Cour Pénale Internationale

International Criminal Court

Separate concurring opinion

of Judge Luz del Carmen Ibáñez Carranza to the Judgment

on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release'

INTRODUCTION

1. I concur with the outcome of the Judgment to unanimously confirm the Decision on the Defence Request for Interim Release (the 'Impugned Decision'), rejecting the request by Mr Ali Muhammad Ali Abd-Al-Rahman ('Mr Abd-Al-Rahman') for interim release to the territory of the host State pending trial, pursuant to article 60(2) of the Statute. I also agree with most of the arguments presented in the Judgment. However, I am unable to agree with the majority on two discrete issues, relating, respectively, to the first and the fifth ground of appeal.

2. Under the first ground, I am unable to agree with the majority's approach to change the nature of the alleged error from an error of law to an error of fact, which I consider to be potentially unfair towards an appellant who duly substantiated his/her ground of appeal to allege an error of law. In this case, however, the appellant did not sufficiently substantiate the first ground of appeal as an error of law. I would thus have rejected it for lack of substantiation instead. With regard to the fifth ground, I am not persuaded by the majority's interpretation of regulation 51 of the Regulations of the Court (the 'Regulations') and its finding that a chamber is not required to seek observations from the relevant State or States regardless of whether or not it is minded to grant an application for interim release. Contrary to the majority's finding, and for the reasons developed in this separate opinion, I firmly believe that regulation 51 must be read as imposing on a chamber hearing an application for interim release a general obligation to seek observations from the host State and/or the State on whose territory release is sought. As follows from the wording, context and

purpose of regulation 51, this obligation exists regardless of whether or not the chamber hearing the application is minded to grant interim release.

3. As I cannot agree with my colleagues' reasoning in relation to these two issues, I feel obligated to provide my personal views on these matters through the present separate opinion.

I. CHAPTER I

4. Under the first ground, Mr Abd-Al-Rahman submits that Pre-Trial Chamber II (the 'Pre-Trial Chamber') erred in law by relying on the Prosecutor's inability to protect her witnesses in Darfur/Sudan.

5. The majority notes that, while Mr Abd-Al-Rahman frames this first ground as an error of law, his arguments mainly challenge the Pre-Trial Chamber's assessment of the facts, which is insufficient to establish an error of law. That notwithstanding, the majority proceeded, on the basis of Mr Abd-Al-Rahman's arguments, to consider whether the Pre-Trial Chamber's factual findings were erroneous.[1]

6. In doing so, the majority essentially re-characterised an alleged error of law as an alleged error of fact. I respectfully disagree with the majority's approach. First, I note that the Pre-Trial Chamber considered the factual allegations in the case at hand, including the Prosecutor's inability to protect witnesses in Darfur/Sudan, leading to its conclusion to reject the request for interim release on the basis of article 58(1)(b) and article 60(2). In light of the Pre-Trial Chamber's determination regarding these provisions, I am of the view that the appellant has raised this ground of appeal as an error of law. I can therefore not agree with my colleagues' approach to re-characterise the alleged error as an error of fact.

7. Furthermore, I find that the majority's approach, to review as a factual error a ground of appeal that was raised as an error law, risks entailing the Appeals Chamber to reach *ultra petita* determinations. In doing so, I am of the view that the majority's approach sets a worrisome precedent that might lead to unfairness

[1] Judgment, para. 25.

towards an appellant who substantiated his/her ground of appeal as an error of law, not as an error of fact. This is because the appellant would not have had the opportunity to substantiate his/her ground of appeal as an error of fact, thereby facing a prejudice in his/her position. If a ground was substantiated as an error of law and, nevertheless, the Appeals Chamber decides to review it under the standard of review for errors of fact, it could risk creating a situation of unfairness and affect to some extent the appellate and defence rights of the appellant.

