

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-RoR220-04/21**
Date: **18 October 2021**

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

SITUATION IN DARFUR, SUDAN

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

Public

**Decision on the ‘Motion for Judicial Review of Registrar’s Decision’ dated
10 August 2021 (ICC-RoR220-04/21-1)**

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

The Office of the Prosecutor

Mr Karim Khan
Mr James Stewart

Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Detention Section

Mr Harry Tjonk, Acting Chief Custody
Officer

Division of Court Services

The Presidency of the International Criminal Court (the ‘Court’) has before it the application filed by Mr Ali Muhammad Ali Abd-Al-Rahman dated 10 August 2021, seeking judicial review pursuant to regulation 220 of the Regulations of the Registry (the ‘Regulations’) of a decision of the Registrar dated 3 August 2021, and requesting the right to communicate with the media in writing (the ‘Application’).¹

I. PROCEDURAL HISTORY

1. On 21 June 2021, Counsel for Mr Abd-Al-Rahman informed the Acting Chief Custody Officer (the ‘Acting CCO’) that he intended to send draft responses of Mr Abd-Al-Rahman to questions of a Sudanese journalist (the ‘Interview Responses’) to the Acting CCO for his verification pursuant to regulation 169 of the Regulations.² The Interview Responses were sent to the Acting CCO on 23 June 2021,³ who advised on 25 June 2021 that a request for review of outgoing mail would be denied pursuant to regulation 169(3)(b)(iii) and (iv) of the Regulations (the ‘CCO Decision’).⁴ In explaining the reasoning, the Acting CCO advised that: (i) the spirit of regulation 180(1)(c) of the Regulations, which provides a refusal of visits if the purpose is to obtain information which may be subsequently reported in the media, extends to telephone calls and written correspondence; and (ii) some information contained in the Interview Responses was confidential and sharing this information would interfere with the maintenance of security, safety and good order of the Detention Centre.⁵
2. On 30 June 2021, Mr Abd-Al-Rahman submitted a complaint to the Acting CCO pursuant to regulation 106(1) of the Regulations of the Court and regulations 217 and 218 of the Regulations asking him to revisit his decision and authorise the outgoing mail to the Sudanese journalist pursuant to regulation 169 of the Regulations (the ‘Complaint’).⁶

¹ Defence for Mr Abd-Al-Rahman, Motion for Judicial Review of Registrar’s Decision, 10 August 2021, ICC-RoR220-04/21-1, paras 1, 36.

² Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, pp. 19-20 *annexed to* Registrar, Transmission pursuant to Regulation 220(3) of the Regulations of the Registry, ICC-RoR220-04/21-2-Conf-Exp, 12 August 2021 (‘Registry Transmission’).

³ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, p. 19.

⁴ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, pp. 18-19.

⁵ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, p. 19. Counsel subsequently offered to remove the confidential information. In response, the Acting CCO confirmed his decision that he cannot allow the correspondence as it is a media interview. Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, p. 18.

⁶ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, pp. 2-7, paras 1, 19. The Complaint was received by the Acting CCO on 1 July 2021. Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, p. 8.

3. On 16 July 2021, the Acting CCO issued a decision pursuant to regulation 218 of the Regulations, rejecting the Complaint.⁷ He reiterated that his refusal to authorise the correspondence pursuant to regulation 169(3)(a) was based on the view that the spirit and purpose of regulation 180(1)(c) of the Regulations does not authorize the CCO to allow detained persons to communicate with the media.⁸ In addition, he noted with reference to regulation 169(3)(b)(iii), that the correspondence may also interfere with the administration of justice (as it refers to Mr Abd-al Rahman's trial and matters that may be considered to be related to his trial or transfer) and, with reference to 169(3)(b)(iv), that the correspondence may contain information that may otherwise disturb the maintenance of security, safety and good order of the Detention Centre.⁹
4. On 21 July 2021, Mr Abd-Al-Rahman submitted a request for review to the Registrar, requesting that the latter consider the Complaint anew pursuant to regulation 219(3) of the Regulations and provide authorisation to send the relevant correspondence (the 'Request for Review').¹⁰ He argued that the nature and content of the Interview Responses were entirely uncontroversial and that their communication to the journalist would neither amount to any breach of the Regulations, nor be contrary to any principle of good detention centre management.¹¹
5. On 3 August 2021, the Registrar issued a decision pursuant to regulation 219(3) of the Regulations rejecting the Request for Review (the 'Impugned Decision'),¹² holding that written interview questions fall within the scope of regulation 180(1)(c) of the Regulations, applied by analogy, insofar as the intention is to report the answers in the media.¹³
6. On 10 August 2021, Mr Abd-Al-Rahman submitted his Application for review of the Impugned Decision by the Presidency.¹⁴ On 13 August 2021, the Registrar transmitted the supporting documents to the Presidency, in accordance with regulation 220(3) of the

