specific examples demonstrating the concern that redactions would make the statements ‘of limited value to the preparation of the Defence case’. The Chamber notes, furthermore, that the Prosecutor’s 4 December 2020 Request does not even address this issue. The Chamber therefore cannot but conclude that the Prosecutor has violated the Chamber’s instructions”).

¹⁰¹ [Appeal](#), para. 22.

¹⁰² ICC-02/05-01/20-196 (“[First Confirmation Postponement Decision](#)”), para. 34. This instruction is cited in the [Second Confirmation Postponement Decision](#) at paragraph 8.

32. *Third*, aside from arguing that this error invalidates the Decision, the Appellant fails to explain how it does so.¹⁰³ His failure to substantiate the third ground of appeal in this ground warrants its dismissal *in limine*.

C. Ground 3: The Pre-Trial Chamber reasonably exercised its discretion in declining to release the Appellant on humanitarian grounds

33. The Appellant argues that the Pre-Trial Chamber erred in fact by not taking into account the risks inherent in his advanced age and the particular circumstances of the ICC Detention Centre; and erred in law by not ordering the minimum measures required to respect his right to life.¹⁰⁴ The Appellant's third ground of appeal should be rejected as it fails to demonstrate that the Chamber was unreasonable in the exercise of its discretion not to release him on medical grounds, and merely disagrees with the Chamber's decision.

34. The Court's legal texts do not specifically provide for the interim or conditional release of a detained person on health grounds.¹⁰⁵ Instead, a decision to release a suspect on health or medical grounds is a matter within the Pre-Trial Chamber's discretion.¹⁰⁶ In this case, the Chamber exercised its discretion reasonably¹⁰⁷ in light of several factors.

35. *First*, the Appellant did not claim to be suffering from any adverse health conditions at the time he made his submissions on interim release before the Pre-Trial Chamber.¹⁰⁸ The Appellant [REDACTED],¹⁰⁹ and the Pre-Trial Chamber reasonably relied upon this fact in

¹⁰³ [Appeal](#), paras. 24-25.

¹⁰⁴ [Appeal](#), paras. 8, 26-29.

¹⁰⁵ ICC-02/11-01/11-278-Red ("[Gbagbo Interim Release AD](#)"), para. 86.

¹⁰⁶ [Gbagbo Interim Release AD](#), para. 87.

¹⁰⁷ ICC-01/04-01/07-2259 ("[Katanga Unlawful Detention AD](#)"), para. 34 ("[T]he Appeals Chamber [...] will not interfere with a discretionary decision of another Chamber unless that decision is vitiated by a legal error, a factual error or a procedural error, and only if the error materially affected the decision"); ICC-01/05-01/08-3636-Red ("[Bemba AJ](#)"), para. 48 ("[T]he Appeals has established that [...] it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision").

¹⁰⁸ See [Defence Response](#), para. 38.

¹⁰⁹ [Appeal](#), para. 28; [Defence Response](#), para. 38.

determining that his release on humanitarian grounds was unwarranted.¹¹⁰ The state of his health is also not in issue in this appeal.

36. *Second*, the Appellant's claim that his advanced age [REDACTED] is speculative and ignores [REDACTED] even if released from detention. The Appellant did not provide the Pre-Trial Chamber with any evidence—let alone any independent, expert medical evidence—to support his assertions [REDACTED] but instead relied on the lay opinion of Counsel.¹¹¹ On appeal, the Appellant [REDACTED].¹¹² [REDACTED]

37. *Third*, the Appellant fails to demonstrate that his detention, in light of his age [REDACTED], is incompatible with his rights under international human rights law, including his right to life.¹¹³ The European Court of Human Rights has held that there is no general obligation under human rights law to release detainees on age or health grounds.¹¹⁴ Even if a detainee contracts an infectious disease, this fact in itself would not imply a violation of the detainee's rights provided that they received adequate medical assistance.¹¹⁵ Rather, the compatibility of a detainee's state of health and continued detention depends on: (i) the condition of the detainee; (ii) the quality of care provided to them in detention; and (iii) the advisability of continuing detention in light of the detainee's state of health.¹¹⁶ As to the first factor, the Appellant does not allege he is suffering from any adverse health condition, let alone one that is sufficiently serious to trigger consideration of his release.¹¹⁷ As to the second factor, a detainee's physical health and well-being must be adequately

¹¹⁰ [Decision](#), para. 34.

¹¹¹ [Defence Response](#), para. 38.

¹¹² [Appeal](#), para. 28.

¹¹³ *Contra* [Appeal](#), paras. 26, 29.

¹¹⁴ [Sawonkiuk v. The United Kingdom](#), App. No. 63716/00, Decision, 29 May 2001, p. 3; [Papon v. France](#), App. No. 64666/01, Decision, 7 June 2001 ("[Papon v. France](#)"); [Pitalev v. Russia](#), App. No. 34393/03, Judgment, 30 July 2009 ("[Pitalev v. Russia](#)"), paras. 37, 54; [Dzieciak v. Poland](#), App. No. 77766/01, Judgment, 9 December 2008, para. 91.

¹¹⁵ [Pitalev v. Russia](#), para. 53 ("[E]ven if the applicant had contracted tuberculosis while in detention, this fact in itself would not imply a violation of Article 3, provided that he received treatment for it. However, a lack of adequate medical assistance for serious diseases which one did not suffer from prior to detention may amount to a violation of Article 3").

¹¹⁶ [Contrada v. Italy \(No. 2\)](#), App. No. 7509/08, Arrêt, 11 February 2014, para. 78 (« *La Cour doit tenir compte, notamment, de trois éléments afin d'examiner la compatibilité d'un état de santé préoccupant avec le maintien en détention du requérant, à savoir : a) la condition du détenu, b) la qualité des soins dispensés et c) l'opportunité de maintenir la détention au vu de l'état de santé du requérant* »).

¹¹⁷ [Papon v. France](#), "B. Relevant law: The Law" (in relation to a 90-year old applicant who alleged that his detention violated article 3 of the European Convention on Human Rights (prohibiting torture or inhuman or degrading treatment or punishment), the Court found that while he had health problems which restricted his freedom of movement, his overall condition was good and he was receiving adequate medical treatment in prison. It concluded that his situation did not attain a "sufficient level of severity to come within the scope of Article 3 of the Convention").

secured by providing them with the requisite medical assistance when needed.¹¹⁸ However the Appellant [REDACTED]. In the absence of the first two factors, the third factor therefore does not fall for consideration. The Appellant's reference to the Council of Europe's statement of principles relating to the treatment of detainees in the context of the Covid-19 pandemic¹¹⁹ adds no weight to his appeal. The Council of Europe guidance imposes no additional legal obligations on the Court under international human rights law, and does not supersede the requirements of the Rome Statute and in particular, the fundamental considerations under article 58(1) that govern detention.

38. In these circumstances, the Pre-Trial Chamber reasonably exercised its discretion by relying upon the Appellant's actual medical condition at the time of reviewing his detention to conclude that the Appellant's release was not warranted on medical grounds.

CONCLUSION AND RELIEF SOUGHT

39. For the foregoing reasons the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal and affirm the Decision.



James Stewart, Deputy Prosecutor

Dated this 22nd day of January 2021

At The Hague, The Netherlands

¹¹⁸ [Pitalev v. Russia](#), paras. 37, 54 (“The Court accepts that the medical assistance available in prison hospitals may not always be of the same standard as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance”).

¹¹⁹ Appeal, para. 29, citing Council of Europe, “[Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease \(COVID-19\) pandemic](#)”, 20 March 2020.