



Original: English

**No. ICC-02/05-01/20 OA2
Date: 8 October 2020**

THE 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 THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-
RAHMAN ('ALI KUSHAYB')**

Public document

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'**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Cyril Laucci

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II entitled ‘Decision on the Defence Request for Interim Release’ of 14 August 2020 (ICC-02/05-01/20-115),

After deliberations,

Unanimously,

Delivers the following

JUDGMENT

The ‘Decision on the Defence Request for Interim Release’ of 14 August 2020 (ICC-02/05-01/20-115) is confirmed.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

1. On 27 April 2007, Pre-Trial Chamber I decided to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’) for his alleged responsibility for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas, in Darfur, Sudan, between August 2003 and March 2004.¹

2. On 16 January 2018, Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) granted the Prosecutor’s application to amend the first warrant of arrest pursuant to article 58(6) of the Statute² by issuing a second warrant of arrest against Mr Abd-Al-Rahman for his

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

² [Public redacted version of “Prosecution’s application pursuant to article 58\(6\) of the Rome Statute to amend the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN \(“ALI KUSHAYB”\) by adding new crimes”, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp](#), 26 June 2020, ICC-02/05-

alleged responsibility for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas, in Darfur, Sudan, between on or about 5 to 7 March 2004.³

3. On 9 June 2020, Mr Abd-Al-Rahman was transferred to the detention centre of the Court.⁴

4. On 1 July 2020, Mr Abd-Al-Rahman filed a request for interim release to the territory of the host State pending trial, pursuant to article 60(2) of the Statute (the ‘Interim Release Request’).⁵

5. On 13 July 2020, the Prosecutor responded to the Interim Release Request (the ‘Interim Release Response’).⁶

6. On 22 July 2020, Mr Abd-Al-Rahman, having been granted leave to that effect,⁷ replied to the Interim Release Response.⁸

7. On 14 August 2020, Pre-Trial Chamber II, Judge Rosario Salvatore Aitala acting as Single Judge, issued the ‘Decision on the Defence Request for Interim Release’ (the ‘Impugned Decision’), rejecting the Interim Release Request.⁹

01/20-6-Red2 (confidential redacted version registered on 25 June 2020 (ICC-02/05-01/20-6-Conf-Red)).

³ [Public redacted version of ‘Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman \(“Ali Kushayb”\)](#), 16 January 2018, ICC-02/05-01/07-74-Secret-Exp, 11 June 2020, ICC-02/05-01/07-74-Red, p. 13 (*ex parte* version registered on 16 January 2018 (ICC-02/05-01/07-74-Secret-Exp); confidential version registered on 12 June 2020 (ICC-02/05-01/07-74-Conf)).

⁴ See Report of the Registry on the Arrest and Surrender of Mr Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), 10 July 2020, ICC-02/05-01/20-90-Conf-Exp (originally registered on 12 June 2020 under the case and document number ICC-02/05-01/07-85-Conf-Exp).

⁵ [Requête en vertu de l’Article 60-2](#), 1 July 2020, ICC-02/05-01/20-12.

⁶ [Prosecution’s Response to “Requête en vertu de l’Article 60-2” \(ICC-02/05-01/20-12\)](#), 13 July 2020, ICC-02/05-01/20-95 with [Annex 1](#) (ICC-02/05-01/20-95-Anx1), [Annex 2](#) (ICC-02/05-01/20-95-Anx2), [Annex 3](#) (ICC-02/05-01/20-95-Anx3).

⁷ [Decision on Defence Request for Leave to Reply](#), 17 July 2020, ICC-02/05-01/20-99.

⁸ Réplique à la « *Prosecution’s Response to “Requête en vertu de l’Article 60-2”* » (ICC-02/05-01/20-95), 22 July 2020, ICC-02/05-01/20-100 (the ‘[Reply](#)’).

⁹ [Decision on the Defence Request for Interim Release](#), 14 August 2020, ICC-02/05-01/20-115, p. 11.

B. Proceedings before the Appeals Chamber

8. On 19 August 2020, Mr Abd-Al-Rahman filed his appeal brief against the Impugned Decision (the ‘Appeal Brief’).¹⁰

9. On 20 August 2020, the Prosecutor filed the ‘Prosecution’s Request to dismiss *in limine* the “Mémoire d’appel de la décision ICC-01/06-01/20-115”’, requesting the Appeals Chamber, *inter alia*, to dismiss the Appeal Brief *in limine*.¹¹

10. On 21 August 2020, Mr Abd-Al-Rahman filed a notice of appeal, in which he submitted that he proceeded to file the Appeal Brief immediately for reasons of expeditiousness and that there was no basis for dismissing that brief *in limine*.¹²

11. On 21 August 2020, the Appeals Chamber rejected the Prosecutor’s request to dismiss the Appeal Brief *in limine*, noting that while Mr Abd-Al-Rahman did not file a notice of appeal prior to filing his Appeal Brief, the notice of appeal was nevertheless filed within the prescribed time limit under regulation 64(5) of the Regulations of the Court (the ‘Regulations’).¹³ On that same date, the Appeals Chamber issued directions on the conduct of the present proceedings, deciding that it would proceed with the appeal by way of written submissions only pursuant to regulation 64(6)(b) of the Regulations.¹⁴

12. On 31 August 2020, in accordance with the Directions,¹⁵ the Prosecutor responded to the Appeal Brief (the ‘Prosecutor’s Response’).¹⁶

¹⁰ [Mémoire d’appel de la décision ICC-02/05-01/20-115](#), 19 August 2020, ICC-02/05-01/20-120 (a corrected version was registered on the same day ([ICC-02/05-01/20-120-Corr](#)); the English translation was registered on 11 September 2020 (ICC-02/05-01/20-120-Corr-tENG (the ‘[Appeal Brief](#)’))).