⁷ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, pp. 8-11, para. 15.

⁸ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, p. 10, para. 7.

⁹ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, p. 10, para. 7.

¹⁰ Request for Review by the Registrar, ICC-RoR220-04/21-2-Conf-Exp-AnxII, para. 2 *annexed to the Registry Transmission*, ICC-RoR220-04/21-2-Conf-Exp.

¹¹ Request for Review by the Registrar, ICC-RoR220-04/21-2-Conf-Exp-AnxII, para. 2.

¹² Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, para. 4, p. 5 *annexed to the Registry Transmission*, ICC-RoR220-04/21-2-Conf-Exp.

¹³ Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, para. 15.

¹⁴ Application, ICC-RoR220-04/21-1.

Regulations.¹⁵ The Registrar did not submit any observations pursuant to regulation 220(4) of the Regulations.

II. IMPUGNED DECISION

7. In the Impugned Decision, the Registrar recognises that the matter at hand is not explicitly addressed by the Regulations or the Regulations of the Court, but notes that the policy rationale underlying regulation 180(1)(c) of the Regulations, which concerns visits, seems to be that no information must be obtained from detained persons for reporting in the media.¹⁶ This rationale would be undermined if information obtained from detained persons through other forms of interaction could be reported in the media.¹⁷ He concludes that for this reason, regulation 180(1)(c) is necessarily to be applied by analogy to other forms of interaction with detained persons, insofar as the intention is to report the answers in the media.¹⁸ In view of the absolute nature of the prohibition under regulation 180(1)(c), the Registrar considers that the content of the information, or the purpose for its reporting, is irrelevant.¹⁹

III. APPLICATION

8. The Application seeks review of the Impugned Decision and requests that the Presidency: (i) quash the Impugned Decision; (ii) declare that detainees at the Detention Centre have the right to communicate with the media in writing; and (iii) order the Acting CCO to permit the transmission of the amended Interview Responses.²⁰
9. Mr Abd-Al-Rahman submits that the Impugned Decision erroneously relies on an inapposite analogy between media visits and communication with media in writing,²¹ and

¹⁵ Registry Transmission, ICC-RoR220-04/21-2-Conf-Exp, para. 2.

¹⁶ Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, paras 10-11, 13.

¹⁷ Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, para. 14.

¹⁸ Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, paras 14-15.

¹⁹ Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, paras 12, 16. The Impugned Decision also rejects Mr Abd-Al-Rahman's argument that the Acting CCO's response created any legitimate expectations that his Request for Review would be granted. Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, paras 17-19. This aspect has not been challenged in the Application.

²⁰ Application, ICC-RoR220-04/21-1, paras 1, 36.