8. For this reason, I consider that the Appeals Chamber may only re-characterise as error of fact a ground of appeal otherwise raised in very rare exceptions: when it is extremely necessary, in order to avoid a potential pejorative ruling for the appellant (*non reformatio in pejus*) or to rather favour the appellant's case, and as long as this does not prejudice the rights of the appellant and the guarantees of fairness in the proper administration of justice.

9. This is so because, as reflected in the doctrine and in the case law of the Appeals Chamber, errors of fact and errors of law are fundamentally different as concerns their nature, the level of substantiation required by the appellant, and standard of review by the Appeals Chamber. Errors of law concern 'mistakes regarding the legal analysis made by the chamber at first instance'.[2] That is, errors of law refer to mistakes in the interpretation and/or application of the law. Errors of fact, on the other hand, describe a situation where the first instance chamber 'erred in reaching the conclusions of fact that it did on the basis of the evidence that was before it'.[3] Namely, errors of fact refer to the mistakes made by the *ad quo* chamber in reaching its factual findings and conclusions on the basis of the evidence before it.

10. In case of an error of law, the Appeals Chamber has held that,[4]

> 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

[2] Christopher Staker and Franziska Eckelmans, 'Article 81' in O. Triffterer and K. Ambos (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2015), p. 1930.
[3] Christopher Staker and Franziska Eckelmans, 'Article 81' in O. Triffterer and K. Ambos (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2015), p. 1935.
[4] The different standard of review has also been noted in the Judgment, paras 13-17.

> 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.
> A judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'.[5]

11. It further specified, with regard to an error of law, that 'the appellant has to substantiate that the Trial Chamber's interpretation of the law was incorrect; […] this may be done including by raising arguments that were previously put before the Pre-Trial and/or Trial Chamber. In addition, the appellant must substantiate that the decision under review would have been substantially different, had it not been for the error'.[6]

12. As regards an error of fact, the Appeals Chamber has held that,

> [W]hen a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence de novo with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber.[7]

13. The Appeals Chamber has further held that it will not interfere with the factual findings of a first-instance chamber 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'.[8]

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[5] *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', 8 March 2018, ICC-01/05-01/13-2275-Red (hereinafter *Bemba et al* Appeal Judgment), para. 90, quoting from *Lubanga* Appeal Judgment, paras 18-19 and *Ngudjolo* Appeal Judgment, para. 20.
[6] *Bemba et al* Appeal Judgment, para. 110.
[7] *Lubanga* Appeal Judgment, para. 27
[8] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307 (hereinafter *Ruto* Admissibility Judgment), para. 56; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 August 2011, ICC-01/09-02/11-274, (hereinafter *Kenyatta* Admissibility

Additionally, it has established that it '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'.[9] The Appeals Chamber 'will interfere only in the case where it cannot discern how the first-instance Chamber's conclusion could have reasonably been reached from the evidence before it.'[10]

14. In light of these differences, and in line with my views on the nature of the alleged error as set out in paragraphs 6-7 above, I would have followed the classification adopted by the appellant and assessed the first ground of appeal as an error of law. In following the applicable standard of review in the case at hand, I would have found that Mr Abd-Al Rahman has failed to sufficiently substantiate his argument that the Pre-Trial Chamber's interpretation of the law was incorrect and to substantiate that the decision under review would have been substantially different, had it not been for the error. In my view, this approach would have more accurately captured the nature of the alleged error and avoided the risk of creating a worrisome precedent for future cases, where the change of the nature of an alleged error could be prejudicial to the rights of an appellant who duly substantiates a ground of appeal as an error of law and the Appeals Chamber nonetheless decides to review it as an error of fact.

15. However, in the case at stake, considering that the Pre-Trial Chamber has weighed the concrete circumstances of the case under article 58(1), it appears that the appellant has failed to meet his burden to substantiate this ground of appeal as an error of law, and to show any material effect on the Impugned Decision.

Judgment), para. 55; The Prosecutor v. Simone Gbagbo, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, ICC-02/11-01/12-75-Red, (hereinafter*Simone Gbagbo* Admissibility Appeal, para. 38.