¹¹ [Prosecution’s Request to dismiss in limine the “Mémoire d’appel de la décision ICC-01/06-01/20-115”](#), 20 August 2020, ICC-02/05-01/20-122, paras 1, 6-7.

¹² [Acte d’appel de la décision ICC-02/05-01/20-115 en vertu de l’article 82-1-b du Statut de Rome et de la norme 65-5 du Règlement de la Cour](#), dated 20 August 2020 and registered on 21 August 2020, ICC-02/05-01/20-125, para. 2.

¹³ Decision on the Prosecutor’s request to dismiss appeal brief *in limine* and Directions on the conduct of the appeal proceedings, 21 August 2020, ICC-02/05-01/20-126 (the ‘[Directions](#)’), paras 3-7.

¹⁴ [Directions](#), para. 8.

¹⁵ [Directions](#), para. 8.

¹⁶ Prosecution or’s Response to the “Mémoire d’appel de la décision ICC-02/05-01/20-115” 31 August 2020, ICC-02/05-01/20-143 (the ‘[Prosecutor’s Response](#)’).

II. STANDARD OF REVIEW

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”.¹⁷

14. With respect of 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.¹⁸

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

its review is corrective and not *de novo*. It has explained that “[i]t will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”. As regards the “misappreciation of facts” the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber’s findings.¹⁹

16. The Appeals Chamber further considers it appropriate to emphasise that, for a ground of appeal to be considered by the Appeals Chamber, the appellant must properly substantiate the alleged error and demonstrate how it materially affected the impugned

¹⁷ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”, 19 July 2017, ICC-02/11-01/15-992-Red (OA10) (the ‘[Gbagbo OA10 Judgment](#)’), para. 14, referring to Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo's detention pursuant to article 60\(3\) of the Rome Statute”](#), 29 October 2013, ICC-02/11-01/11-548-Red (OA4), para. 18 (footnote omitted).

¹⁸ [Gbagbo OA10 Judgment](#), para. 15 and references cited therein.

¹⁹ [Gbagbo OA10 Judgment](#), para. 16 (footnotes omitted).

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.

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

III. MERITS

A. The Impugned Decision

18. In its determination on the Interim Release Request, the Pre-Trial Chamber examined ‘whether Mr Abd-Al-Rahman’s continued detention appears necessary to ensure the investigation or court proceedings are not obstructed or endangered’.²⁰ In this regard, the Pre-Trial Chamber considered ‘the Prosecutor’s submission that [she] is not yet in a position to protect witnesses in Darfur, as well as the report of threats allegedly made by the suspect and his supporters to human rights activists’,²¹ and ‘the alleged high ranking position previously held by the suspect 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’.²² It concluded that any risks to the ‘integrity of the investigations and of the proceedings and the safety of witnesses [...] would not be sufficiently mitigated by imposing conditions upon interim release’.²³ It therefore rejected the Interim Release Request and ordered the continued detention of Mr Abd-Al-Rahman.²⁴

19. Furthermore, the Pre-Trial Chamber clarified that for the purpose of its decision, it did not seek observations from the host State, considering this to be ‘unnecessary in light of [its] findings in relation to article 58(1) of the Statute’.²⁵ In support of this approach, the Pre-Trial Chamber found that, ‘while interim or conditional release cannot be granted unless State observations have first been requested, regulation 51 of

²⁰ [Impugned Decision](#), para. 27.

²¹ [Impugned Decision](#), para. 28.

²² [Impugned Decision](#), para. 29 (footnote omitted).

²³ [Impugned Decision](#), para. 29.

²⁴ [Impugned Decision](#), p. 11.