²¹ Application, ICC-RoR220-04/21-1, para. 3.

argues that the Court's legal texts do not provide for a blanket prohibition on communications intended for publication, but merely for a prohibition of media visits.²² Unlike visits, written communication with media allows the CCO to require the removal of any answers that might be considered confidential or too sensitive for reporting in the media.²³ Mr Abd-Al-Rahman considers that it was thus unreasonable for the Registrar to conclude that the rationale of regulation 180(1)(c) of the Regulations would be undermined if written media interviews were allowed.²⁴ If such communications were meant to be prohibited, the drafters of the Regulations would have included this aspect in regulation 169(3).²⁵

10. Furthermore, Mr Abd-Al-Rahman submits that a blanket prohibition on contact with the media amounts to a disproportionate restriction of his fundamental right to freedom of expression.²⁶ Recalling that any limitations of this right are subject to a proportionality test,²⁷ he argues that detained persons should be allowed to communicate with the media unless there are compelling reasons to forbid it,²⁸ and that this interpretation is further supported by the approaches of other international criminal courts and tribunals.²⁹

IV. DETERMINATION OF THE PRESIDENCY

A. Standard for judicial review and applicable law

11. The Presidency recalls that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness,

²² Application, ICC-RoR220-04/21-1, paras 3-4, 15-16, 22, 35.

²³ Application, ICC-RoR220-04/21-1, paras 19-20, 35.

²⁴ Application, ICC-RoR220-04/21-1, paras 4, 17, 21.

²⁵ Application, ICC-RoR220-04/21-1, para. 18.

²⁶ Application, ICC-RoR220-04/21-1, paras 3, 6, 24.

²⁷ Application, ICC-RoR220-04/21-1, paras 12, 23 *referring to* Council of Europe, article 10 of the European Convention on Human Rights, 4 November 1950, ETS 5 (the 'European Convention on Human Rights').

²⁸ Application, ICC-RoR220-04/21-1, paras 13-14, 23-24 *referring to* Council of Europe: Committee of Ministers, paragraphs 3 and 24.12. of the Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, 11 January 2006, Rec(2006)2 (the 'European Prison Rules').

²⁹ Application, ICC-RoR220-04/21-1, paras 25-34. Mr Abd-Al-Rahman also submits that the Impugned Decision prevents Mr Abd-Al-Rahman from seeking to contribute, in his own limited way, to peace and reconciliation in Sudan, which forms part of the mandate and core values of the Court under the preamble of the Rome Statute. Application, ICC-RoR220-04/21-1, para. 35. *See also* Application, ICC-RoR220-04/21-1, paras 5, 32.

acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.³⁰

B. Merits

12. The Presidency observes that the procedure for incoming and outgoing mail of detained persons is governed by regulation 169 of the Regulations, which requires review of all correspondence by the CCO and provides for the possibility to restrict such communications on grounds listed in sub-section 169(3). Unlike regulation 180(1)(c) of the Regulations, which clarifies that visits to a detained person may be refused if the Registrar or the CCO has reasonable grounds to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media, regulation 169 provides no direct guidance on the issue of written communication with the media. Whereas the CCO Decision also relied on regulation 169(3)(b)(iii) and (iv), that is a potential interference with the administration of justice and disturbance of the maintenance of the security, safety and good order of the Detention Centre,³¹ the Impugned Decision is exclusively based on an application, by analogy, of regulation 180(1)(c) of the Regulations.³²
13. The Presidency recognises that neither the Regulations nor the Regulations of the Court expressly permit written communication between detained persons and the media. It further acknowledges the risk that regulation 180(1)(c) could be practically undermined to a certain extent by contact with the media through other means of transmission. At the same time, however, the Presidency must affirm the importance of the fundamental right to freedom of expression, recognised by all major human rights conventions,³³ and recalls

³⁰ The standard of judicial review was defined by the Presidency in its Decision on the Application to Review the Registrar's Decision Denying the Admission of Mr Ernest Midagu Bahati to the list of Counsel, 20 December 2005, ICC-RoC72-02/05, para. 16; and supplemented in its Decision on the application to review the decision of the Registrar denying Mr. Balembo privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. *See also* Presidency, Reasons for the 'Decision on the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel"', 10 July 2008, ICC-RoC72-01/08-10, para. 20; Presidency, Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts, 6 August 2009, ICC-RoR56-01/09-2, para. 11.

³¹ Annex I, ICC-RoR220-04/21-2-Conf-Exp-AnxI, pp. 10, 19.

³² Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, paras 12-16.