[9] *Ruto* Admissibility Judgment, para. 56; *Kenyatta* Admissibility Judgment, para. 55; *Simone Gbagbo* Admissibility Appeal, para. 38.

[10] *Ruto* Admissibility Judgment, para. 56; *Kenyatta* Admissibility Judgment, para. 55; *Simone Gbagbo* Admissibility Appeal, para. 38.

II. CHAPTER II

16. Under the fifth ground, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber committed an error of law by failing to seek observations from the host State as required under regulation 51 of the Regulations. The majority rejected this ground of appeal, finding that regulation 51 of the Regulations cannot be understood as imposing on the chamber hearing an application for interim release, in the absence of any prospect for the application to succeed, a general obligation to seek observations from the host State and/or the State on the territory of which interim release is sought.[11]

17. For the reasons that follow, I cannot adhere to the majority's interpretation of regulation 51 of the Regulations. Regulation 51 provides that '[f]or the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released.'

18. My personal interpretation of this provision is guided, *inter alia*, by the principles set out in the Vienna Convention on the Law of Treaties (the 'VCLT').[12] While it is true that the Regulations of the Court do not constitute an international convention, they develop rules that enable the Court to properly apply the various articles of the Statute which, in turn, constitutes an international convention, governed by the principles set out in the VCLT.[13] I therefore consider that the VCLT also offers, *mutatis mutandis*, useful guidance in the case at hand.[14]

19. In this regard, I note first that, contrary to the majority's interpretation, the 'ordinary meaning' of the 'terms' of regulation 51 poses no condition to the Pre-

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[11] Judgment, para. 61.
[12] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.
[13] In this regard, the Appeals Chamber has previously held that it would 'first consider the Statute and the Rules of Procedure and Evidence, interpreting its provisions in accordance with the rules applicable to the interpretation of treaties provided for in the Vienna Convention.' *See The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 9 October 2014, ICC-01/09-01/11-1598 OA 7 OA 8, para 105.
[14] For the application of the VCLT for the interpretation of the Statute and the Rules of Procedure and Evidence, *see The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 9 October 2014, ICC-01/09-01/11 OA 7 OA 8, para 105.

Trial Chamber's obligation to seek observations from the relevant State or States, such as the condition the majority imposed by saying that the chamber must be minded to grant interim release before seeking such observations. If such a pre-condition had been the intention of the drafters of that provision, this would be reflected in the wording of regulation 51. Finding that the obligation to seek observations only applies in circumstances where a chamber has decided to grant interim release is therefore tantamount to adding to the wording of regulation 51 a condition that has not been envisaged by the drafters of the provision. For this reason, I further cannot concur with the majority's consideration that its interpretation of regulation 51 is supported by the fact that regulation 51 refers to a 'decision *on* interim release' while rule 118 of the Rules of Procedure and Evidence (the 'Rules') refers to a request for interim release.[15]

20. Second, I note that regulation 51 unequivocally provides that '[f]or the purposes of a decision on interim release, the Pre-Trial Chamber *shall* seek observations from the host State and from the State to which the person seeks to be released' (emphasis added). According to the Concise Oxford Dictionary of Current English, 'shall' must be understood 'in the 2nd and 3rd persons' as 'expressing a strong assertion or command rather than a wish (cf. WILL)'. It further states that 'shall' must be understood as 'expressing a command or duty (*thou shall not steal*; *they shall obey*)'.[16] The Cambridge Dictionary indicates that when it is not used in the first person, 'shall' is 'used to say that something certainly will or must happen, or that you are determined that something will happen'.[17] It can therefore only be concluded that the use of the imperative 'shall' clearly indicates that the procedural step of seeking observations is a mandatory requirement and not subject to any pre-conditions or limitations.

21. Moreover, and in accordance with article 33 of the VCLT,[18] I note that the French and Spanish versions of regulation 51 provide for the same meaning of the term

[15] Judgment, para. 56.
[16] The Concise Oxford Dictionary of Current English, Eight Edition, p. 1113.
[17] Cambridge English, Eight Edition, available at https://dictionary.cambridge.org/dictionary/english/shall.
[18] Article 33(3) of the VCLT reads: '[t]he terms of the treaty are presumed to have the same meaning in each authentic text'.