²⁵ [Impugned Decision](#), para. 32.

the Regulations cannot be understood as requiring that observations must be requested even when the Chamber does not intend to grant interim release'.²⁶

B. Mr Abd-Al-Rahman's submissions

20. Mr Abd-Al Rahman requests the Appeals Chamber to: (i) reverse the Impugned Decision, order his interim release 'to the territory of the Host State subject to any conditions that the Court and/or the Host State may see fit to apply under rule 119 of the Rules [of Procedure and Evidence (the 'Rules')] and/or article 38(3) of the Headquarters Agreement'; and (ii) 'order immediate commencement of the consultations with the Host State referred to in regulation 51 of the Regulations'.²⁷

21. In support of his request, Mr Abd-Al Rahman presents five grounds of appeal challenging the Pre-Trial Chamber's: (i) reliance on information concerning the Prosecutor's inability to protect her purported witnesses in Sudan (the 'First Ground');²⁸ (ii) reliance on an NGO report submitted by the Prosecutor as Annex 3 to the Interim Release Response ('Annex 3') for its finding that there was an appearance that Mr Abd-Al-Rahman and his supporters have threatened human rights activists (the 'Second Ground');²⁹ (iii) failure to consider a number of factors for its conclusion to keep Mr Abd-Al-Rahman in detention (the 'Third Ground');³⁰ (iv) alleged reversal of the presumption that detention is the exception and not the rule (the 'Fourth Ground');³¹ and (v) failure to seek observations from the host State as required under regulation 51 of the Regulations (the 'Fifth Ground').³²

C. The Prosecutor's Response

22. The Prosecutor submits that Mr Abd-Al-Rahman's appeal should be dismissed as he 'misconstrues the [Impugned] Decision, misunderstands the applicable law, and often merely expresses disagreement with the [Pre-Trial Chamber's] conclusions in attempting to re-litigate the arguments previously advanced'.³³

²⁶ [Impugned Decision](#), para. 32.

²⁷ [Appeal Brief](#), para. 9, p. 20.

²⁸ [Appeal Brief](#), paras 10-16.

²⁹ [Appeal Brief](#), paras 17-24.

³⁰ [Appeal Brief](#), paras 25-26.

³¹ [Appeal Brief](#), paras 8, 27-32.

³² [Appeal Brief](#), paras 8, 33-36.

³³ [Prosecutor's Response](#), para. 2.

D. Determination by the Appeals Chamber

23. Having considered the Impugned Decision in light of the parties' submissions and the standard of review set out above, the Appeals Chamber finds, for the reasons set out below, that Mr Abd-Al-Rahman's submissions advanced in his five grounds of appeal do not show any error by the Pre-Trial Chamber.

1. First Ground

24. In support of his submission that the Pre-Trial Chamber erred in law by relying on the Prosecutor's inability to protect her witnesses in Darfur/Sudan, Mr Abd-Al-Rahman argues that: (i) said inability is old information which cannot be attributed to the accused and must not adversely affect his right to interim release;³⁴ (ii) the Prosecutor currently has no means of conducting investigations in Sudan, which, if confirmed, could form the subject matter of a request for a permanent stay of proceedings on the ground that the Prosecutor lacks the ability to conduct a prosecution against him, which would further likely give rise to an action for compensation for unlawful detention under article 85(1) of the Statute;³⁵ and (iii) the Pre-Trial Chamber's 'warning' for the Prosecutor to put in place mechanisms to protect potential witnesses and/or safeguard potential evidence does not cure the error of law identified under the First Ground.³⁶

25. At the outset, while Mr Abd-Al-Rahman frames the First Ground as an error of law,³⁷ the Appeals Chamber, by majority, Judge Ibáñez Carranza is appending a separate concurring opinion, considers that his arguments mainly challenge the Pre-Trial Chamber's assessment of the facts. Indeed, Mr Abd-Al-Rahman mainly challenges the Pre-Trial Chamber's reliance on the Prosecutor's inability to protect witnesses in Darfur. While Mr Abd-Al-Rahman's arguments concern the factual basis of the Pre-Trial Chamber's decision and are therefore insufficient to establish an error of law, the Appeals Chamber will nevertheless, based on his arguments, consider whether the factual findings were erroneous. In doing so, the Appeals Chamber finds,

³⁴ [Appeal Brief](#), paras 11-13.

³⁵ [Appeal Brief](#), para. 14.

³⁶ [Appeal Brief](#), para. 15.

³⁷ [Appeal Brief](#), paras 11, 15.

for the reasons developed below, that Mr Abd-Al-Rahman does not show that the Pre-Trial Chamber erred in its factual assessment.

26. The Appeals Chamber notes that the Prosecutor's inability to protect witnesses in Darfur/Sudan cannot be assessed in isolation as the Pre-Trial Chamber's determination is also based on other considerations.³⁸ Indeed, in finding that continued detention appeared necessary to ensure that Mr Abd-Al-Rahman does not obstruct or endanger the investigation or court proceedings, the Pre-Trial Chamber referred, in addition to the Prosecutor's inability to protect witnesses in Darfur/Sudan, to the report in Annex 3 highlighting threats allegedly made by Mr Abd-Al-Rahman and his supporters to human rights activists.³⁹ The Pre-Trial Chamber also noted, on the basis of the information included in the two warrants of arrest, his position and the likelihood that he still has supporters who may have access to actual or potential witnesses.⁴⁰ Thus, the Pre-Trial Chamber considered the available information holistically for the purposes of its finding.