³³ *See e.g.* Organisation of African Unity, article 9 of the African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Organization of American States, article 13 of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955 (the 'American Convention on Human Rights'); United Nations General Assembly, article 19 of the International

that, pursuant to article 21(3) of the Rome Statute, the Court's application and interpretation of applicable law must be consistent with internationally recognised human rights. While the right to freedom of expression is not absolute, restrictions of this right, including in the context of detention, must be provided by law, necessary and proportionate to a legitimate aim.³⁴ The Presidency does not find convincing the Impugned Decision's characterisation that regulation 180(1)(c) effectively creates a prohibition on *any* information obtained from detained persons being reported in the media. The scope of regulation 180(1) is limited to permission for visits. Other forms of communication between detained persons and the outside world do not contain an equivalent prohibition, notwithstanding that sub-regulation 169(3)(b) and (c) are materially similar to regulation 180(1) in its other aspects. Further, the Presidency considers it evident that immediate forms of communication with the media are different in nature from written communications which can be fully reviewed and assessed for compliance with the requirements of regulation 169(3). In sum, the Presidency considers that the Impugned Decision erred in law in its assessment that the Regulations prohibit any form of communications between detained persons and the media. In view of this finding that the Impugned Decision lacks a legal basis for its asserted blanket prohibition on media contact, there is presently no need to further consider necessity and proportionality.

14. The Presidency emphasises that this in no way permits unfettered or unrestricted written access of detained persons to the media. Rather, a clear legal basis to impose necessary and proportionate restrictions to such access is established in regulation 169(3) of the Regulations, which governs incoming and outgoing mail. The Presidency considers that this must necessarily include written correspondence with the media. The Presidency observes that other international criminal courts or tribunals generally prohibit media visits but allow for some communication with the media, subject to Registry approval and provided that such communication, amongst other grounds, neither disturbs the

Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999 (the 'ICCPR'), p. 171; article 10 of the European Convention on Human Rights; United Nations General Assembly, article 19 of the Universal Declaration on Human Rights, 10 December 1948, 217 A (III).

³⁴ See e.g. article 10(2) of the European Convention on Human Rights; 19(3) ICCPR; article 13(2) American Convention on Human Rights; European Court of Human Rights, *Nilsen v. The United Kingdom*, Decision as to the Admissibility of Application no. 36882/05, 9 March 2010, para. 45; Inter-American Court of Human Rights, *Palamara Iribarne vs. Chile*, Sentence, 22 November 2005, Series C No. 135, para. 79.

administration of justice nor the good order of the relevant detention centre.³⁵ While the Nelson Mandela Rules are silent on this issue,³⁶ the European Prison Rules provide that '[p]risoners shall be allowed to communicate with the media unless there are compelling reasons to forbid this for the maintenance of safety and security, in the public interest or in order to protect the integrity of victims, other prisoners or staff.'³⁷ The grounds for refusal to transmit written correspondence listed in regulation 169(3) of the Regulations, such as a risk of interference with or intimidation of a witness, interference with the administration of justice, or otherwise disturbance of the maintenance of the security, safety and good order of the Detention Centre, follow a similar reasoning. The Impugned Decision does not examine whether the CCO Decision may have been justified by a ground listed therein. Indeed, the Impugned Decision does not appear to have considered the proposed content of the Interview Responses in any way.³⁸

15. In these circumstances, the Presidency is not convinced that regulation 180(1)(c) of the Regulations supports a blanket restriction of communication of detained persons with the media, and finds that the Impugned Decision is legally erroneous in this regard. The Registrar should have examined whether the CCO's decision was in conformity with regulation 169 of the Regulations, which is the legally applicable provision governing written communications of detained persons. Such examination would necessarily have included assessment of the content of the Interview Responses including any impact of