'shall'. Indeed, the authentic French version of regulation 51 provides that '*[a]ux fins d'une décision de mise en liberté provisoire, la Chambre préliminaire* demande *des observations à l'État hôte ainsi qu'à l'État sur le territoire duquel la personne demande à être libér*ée' (emphasis added). Similarly, the authentic Spanish version of this provision provides: '*A los efectos de una decisión sobre libertad provisional, la Sala de Cuestiones Preliminares* deberá *obtener las observaciones del Estado anfitrión y del Estado en el que la persona pretenda ser liberada*' (emphasis added). None of these provisions impose any condition; they rather provide for an unqualified obligation on the Pre-Trial Chamber to seek the State's observations.

22. Third, I find that the majority failed to sufficiently acknowledge the difference between the concept of 'consultations' inaccurately used by Mr Abd-Al-Rahman and the concept of 'observations' referred to in regulation 51. Indeed, the majority simply notes that Mr Abd-Al-Rahman wrongly refers to 'consultations' with the relevant State or States, and recalls that regulation 51 clearly uses the term 'observations', which is different from the concept of 'consultation' referred to in other provisions of the Court's legal framework.[19] In this regard, I find it necessary to highlight the fundamental difference that exists between the notion of consultations and the notion of observations. 'Consultations' with States are referred to in article 97, among others, of the Rome Statute (the 'Statute'), and relate to executive procedures that can be initiated by a State or the Court in order to ensure proper execution by a State of an executive order. This concept is different in nature from the concept of observations, as provided for in regulation 51, which entails the provision of views and concerns, relying on information up to date, in order to enable the relevant chamber to take an informed decision on interim release. Consultations are executive in nature, while observations are informative in nature, as they seek to obtain views and concerns from the participants entitled by the Statute (*e.g.*, States and victims).

23. Lastly, I consider that recourse to observations prior to taking a decision on interim release is an essential procedural step in light of the principle of

[19] Judgment, para. 53.

complementarity, as enshrined in articles 1 and 17 of the Statute. It is also in line with the system of State cooperation established by the Statute. In this regard, the Appeals Chamber has previously clarified that '[t]he ICC exercises its functions and powers on the territories of States Parties, and as such is dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuing that the conditions imposed by the Court are enforced'.[20] The Appeals Chamber has stressed that '[w]ithout such cooperation, any decision of the Court granting conditional release would be ineffective.'[21]

24. For example, recourse to observations allows a State to provide, and the chamber to consider, a wide range of information which is crucial for an informed decision, such as the presence on a State's territory of any supporters of the accused, matters of internal security or issues that might obstruct the investigations. It also allows the relevant State to inform the chamber of the presence on its territory of any witnesses or victims whose safety or well-being might be affected by the interim release of an accused, and whose safety, physical and psychological well-being, dignity and privacy is to be protected by the Court under article 68 of the Statute. As such, the invitation to provide observations enables the State on whose territory interim release is sought as well as, where applicable, the host State, to provide a wide range of up-to-date information and concerns. Such invitation does not predetermine the Chamber's decision nor in any way prejudice the rights of the accused. Indeed, the Appeals Chamber previously clarified that the obligation to seek information does not mean 'that the Chamber upon receiving observations from the State is obliged to grant conditional release'.[22] In the Appeals Chamber's

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[20] *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, 2 December 2009, ICC-01/05-01/08-631-Red, (hereinafter *Bemba* Interim Release Appeal Judgment) para. 107.

[21] *Bemba* Interim Release Appeal Judgment, para 107. .