27. The Appeals Chamber is also not persuaded by the contention that the Pre-Trial Chamber inappropriately attributed this information to Mr Abd-Al-Rahman, thus reversely affecting his right to interim release. Rather, the Appeals Chamber finds that in considering this information for the purpose of its determination, the Pre-Trial Chamber acted in line with its obligation under article 68 of the Statute to ensure the protection of victims and witnesses. This is so regardless of whether the Prosecutor is currently in a position to conduct her investigation on the territory of Sudan and implement protective measures for actual or potential witnesses located there. Indeed, 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. Mr Abd-Al-Rahman has not demonstrated any error in this regard.

28. Turning to Mr Abd-Al-Rahman's argument that the Pre-Trial Chamber sought to cure its erroneous consideration when reminding the Prosecutor to ensure the protection

³⁸ See also [Prosecutor's Response](#), para. 5.

³⁹ [Impugned Decision](#), paras 28-29.

⁴⁰ [Impugned Decision](#), paras 28-29.

of potential witnesses and/or potential evidence and ‘to collect more detailed information and evidence about Mr Abd-Al-Rahman’s remaining position of influence in the region’,⁴¹ the Appeals Chamber considers that this argument is plainly unfounded. As noted above, the Appeals Chamber did not identify any error in the Pre-Trial Chamber’s assessment in this regard. Consequently, the aforementioned reminder to the Prosecutor cannot be considered as constituting an attempt to cure any erroneous consideration as argued by Mr Abd-Al-Rahman.

29. Lastly, the Appeals Chamber finds that Mr Abd-Al-Rahman’s submissions on a potential request for compensation following a future request for stay of the proceedings⁴² are speculative and immaterial to the Impugned Decision and do not warrant further examination.

2. *Second Ground*

30. Under this ground of appeal, Mr Abd-Al-Rahman avers that the Pre-Trial Chamber’s reliance on Annex 3 for its finding that ‘there was an “appearance” that Mr Ali Muhammad Ali Abd-Al-Rahman and his supporters have threatened human rights activists in February 2020’ was erroneous in law and fact.⁴³

31. At the outset, the Appeals Chamber finds no merit in Mr Abd-Al-Rahman’s submission that the Pre-Trial Chamber failed to take into account his submissions in the Reply that Annex 3 was inadmissible as ‘lacking even the slightest probative value’.⁴⁴ While not explicitly referring to Mr Abd-Al-Rahman’s submissions to this effect, the Pre-Trial Chamber explained its reliance on Annex 3 by holding that:

[c]onsidering that the latter report comes from a news source, the Single Judge notes the finding in the *Gbagbo* case that there is no ‘impediment to the use of such material, or any requirement that it be corroborated. Rather, the Single Judge must analyse all the material placed before it, in order to determine what weight must be given to it for the purpose of the determination. Further, and as set out in the *Ntaganda* case, an assessment pursuant to article 60(2) of the Statute ‘speaks to a standard of “appearance” that a continued detention is necessary’, and ‘the evidence presented in relation to the necessity of continued detention for the purpose of article 58(1)(b) of the Statute does not have to be of the same nature

⁴¹ [Impugned Decision](#), para. 31; [Appeal Brief](#), para. 15.

⁴² [Appeal Brief](#), para. 14.

⁴³ [Appeal Brief](#), paras 17-18.

⁴⁴ [Appeal Brief](#), para. 21.

and strength as the evidence required to establish reasonable grounds to believe that the person has committed one or more crimes referred to in the Prosecutor’s application’.⁴⁵

32. Thus, the Pre-Trial Chamber addressed the substance of Mr Abd-Al-Rahman’s submissions. His arguments in the Appeal Brief largely repeat and elaborate upon the submissions made in the Reply,⁴⁶ and express a mere disagreement with the Pre-Trial Chamber’s determination without showing any error.

33. As regards the alleged error of law concerning the evidentiary standard applied by the Pre-Trial Chamber when relying on Annex 3 for its conclusion, the Appeals Chamber finds that Mr Abd-Al-Rahman has failed to provide any persuasive argument or authority that would suggest that the Pre-Trial Chamber committed such an error. In this regard, the Appeals Chamber recalls that, when determining whether detention appears necessary under article 58(1)(b) of the Statute, ‘[t]he question evolves around the possibility, not the inevitability, of a future occurrence’.⁴⁷

34. The Appeals Chamber is further unpersuaded by Mr Abd-Al-Rahman’s contention that the Pre-Trial Chamber’s reliance on a decision in the case of *The Prosecutor v. Laurent Gbagbo* was inappropriate.⁴⁸ In the *Gbagbo* decision, which was confirmed by the Appeals Chamber,⁴⁹ the pre-trial chamber determined that ‘there does not exist in the applicable law any impediment to the use of [newspaper articles or other public sources], or any requirement that it be corroborated’ and that the relevant chamber ‘must analyse all the material placed before it, in order to determine what weight must be given to it for the purpose of the determination as to whether continued

⁴⁵ [Impugned Decision](#), para. 28 (footnotes omitted).

⁴⁶ See [Appeal Brief](#), paras 18, 23; [Reply](#), para. 9.

⁴⁷ *The Prosecutor v. Laurent Koudou Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, 26 October 2012, ICC-02/11-01/11-278-Red (OA) (the ‘[Gbagbo OA Judgment](#)’) (confidential version registered on the same day, ICC-02/11-01/11-278-Conf), para. 56; *The Prosecutor v. Germain Katanga*, [Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release](#), 9 June 2008, ICC-01/04-01/07-572, para. 21.