³⁵ See e.g. Kosovo Specialist Chambers, Practice Direction on Media Communications, KSC-BD-28, 23 September 2020, article 4; Residual Special Court for Sierra Leone, Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, 13 May 2019, rule 43; International Residual Mechanism for Criminal Tribunals, Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Mechanism or Otherwise Detained on the Authority of the Mechanism, 5 November 2018, rule 74; International Criminal Tribunal for the former Yugoslavia, Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, IT/38/Rev.10, 15 November 2016, rule 64*bis*; Special Tribunal for Lebanon, Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Special Tribunal for Lebanon or Otherwise Detained on the Authority of the Special Tribunal for Lebanon, STL-BD-2009-02-Rev.1, 18 August 2014, rule 63. See also International Residual Mechanism for Criminal Tribunals, *The Prosecutor v. Radovan Karadžić*, Decision on Request for Review of Registrar's Decision, 17 May 2017, MICT-13-55-A, pp. 2-3; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Radovan Karadžić*, Decision on Radovan Karadzic's Request for Reversal of Denial of Contact with Journalist, 12 February 2009, IT-95-5/18-PT, para. 16.

³⁶ United Nations General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 8 January 2016, A/RES/70/175 (the 'Nelson Mandela Rules').

³⁷ European Prison Rules, para. 24.12. See also Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, March 2008, principle XVI ('Persons deprived of liberty shall have the right to freedom of expression in their own language, association, and peaceful assembly, subject to the limitations that are strictly necessary in a democratic society to protect the rights of others or public health or morals, and maintain public order, internal security, and discipline in places of deprivation of liberty, as well as subject to other limitations permitted by law and international human rights law.').

³⁸ See Impugned Decision, ICC-RoR220-04/21-2-Conf-Exp-AnxIII, para. 16.

media publication on the proceedings against Mr Abd-Al-Rahman, a matter which clearly falls within the scope of the regulation 169(3).

In light of the above, the Presidency, by majority, hereby **GRANTS** the Application, in part, **REVERSES** the Impugned Decision, and **REMITTS** the matter to the Registrar for reconsideration in accordance with the present Decision.

Judge Ibáñez Carranza's dissenting opinion is contained below.

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



Judge Piotr Hofmański
President



Judge Luz del Carmen Ibáñez Carranza
First Vice-President



Judge Antoine Kesia-Mbe Mindua
Second Vice-President

Dated this 18 October 2021

At The Hague, The Netherlands

DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

1. I am respectfully unable to concur with the decision of the majority of the Presidency on the ‘Motion for Judicial Review of Registrar’s Decision’ dated 10 August 2021 filed by Mr Abd-Al-Rahman.³⁹ Contrary to the majority, I find no error in the Impugned Decision, which rightly applied the law and the Court’s Regulations of the Registry (“Regulations”). I also cannot discern any violation of the human right to freedom of expression or of any human right. In fact, I am convinced that the judicial review under consideration does not pose any particular problem in the realm of Human Rights, but rather it raises an issue of compliance with the administrative dispositions of the Court, whose main objective is to ensure the proper functioning of the administration of justice. There are a number of considerations not only of law but also of fact that lead me to this conclusion, as set out hereinafter.

2. First, the right to freedom of expression as any other human right is not an absolute one and it can be regulated or restricted, with due respect for proportionality, in view of a legitimate aim and to guarantee or safeguard superior values, goods or common rights, such as the public order, national security, and so forth. It is true that the right to freedom of expression is the cornerstone of any democratic society and that it is of the utmost importance in all major human rights conventions, but its exercise can be restricted insofar as restrictions are proportionate to a legitimate aim.⁴⁰ This is of particular relevance in the case of detained persons or in the context of a prison environment where there is a need to maintain security and order and assure peaceful coexistence among detained persons, as well as the proper administration of justice.⁴¹ Preserving public

³⁹ Application, ICC-RoR220-04/21-1.