[22] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", 19 August 2011, ICC-01/05-01/08-1626-Red OA7, , paras 2, 55. While I note that this consideration relates to additional observations in the scenario that initial observations are considered insufficient, I am of the view that this consideration still supports the point made in my separate opinion.

words, this 'only means that the Chamber must seek information that would enable it to make an informed decision on the matter.'[23]

25. In my view, such observations have the tremendous benefit of enabling the chamber to take an informed and a more reliable decision. The requirement for observations to be sought prior to taking any decision on a request for interim release, regardless of whether or not a chamber is minded to grant such request, is therefore beneficial to the chamber, the detained person and victims and witnesses, and in furtherance of the purpose of the Statute as a whole. Consequently, I am unable to adhere to the majority's finding that its interpretation of regulation 51 is 'supported by considerations of efficiency and judicial economy'.[24]

26. In view of the above, the only viable conclusion is that regulation 51 must be read as imposing on a chamber hearing an application for interim release, a general obligation to seek observations of the host State and/or the State on whose territory release is sought. This obligation exists in any circumstances, and does not depend on whether a chamber is minded or not to grant such an application.

27. In light of the foregoing, I consider that the Pre-Trial Chamber erred in law by failing to seek observations of the host State, which is the State to whose territory interim release was sought in the case at hand, before deciding on Mr Abd-Al-Rahman's request for interim release. However, as I turn to explain, I am of the view that, considering the circumstances of this case, this error did not materially affect the Impugned Decision.

28. I note that for the purpose of its determination, the Pre-Trial Chamber considered information suggesting that there was an 'appearance' that Mr Ali Muhammad Ali Abd-Al-Rahman and his supporters have threatened human rights activists in February 2020, information in the two warrants of arrest on the alleged high

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[23] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", 19 August 2011, ICC-01/05-01/08-1626-Red OA7, , paras 2, 55. While I note that this consideration relates to additional observations in the scenario that initial observations are considered insufficient, I am of the view that this consideration still supports the point made in my separate opinion.
[24] Judgment, para. 57.

ranking position previously held by Mr Abd-Al-Rahman in Darfur, the connections that he held in this role, and the likelihood that he still has supporters who may have access to actual or potential witnesses as well as the Prosecutor's inability to protect witnesses in Darfur/Sudan. On the basis of this information, considered holistically, the Pre-Trial ultimately concluded that interim release of Mr Abd-Al-Rahman would entail an unacceptable risk to the proceedings, the investigations and the safety of witnesses and that this risk could not be sufficiently mitigated by the guarantees proposed by Mr Abd-Al Rahman. While it would have been preferable for the Pre-Trial Chamber to take its decision after having sought and considered observations by the host State, I note that the request has been ultimately denied on the basis of the conditions set out in article 58(1)(a), which were not challenged and therefore persist, and 58(1)(b), in a holistic way.

29. On that basis, the Pre-Trial Chamber rejected the request for interim release and decided that Mr Abd-Al-Rahman shall stay in detention. I note that this conclusion was taken on the basis of factors that are independent from any observations that could have been provided by the host State and that any such observations would likely not have altered the outcome of the Pre-Trial Chamber's assessment. It follows from this that the Impugned Decision was not materially affected by the failure to seek observations.

III. CONCLUSION

30. For the reasons developed above, I am unable to agree with the majority's approach of addressing the alleged error of law as an error of fact. I would have simply rejected it for lack of substantiation.

31. I also find it unpersuasive the majority's finding that regulation 51 cannot be understood as imposing on the chamber hearing an application for interim release, in the absence of any prospect for the application to succeed, a general obligation to seek observations from the host State and/or the State on the territory of which interim release is sought. The plain reading of the regulation, in the different versions of its authentic languages (*i.e.* English, French and Spanish), poses no condition but rather imposes an unqualified obligation for the chamber to seek the

observations from the State regardless of the chamber's ultimate decision whether or not to grant the application for interim release.

32. That notwithstanding, considering that the Impugned Decision has not been materially affected by this error, I agree with the outcome of the Judgment to reject the appeal and confirm the Impugned Decision.

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

Judge Luz del Carmen Ibáñez Carranza

Dated this 8th day of October 2020
At The Hague, The Netherlands