⁴⁸ [Appeal Brief](#), para. 22, referring to *The Prosecutor v. Laurent Gbagbo*, [Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo”](#), 13 July 2012, ICC-02/11-01/11-180-Red (the ‘[Gbagbo Decision](#)’), para. 54 (confidential version registered the same day, (ICC-02/11-01/11-180-Conf)). See also [Impugned Decision](#), para. 28.

⁴⁹ [Gbagbo OA Judgment](#), para. 91.

detention “appeared necessary”⁵⁰. The fact that in that case the pre-trial chamber relied on a number of newspaper articles rather than a single NGO report⁵¹ does not affect the relevance of the Pre-Trial Chamber’s reference to that decision when determining the case at hand. Likewise, the Appeals Chamber finds that Mr Abd-Al-Rahman failed to articulate why the Pre-Trial Chamber’s approach would be contrary to the application of article 69 to various stages of the proceedings.⁵²

35. Furthermore, Mr Abd-Al-Rahman’s submission that Annex 3 was the sole basis underlying the Pre-Trial Chamber’s conclusion⁵³ appears to be based on a misreading of the Impugned Decision. The Pre-Trial Chamber, in addition to the information contained in Annex 3, also considered the information in the two warrants of arrest on the ‘alleged high 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’.⁵⁴ In this regard, the Appeals Chamber recalls its previous finding that ‘[t]he apparent necessity of continued detention in order to ensure the detainee’s appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together’.⁵⁵ By relying on various factors holistically, including, in addition to the information in Annex 3, the information in the two warrants of arrest on Mr Abd-Al-Rahman’s position and connections, as well as the Prosecutor’s inability to protect witnesses in Darfur, the Pre-Trial Chamber’s analysis was fully in line with this approach. As a result, any limitations concerning the evidentiary value that Annex 3 might have if it were to be considered in isolation are irrelevant.

36. In light of the above, the Appeals Chamber considers that Mr Abd Al Rahman’s contention that, by giving weight to Annex 3 as the single source of information and rejecting the request for release from custody, the Pre-Trial Chamber has created a

⁵⁰ [Gbagbo Decision](#), para. 54.

⁵¹ See [Appeal Brief](#), para. 22.

⁵² See [Appeal Brief](#), paras 22-23.

⁵³ [Appeal Brief](#), paras 19, 23-24.

⁵⁴ [Impugned Decision](#), para. 29 (footnotes omitted).

⁵⁵ [The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, 16 December 2008, ICC-01/05-01/08-323 \(OA\)](#), para. 55.

‘precedent that is extremely dangerous to the image and integrity of proceedings before the Court’⁵⁶ is unfounded.

37. Turning to Mr Abd-Al-Rahman’s contention that the Trial Chamber erred in its reference to dates of events described in Annex 3,⁵⁷ the Appeals Chamber notes that the Pre-Trial Chamber referred to facts which supposedly occurred in February 2020,⁵⁸ whereas Annex 3 refers to the alleged facts as having occurred on 22 and 24 January 2020. This error, however, appears to have resulted from a reference to the date of the NGO report in Annex 3, dated 28 February 2020, rather than to the dates of events described in this report, and does not in any way impact the Impugned Decision.

38. With respect to Mr Abd-Al-Rahman’s submission that Annex 3 does not establish a link between Mr Abd-Al-Rahman and the risk of interference with witnesses because it concerns acts attributed to a person referred to by the name ‘Ali Kushayb’,⁵⁹ the Appeals Chamber considers that the question of the link between Mr Abd-Al-Rahman and the individual referred to as Ali Kushayb, while undeniably being an important one for the case against Mr Abd-Al-Rahman, relates to considerations under article 58(1)(a) of the Statute, rather than article 58(1)(b). As such, it falls outside the scope of the present appeal.⁶⁰

39. The Appeals Chamber also observes that in any event, contrary to Mr Abd-Al-Rahman submission, the report clearly refers to ‘Ali Mohammad Ali Abd-Al-Rahman, commonly known as Ali Kushayb, who was a senior Janjaweed commander supporting the Sudanese government in committing atrocities and human rights violations against the people of Darfur, and for which he is wanted by the ICC for crimes against humanity and other grave violations.’ For these reasons, the Pre-Trial Chamber did not disregard its previous decision that Mr Abd-Al-Rahman should no longer be referred to by the nickname ‘Ali Kushayb’ in official Court documents and no error of law can be discerned in this regard.⁶¹

⁵⁶ [Appeal Brief](#), para. 24.

⁵⁷ [Appeal Brief](#), para. 20(i).

⁵⁸ [Impugned Decision](#), para. 28.

⁵⁹ See [Appeal Brief](#), para. 20(ii).

⁶⁰ See in this regard [Impugned Decision](#), para. 26.

⁶¹ See [Appeal Brief](#), para. 20(ii).