⁴⁰ According to the IACtHR “The Court considers it important to restate that the right to freedom of expression is not an absolute right and that Article 13(2) of the Convention provides for the possibility of placing restrictions on freedom of thought and expression by imposing subsequent liability for abuse of this right. The grounds for imposing subsequent liability must be expressly, previously and strictly limited by law; they should be necessary to ensure “respect for the rights or reputations of others” or “the protection of national security, public order, or public health or morals”, and should in no way restrict, beyond what is strictly necessary, the full exercise of freedom of expression or become either direct or indirect means of prior censorship”. IACtHR, *Palamara Iribarne vs. Chile*, [Judgment](#), 22 November 2005, Series C No. 135, para. 79. *See also*: IACtHR, *Álvarez Ramos v. Venezuela*, [Judgment](#), (Preliminary objections, merits, reparations and costs), 30 August 2019, Series C No. 380, para. 108; IACtHR, *Lagos del Campo v. Peru*, [Judgment](#) (Preliminary objections, merits, reparations and costs), 31 August 2017, Series C No. 340, para. 124.

⁴¹ United Nations, [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#), 9 December 1988, Res 43/173, principle 19 (“A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity

order, safeguarding national security and protecting the proper administration of justice are, *inter alia*, legitimate aims whose importance justifies imposing restrictions on freedom of expression. Furthermore and for the same reasons, it is accepted that the authorities can interfere with freedom of expression when confronted for instance with speech which incites violence against an individual, a public official, or a sector of the population,⁴² or with speech that could jeopardise social stability.⁴³ Hence, there is no absolute right – let alone a human right – of a detained person to give information which will be subsequently reported in the media.

3. The Court's legal framework similarly to other criminal codes around the world has regulated the exercise of the right to freedom of expression in chapter 5 of the Regulations of the Registry, concerning 'Detention Matters', specifically in regulations 169 and 180. In the same vein, regulation 101(1) of the Regulations of the Court provides for the possibility of restrictions imposed by a Chamber when they are necessary in the interests of the administration of justice. In the context of the legal framework of the Court, it is perfectly accepted that some restrictions to the exercise of detained persons' right to freedom of expression are lawful and legitimate. So much so, that according to regulation 101 of the Regulations of the Court the Prosecutor is entitled to request the restriction of these rights if it is considered necessary in the interest of the administration of justice. Hence, there is no lacuna under the Rome Statute's legal framework and there is no need to draw on other sources of law. The restrictions on the forms of communication at the disposal of the detainees are lawful and clear and systematically enshrined in the Rome Statute and related regulations and they must be interpreted in a systematic manner taking into account the spirit, object and purpose of them.
4. Turning to the case at hand, I respectfully disagree that the Impugned Decision in any way illegitimately infringed or violated Mr Abd-Al-Rahman's right to freedom of expression. The Impugned Decision is justified since it is based upon the relevant regulations, and the administrative authorities acted in accordance with them when they disallowed the public dissemination through the media of information pertaining to his judicial proceedings, such as the circumstances of his surrender, transfer, detention, the

to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations").

⁴² See ECHR, *Case of Sürek v. Turkey* (no. 3), [Judgment](#), 8 July 1999, [GC], para. 37.

⁴³ See ECHR, *Case of Zana v. Turkey*, [Judgment](#), 25 November 1997, para. 58.

indictment and charges against him, as well as statements with potentially political aims. As it is clear that such declarations may interfere with and, at the very least, disturb the proper administration of justice. Administrative authorities would be mistaken if they decided to ignore the restrictions imposed by the Regulations. The legal restriction applied to Mr Abd-Al-Rahman cannot be considered a disproportionate one or abridging his freedom of expression because this right does not entail, for detained persons, a right to make public information related to the judicial matters or proceedings in which a detained person is involved while in detention. Let alone when these decisions could at some point jeopardise the legitimacy of the Court or its procedures, or the rights or freedoms of other persons or witnesses.⁴⁴ Avoiding such undesirable consequences is exactly the objective of regulations 180(1)(c) and 169(3)(b)(iii) and (iv) of the Regulations, regulations that are perfectly applicable to Mr Abd-Al-Rahman's case, as the Registry correctly noted.

