



**Original: English**

**No. ICC-02/05-01/20 OA6**

**Date: 5 February 2021**

**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 redacted version**

**Judgment**

**on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence'**

**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 Mr Abd-Al-Rahman**  
Mr Cyril Laucci

**REGISTRY**

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**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 Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence’ of 11 December 2020 (ICC-02/05-01/20-230-Red),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

The ‘Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence’ is confirmed.

## REASONS

### I. INTRODUCTION

1. Pre-Trial Chamber II rejected Mr Ali Muhammad Ali Abd-Al-Rahman’s request for interim release in its review of the circumstances underpinning his detention under article 60(3) of the Statute. Mr Abd-Al-Rahman brings this appeal of that decision, arguing that the reasons for his detention are grounded in inadmissible evidence. He further argues that the chamber failed to appreciate his personal circumstances in rejecting his request for interim release. The Appeals Chamber will review whether Pre-Trial Chamber II erred in finding that the circumstances warranting detention continue to exist.

### II. PROCEDURAL HISTORY

2. On 27 April 2007, Pre-Trial Chamber I issued a warrant of arrest against 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.<sup>1</sup>

3. 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 Statute<sup>2</sup> by issuing a second warrant of arrest against Mr Abd-Al-Rahman for his 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.<sup>3</sup>

4. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the detention centre of the Court.<sup>4</sup>

5. On 1 July 2020, Mr Abd-Al-Rahman filed a request before the Pre-Trial Chamber for interim release to the territory of the host State pending trial, pursuant to article 60(2) of the Statute.<sup>5</sup> The Pre-Trial Chamber, Judge Rosario Salvatore Aitala acting as Single Judge, rejected the request (‘First Interim Release Decision’).<sup>6</sup> Mr Abd-Al Rahman appealed that decision.<sup>7</sup>

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<sup>1</sup> [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.

<sup>2</sup> [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-02/05-01/20-6-Red2 (confidential redacted version registered on 25 June 2020 (ICC-02/05-01/20-6-Conf-Red)).

<sup>3</sup> [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)).

<sup>4</sup> *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).

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

<sup>6</sup> [Decision on the Defence Request for Interim Release](#), 14 August 2020, ICC-02/05-01/20-115, p. 11.

<sup>7</sup> [Mémoire d’appel de la décision ICC-02/05-01/20-115](#), 19 August 2020, ICC-02/05-01/20-120 (corrected version registered on the same day (ICC-02/05-01/20-120-Corr); English translation registered on 11 September 2020 (ICC-02/05-01/20-120-Corr-tENG)); [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.

6. On 8 October 2020, the Appeals Chamber issued its judgment (the ‘*Abd-Al-Rahman* OA2 Judgment’) confirming the First Interim Release Decision.<sup>8</sup>

7. After instructing the Prosecutor and Mr Abd-Al-Rahman to file observations for the Pre-Trial Chamber’s review of Mr Abd-Al-Rahman’s detention pursuant to rule 118(2) of the Rules of Procedure and Evidence (the ‘Rules’), on 11 December 2020, the Pre-Trial Chamber ordered Mr Abd-Al-Rahman’s continued detention (the ‘Impugned Decision’).<sup>9</sup> It found that no changes of circumstances under article 58(1)(a) and (b)(ii) had occurred in the factors underlying the First Interim Release Decision.<sup>10</sup>

8. On 16 December 2020, Mr Abd-Al-Rahman filed a notice of appeal against the Impugned Decision.<sup>11</sup>

9. In accordance with the Appeals Chamber’s instructions,<sup>12</sup> Mr Abd-Al-Rahman filed his appeal brief on 4 January 2021 (the ‘Appeal Brief’)<sup>13</sup> and the Prosecutor filed her response on 11 January 2021 (the ‘Prosecutor’s Response’).<sup>14</sup>

### III. STANDARD OF REVIEW

10. The Appeals Chamber notes that there exists a lacuna in the provisions governing interlocutory appeals under article 82 of the Statute as regards the grounds of appeal that a party may raise. In response, the Appeals Chamber has determined that a party

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<sup>8</sup> [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’](#), ICC-02/05-01/20-177. *See also 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’*, 8 October 2020, ICC-02/05-01/20-177-Anx.