40. Lastly, Mr Abd-Al-Rahman contends that the events alleged in Annex 3 bear no relation to witness safety, absent any suggestion that the threatened individuals were witnesses in this case.⁶² The Appeals Chamber finds that this argument equally fails since it is based on a misreading of the Impugned Decision. Indeed, in light of the evidentiary standard addressed above, the Pre-Trial Chamber was not required to establish that interference with witnesses has occurred, but rather to consider whether there is an appearance that such interference could occur. In this sense, the Pre-Trial Chamber noted, on the basis of, *inter alia*, Annex 3, that Mr Abd-Al-Rahman and his supporters allegedly threatened human rights activists and found that he likely still had supporters who may have access to actual or potential witnesses.⁶³ In this context, it found that interim release would present an unacceptable risk that he may exert pressure on witnesses, either directly or indirectly through his supporters, thus obstructing or endangering the investigation or the Court's proceedings.⁶⁴ In making this finding, the Pre-Trial Chamber expressly referred to 'actual or *potential* witnesses'.⁶⁵ Mr Abd-Al-Rahman's argument based on the absence of any indication that the individuals subject to the alleged threats in Annex 3 are not witnesses in this case⁶⁶ is therefore irrelevant to the Pre-Trial Chamber's determination.

3. *Third Ground*

41. Under this ground of appeal, Mr Abd-Al-Rahman avers that the Pre-Trial Chamber's conclusion to keep him in detention due to the existence of an unacceptable risk that he may exert pressure on witnesses is erroneous in fact and law because it fails to take into account, or give reasons for summarily rejecting, a series of factors.⁶⁷ Specifically, Mr Abd-Al Rahman submits that the Pre-Trial Chamber failed to: (i) distinguish between witnesses in Sudan and those in other countries; (ii) respond to the argument that the presence of witnesses of the Prosecutor in Sudan is impossible; (iii) remind the Prosecutor of her 'obligations relating to confidentiality of information and the safety of witnesses'; and (iv) assess the impact of his submissions on the

⁶² See [Appeal Brief](#), para. 20(iii).

⁶³ [Impugned Decision](#), para. 29.

⁶⁴ [Impugned Decision](#), para. 29.

⁶⁵ [Impugned Decision](#), para. 29 (emphasis added).

⁶⁶ [Appeal Brief](#), para. 20(iii).

⁶⁷ [Appeal Brief](#), para. 26.

‘assessment of the risk that witnesses would face were Mr [...] Abd-Al Rahman to be released’.⁶⁸

42. As a preliminary matter, the Appeals Chamber notes that Mr Abd-Al-Rahman contends that the Pre-Trial Chamber failed to give reasons for summarily rejecting and failing to consider the arguments listed in the paragraph above, thus violating the ‘obligation under article 74(5) of the Statute to state reasons for decisions’.⁶⁹ The Appeals Chamber finds no merit in this contention. In that regard, it recalls that ‘the extent of the reasoning will depend on the circumstances of the case’, and that the obligation to provide reasons ‘will not necessarily require reciting each and every factor that was before the [relevant chamber] to be individually set out, but [requires the relevant chamber] to identify which facts it found to be relevant in coming to its conclusion’.⁷⁰

43. The Pre-Trial Chamber noted Mr Abd-Al-Rahman’s submissions made in his Reply on the alleged absence of witnesses in Darfur/Sudan⁷¹ and the lack of disclosure of the identities of the Prosecutor’s witnesses.⁷² While the Pre-Trial Chamber did not expressly address the distinction between witnesses residing in Darfur/Sudan and in other countries, the Pre-Trial Chamber found that the interim release would expose any kind of witnesses to an unacceptable risk.⁷³

44. In these circumstances, the Appeals Chamber finds that Mr Abd-Al-Rahman has failed to articulate how the lack of distinction between witnesses residing in Darfur/Sudan and in other countries amounts to an error. His arguments related to the allegation that the Prosecutor could not have witnesses in Sudan and that no witness identity has been disclosed are therefore immaterial to the Pre-Trial Chamber’s

⁶⁸ [Appeal Brief](#), para. 26.

⁶⁹ [Appeal Brief](#), para. 26.

⁷⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”](#), 14 December 2006, ICC-01/04-01/06-774 (OA4), para. 30, citing *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”](#), 14 December 2006, ICC-01/04-01/06-773 (OA5), para. 20. See also [Gbagbo OA Judgment](#), paras 46-47, where the Appeals Chamber clarified that these principles also apply to decisions on interim release.

⁷¹ [Impugned Decision](#), paras 16-17.

⁷² [Impugned Decision](#), paras 19-20.

⁷³ [Impugned Decision](#), para. 29.

conclusion. The absence of any specific reasoning in this regard does not violate article 74(5) of the Statute as the Impugned Decision is not based on that provision.

45. Lastly, given that the Pre-Trial Chamber had concluded that interim release would cause an unacceptable risk to the safety of witnesses and the investigations, the Appeals Chamber considers that there was no need for the Pre-Trial Chamber to further address Mr Abd-Al-Rahman's submissions on the lack of any allegations that he threatened the administration of justice and that there is no legal error in this respect.⁷⁴ His argument in that regard is dismissed.