5. Furthermore, the freedom of expression of Mr Abd-Al-Rahman is not being unlawfully restricted, as the essential content of the right is being respected and he has other means to express himself at present. Beyond the legal framework of the Court, he has not been subjected to any prohibition of expressing himself in his own language, and his possibilities to divulgate his thoughts and ideas are not unlawfully being limited. Alternative means of communication remain open to him – he can correspond or receive visits within the limits established by the Regulations – and it is reasonable to suppose that, as a result of these visits and interactions, he will express his opinions, which is permitted under the right to freedom of expression. Indeed, he has the possibility of expressing himself before, *inter alia*, the Judges, counsellors, diplomatic personnel, family, friends. In my view, a human rights breach or violation is not at stake in this case as the hard core of the right and its essence is in force and is being fully respected, thus the mention of article 21(3) of the Rome Statue is not relevant to solve the issue.

⁴⁴ In fact, the inclusion in the Regulations of a specific provision banning the possibility, for a detained person, to share information with the media, proves that the right to freedom of expression does not contemplate this possibility in the case of detained persons. Principle 19 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* indicates that imprisoned persons have the right to be visited by and to correspond with family members, but it does not mention the possibility for them to make available to the public certain information subject to restrictions under *lex specialis*: “A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or regulations.” UN General Assembly, [*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*](#), 9 December 1988, A/RES/43/173.

6. Second, I am convinced that the joint application of regulations 180(1)(c) and 169(3)(b)(iii) and (iv) of the Regulations of the Registry, as the specialised law, is legally correct. Regulation 169 allows for the possibility of restricting written correspondence (through email) of detained persons to safeguard superior aims, such as public order, security or the administration of justice, while regulation 180(1)(c) allows the Registrar or the Chief Custody Officer not to grant permission for visits if there are reasonable grounds to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media. In my humble view these regulations must not be read as independent dispositions or in an isolated manner. Contrary to my colleagues, whose decision is based on a literal, restricted interpretation of the Regulations, I consider that these Regulations should be read systematically, as they interact with the same purpose: to protect the proper administration of justice. Thus there is no lacuna in the applicable legal framework and no regulation needs be applied by analogy, and there is no necessity to resort to any other source of law. Regulations 180(1)(c) and 169(3)(b)(iii) and (iv) of the Regulations are systemic adequate provisions in perfect accordance with human rights law doctrine and practice whose application in the case at stake is mandatory.
7. Third, my colleagues' decision is based on a restricted and isolated interpretation of the Regulations and on a misreading of Article 31(1) of the Vienna Convention on the Law of Treaties ("Vienna Convention").⁴⁵ Their decision focuses on the form of communication and ignores the object and purpose of the restriction contained in article 180(1)(c) of the Regulations. The method of teleological interpretation of the law, whose aim is applying the law in the light of the purpose it is intended to achieve, is particularly present in treaty interpretation and expressly mentioned by Article 31(1) of the Vienna Convention⁴⁶ as a general rule of interpretation. In the case under consideration no analogy is needed to understand the meaning and sense of the Impugned Decision. A systematic approach to the Court's legal framework interpreted under the teleological method provided in Article 31(1) of the Vienna Convention⁴⁷ reveals that there is a clear restriction of contact with or access to detained

⁴⁵ United Nations, [Vienna Convention on the Law of Treaties](#), 23 May 1969, article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

persons where the purpose is to obtain information which may be subsequently reported in the media. This is the object and purpose of regulation 180(1)(c) of the Regulations and it is of little relevance whether such communication with the media occurs in writing or in person. Although regulation 180(1)(c) refers to visits and does not contain any mention regarding written questions, it is reasonable to consider that the object and purpose of the norm is not simply banning visits but avoiding that the media has access to information that could potentially compromise the proper administration of justice or jeopardise public security or the security, order or safety of the prison. A reduced interpretation of this norm to the effect that only information obtained by the media through a physical visit is prohibited, would unreasonably privilege a literal interpretation of the regulation over its object and purpose, contrary to the principles of legal interpretation.

8. Where there is an attempt to communicate with the media in writing, and through emails regulation 169(b)(iii) allows for the interdiction of such communication, if the administrative authority has reasonable grounds to believe that it would interfere with the administration of justice, as reflected in the Impugned Decision in this case. It is, however, clear that the application of this regulation merely complements the application of regulation 180(1)(c). Also, at this point we must recognize that due to the COVID-19 pandemic the conditions of visits and communication for detained persons have changed. Therefore it is logical that restrictions are applicable not only to physical visitors but also to the ones that can potentially make use of modern means of communication to unlawfully have access to information from detained persons for forbidden purposes.
9. Moreover, there is no issue of proportionality in this case. The only restriction at stake is the one coming from the application of regulations 180(1)(c) and 169(3)(b)(iii) and (iv) of the Regulations, the object and purpose of which is to disallow the access to information from a detained person which may be subsequently reported in the media that can jeopardise the proper administration of justice. In the case under consideration, the Registry has evaluated the facts and the Regulations in a systematic manner and the Regulations were correctly applied. I acknowledge that there is no absolute prohibition as the Impugned Decision erroneously asserted, nevertheless in the case at hand we are before concrete restrictions to be applied under concrete circumstances, therefore I find that the error did not materially impact the outcome. Furthermore if the defendant insists that regulations 180(1)(c) and 169(3)(b)(iii) and (iv) of the Regulations are not applicable

to his case, he certainly can address his request to the Trial Chamber. It is for the Trial Chamber to evaluate the potential prejudices to the process and to the interest of justice raised by this case, and to rule according to the Regulations and procedures of the Court in which the Prosecutor and the other parties can intervene.

10. Finally, I wish to express concern with regard to the contents of the interview, which is the subject-matter of the dispute. In the current context and circumstances, it is apparent that there is a political objective behind Mr Abd-Al-Rahman's words as his declarations are related to the circumstances of his surrender, transfer and detention before the Court and to the grounds of his indictment and charges. Despite some expression of sorrow and condolence to the victims, the defendant could potentially use this opportunity of massive exposure to send coded messages to his allies and to establish a narrative, with a view to influence witnesses and political opinion in Sudan. Such course of action may have a negative impact on the proper administration of justice, let alone the legitimacy of the Court could be jeopardised. As it is well known, the cases before the ICC have profound political implications in the respective countries and regions from which the defendants come, and the case of Mr Abd-Al-Rahman is no exception. Mr Abd-Al-Rahman is involved in the political situation of Sudan and his declarations being widely disseminated through the media could potentially raise problems between the different political actors not only in Sudan but in the region, which could potentially impact the public national or international order. I consider that we must not allow the ICC or the Presidency to be instrumentalised for such an aim. In granting his request, the Court would not only permit Mr Abd-Al-Rahman to pursue such wrongful objectives, but it could also open the door for other persons subject to proceedings before this Court to engage in the same type of behaviour. Furthermore, these considerations of fact must not be assessed by the prison authorities because it exceeds the scope of their responsibilities and duties. Instead, this analysis must be carried out by judicial authorities with the participation of the other parties.

11. As pointed out above, the right to freedom of expression does not encompass the possibility for detained persons to make public statements or give information to be subsequently reported in the media that could interfere with the judicial process or jeopardise public order or safety or the rights or freedoms of any person. Avoiding such undesirable consequences is exactly the objective of regulations 180(1)(c) and

169(3)(b)(iii) and (iv) of the Regulations, which are perfectly applicable in the present case as the Registry correctly noted. To remit the matter to the Registrar for reconsideration entails a request to the CCO to evaluate also the potential political impact of the case, which exceeds the CCO's responsibilities and duties and the scope of administrative matters. The issue must not be remitted to the Registrar for reconsideration and, as I have already expressed, it remains possible for Mr Abd-Al-Rahman to address his request before the relevant Chamber.

12. It is for these reasons that I would have confirmed the Impugned Decision and rejected the Application.

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



Judge Luz del Carmen Ibáñez Carranza
First Vice-President

Dated this 18 October 2021

At The Hague, The Netherlands