4. *Fourth Ground*

46. Under this ground of appeal, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber, while recalling the principle that detention is the exception and not the rule, nevertheless reversed this presumption in its reasoning.⁷⁵ He submits that the Impugned Decision is 'underpinned entirely' by three considerations, namely: (i) the Prosecutor's inability to protect her witnesses; (ii) the NGO report contained in Annex 3 which is unreliable for the reasons set out under the Second Ground; and (iii) the high ranking position Mr Abd-Al-Rahman is alleged to have held in the past and the possibility that he still has supporters.⁷⁶

47. On the other hand, Mr Abd-Al-Rahman argues that: (i) he has surrendered himself to the Court voluntarily; (ii) there is remaining uncertainty whether he is indeed the person referred to in the charges under the name 'Ali Kushayb'; (iii) in addition to his sworn statement that he would not abscond from the authority of the Court and the genuine ongoing concern for the victims and witnesses he has expressed since his first appearance, he indicated that he was prepared to comply with a number of strict security conditions under rule 119 of the Rules and/or article 38(3) of the Headquarters Agreement; and (iv) no clear link could be established between him and the alleged supporters.⁷⁷

⁷⁴ [Appeal Brief](#), para. 26.

⁷⁵ [Appeal Brief](#), para. 27.

⁷⁶ [Appeal Brief](#), para. 31.

⁷⁷ [Appeal Brief](#), paras 28-30, 32.

48. In Mr Abd-Al-Rahman’s view, the principle that detention is an exception should have led to his interim release and that the rejection of the Interim Release Request constitutes a ‘reversal of the hitherto progressive case-law of the Court, which is both damaging and contrary to the rights of the person’.⁷⁸

49. For the reasons set out below, the Appeals Chamber finds that the arguments under the Fourth Ground fail to show an error on the part of the Pre-Trial Chamber. First, most of these arguments largely repeat and rely upon submissions brought and addressed under the first three grounds of appeal, and as such, will not be entertained again by the Appeals Chamber.

50. The remaining arguments relating to the circumstances of Mr Abd-Al-Rahman’s surrender to the Court and his willingness to comply with stringent security conditions, which, in Mr Abd-Al-Rahman’s view, would militate in favour of his release, repeat the arguments made in the Interim Release Request.⁷⁹ These arguments have been considered by the Pre-Trial Chamber,⁸⁰ which found them insufficient to mitigate the risk to the integrity of the investigation and the proceedings and the safety of witnesses.⁸¹

51. The Appeals Chamber also emphasises that the Pre-Trial Chamber clearly recalled that, ‘in considering the right to interim release, one must bear in mind the fundamental principle that deprivation of liberty is the exception and not the rule’.⁸² The fact that, having considered the circumstances and information before it, the Pre-Trial Chamber concluded that detention was to be maintained, does not in any way suggest a reversal of the presumption that detention remains the exception.⁸³ As such, Mr Abd-Al-Rahman’s contentions constitute a mere disagreement with the Pre-Trial

⁷⁸ [Appeal Brief](#), para. 32.

⁷⁹ [Interim Release Request](#), paras 13-17.

⁸⁰ [Impugned Decision](#), paras 8-10.

⁸¹ [Impugned Decision](#), para. 29.

⁸² [Impugned Decision](#), para. 23. This is in line with the jurisprudence of the Appeals Chamber, *see e.g.*, *The Prosecutor v Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”](#), 11 July 2014, ICC-01/05-01/13-558 (OA2), para. 67. It further reflects the jurisprudence of international human rights bodies, *see e.g.*, United Nations Human Rights Committee, *Abdelhamid Taright et al v. Algeria*, Views, 15 March 2006, U.N. Doc. CCPR/C/86/D/1085/2002, para. 8.3; United Nations General Assembly, Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/19/57, 26 December 2011, para. 56.

⁸³ *See* [Appeal Brief](#), para. 27.

Chamber's determination and warrant no further examination for the purpose of the present appeal.

5. *Fifth Ground*

52. Under this ground of appeal, 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. Mr Abd-Al-Rahman submits that the Pre-Trial Chamber, before ruling on his release, should have sought observations from the host State, arguing that regulation 51 mandates that 'consultations' take place not once there is an intention to grant release, but as soon as release has been requested.⁸⁴

53. As a preliminary matter, the Appeals Chamber notes that under this ground and on a number of occasions, Mr Abd-Al-Rahman wrongly refers to 'consultations' with the relevant State or States.⁸⁵ In this regard, the Appeals Chamber finds it important to recall 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.

54. Turning to the merits of this ground, and for the reasons that follow, the Appeals Chamber, by majority, Judge Ibáñez Carranza is appending a separate concurring opinion, finds that this argument is unsupported by the applicable legal framework and the case law of this Court.

55. The Appeals Chamber observes that regulation 51, entitled 'Decision on interim release', 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'. The fact that this provision refers to a 'decision *on* interim release' as opposed to a decision on *a request* or *an application*⁸⁶ for interim release suggests that the requirement set out in this provision pertains to scenarios where a chamber, in the circumstances at hand, intends to grant interim release or envisages the

⁸⁴ [Appeal Brief](#), para. 34.

⁸⁵ See [Appeal Brief](#), paras 7, 8, 9, 34, 36, p. 18.

⁸⁶ The Appeals Chamber notes that article 60(2) of the Statute provides that the person '*may apply for* interim release' (emphasis added). Regulation 51 does not include any wording to reflect this concept.

possibility thereof.⁸⁷ This textual interpretation seems even clearer on the basis of the French version of the relevant provision which refers to a ‘*décision de mise en liberté provisoire*’,⁸⁸ i.e., a decision to provisionally release someone.

56. The Appeals Chamber also notes that contrary to the wording of regulation 51, rule 118(1), (2), and (3) of the Rules clearly refers to a ‘request’ for interim release. In addition, rule 118(3) of the Rules, providing that after having received a request for interim release, ‘[t]he Pre-Trial shall decide after having received observation in writing of the Prosecutor or the detained person’, does not refer to observations from the relevant State or States.

57. This interpretation is further supported by considerations of efficiency and judicial economy. This is because in a scenario where a chamber has already decided, for reasons unrelated to any position of the State or States concerned, that continued detention appears necessary regardless of any conditions imposed, it would seem unnecessary to seek, await and consider submissions from the relevant State or States.

58. Furthermore, this interpretation is in line with the case law of this Court. In this regard, the Appeals Chamber finds that Mr Abd-Al-Rahman’s reliance on the Appeals Chamber’s finding in *The Prosecutor v. Jean-Pierre Bemba Gombo* (the ‘*Bemba Interim Release OA2 Judgment*’)⁸⁹ for his argument that observations of the State to whose territory the release is sought should be obtained prior to the decision on the release or continued detention and forms part of the hearing of that matter⁹⁰ is based on a misreading of said judgment.

59. Indeed, the *Bemba Interim Release OA2 Judgment* does not indicate that any decisions on requests for interim release need to be preceded by observations of the relevant State or States. Rather, read in its proper context, the holding in that judgment

⁸⁷ Emphasis added.

⁸⁸ Emphasis added.

⁸⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”](#), 2 December 2009, ICC-01/05-01/08-631-Red (OA2) (confidential version registered on the same day (ICC-01/05-01/08-631-Conf)).

⁹⁰ [Appeal Brief](#), para. 35, referring to [Bemba Interim Release OA2 Judgment](#), paras 2, 106.

concerned a decision *granting* interim release in the absence of having identified a State willing to accept the person concerned.⁹¹

60. In addition, the Appeals Chamber later specified that ‘[a] Chamber's obligations to specify conditions and, if necessary, seek additional information regarding conditions of release are only triggered when: (a) the Chamber is considering conditional release; (b) a State has indicated its general willingness and ability to accept a detained person into its territory; and (c) the chamber does not have sufficient information before it regarding the conditions of release to enable it to make an informed decision.’⁹²

61. In light of the above, the Appeals Chamber finds 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.

62. Finally, the Appeals Chamber considers that the absence of an obligation to seek observations in the scenario described above does not prevent a chamber from doing so, if necessary on an urgent basis, upon a subsequent request for interim release when it considers that the conditions for maintaining the accused in detention may no longer be satisfied or after reversal of a decision denying interim release by the Appeals Chamber. Mr Abd-Al-Rahman’s contention that the absence of observations presents the Appeals Chamber with a ‘*fait accompli*’ preventing it from ordering his immediate release is therefore without merit. In that same vein, his argument that by not seeking observations, the Pre-Trial Chamber signalled that it would not grant his release at the time of the periodic review phases⁹³ is unfounded.

⁹¹ See e.g. [Bemba Interim Release OA2 Judgment](#), paras 106, 109.

⁹² [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 26 September 2011 entitled “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”](#), dated 15 December 2011 and registered on 16 December 2011, ICC-01/05-01/08-1937-Red2 (OA9), para. 35 (confidential version registered on 23 November 2011 (ICC-01/05-01/08-1937-Conf)). The Appeals Chamber’s finding was made in the context of and with reference to a chamber’s decision not to seek additional observations from a relevant State when reconsidering an application for interim release upon reversal of its original decision by the Appeals Chamber.

⁹³ [Appeal Brief](#), para. 36.

IV. APPROPRIATE RELIEF

63. In an appeal pursuant to article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case, for the reasons set out above, the Appeals Chamber has dismissed Mr Abd-Al-Rahman's five grounds of appeal, and confirms the Impugned Decision.

64. Judge Ibáñez Carranza appends a separate concurring opinion to this judgment on the issues of the re-characterisation of the alleged errors presented by Mr Abd-Al-Rahman under the first ground of appeal and on the interpretation of regulation 51 of the Regulations under the fifth ground of appeal as discussed at paragraphs 25 to 29 and 54 to 61 of this judgment.

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



Judge Piotr Hofmański
Presiding

Dated this 8th day of October 2020

At The Hague, The Netherlands