<sup>9</sup> [Public redacted version of ‘Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118\(2\) of the Rules of Procedure and Evidence’](#), 11 December 2020, ICC-02/05-01/20-230-Red (confidential version registered on the same date (ICC-02/05-01/20-230-Conf)), para. 7, p. 10.

<sup>10</sup> [Impugned Decision](#), paras 27-28.

<sup>11</sup> [Notice of Appeal against Decision ICC-02/05-01/20-230-Red](#), dated 16 December 2020 and registered on 17 December 2020, ICC-02/05-01/20-234 (English translation registered on 31 December 2020 (ICC-02/05-01/20-234-tENG)).

<sup>12</sup> [Order on the conduct of the appeal proceedings](#), 18 December 2020, ICC-02/05-01/20-240.

<sup>13</sup> [Appeal Brief against Decision ICC-02/05-01/20-230-Red](#), dated 1 January 2021 and registered on 4 January 2021, ICC-02/05-01/20-247-Red (confidential version registered on the same date (ICC-02/05-01/20-247-Conf)); English translation registered on 4 February 2021 (ICC-02/05-01/20-247-Conf-tENG)).

<sup>14</sup> [Public Redacted Version of Prosecution Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-230-RED” \(ICC-02/05-01/20-247\)](#), ICC-02/05-01/20-252-Red, 22 January 2021 (with confidential Annex A (ICC-02/05-01/20-252-Conf-AnxA) (confidential version registered on 11 January 2021 (ICC-02/05-01/20-252-Conf))).

may raise the same grounds as for final appeals under article 81 of the Statute.<sup>15</sup> Particularly in this appeal, as it concerns the findings of the Pre-Trial Chamber in relation to the criteria under article 58(1) of the Statute, it is necessary to apply the permissible grounds of appeal under 81 of the Statute *mutatis mutandis* to appeals of decisions granting or denying release under article 82(1)(b) of the Statute.

11. 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”.<sup>16</sup>

12. With respect to errors of law, the Appeals Chamber has held that it

will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.<sup>17</sup>

13. 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

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<sup>15</sup> See e.g., *Situation in the Democratic Republic of Congo*, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”](#), 23 September 2008, ICC-01/04-169 (OA) (*ex parte* version registered on 13 July 2006 (ICC-01/04-169-US-Exp)), paras 32-34; *The Prosecutor v. Joseph Kony et al.*, [Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 \(1\) of the Statute” of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408 (OA3), paras 46-47.

<sup>16</sup> *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).

<sup>17</sup> [Gbagbo OA10 Judgment](#), para. 15 and references cited therein.

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.<sup>18</sup>

14. The Appeals Chamber notes that, under article 58(1)(a) of the Statute, the standard of proof is 'reasonable grounds to believe' and, under article 58(1)(b) of the Statute, detention may be ordered if it 'appears necessary' to avoid the enumerated risks. Taking this into account, the above standard of appellate review will guide the analysis of the Appeals Chamber.

#### IV. MERITS

##### A. The Impugned Decision

15. The Pre-Trial Chamber rejected Mr Abd-Al-Rahman's arguments regarding the inadmissibility of the evidence relied upon for the warrants of arrest, finding that even if his arguments had merit, the challenged evidence related only to an 'insignificant' amount of the total evidence relied upon.<sup>19</sup> The Pre-Trial Chamber recalled that under article 61(6)(b) of the Statute Mr Abd-Al-Rahman 'may challenge the admissibility of the evidence at the confirmation hearing'.<sup>20</sup>

16. The Pre-Trial Chamber noted further the 'limited progress' that the Prosecutor and the Victims and Witnesses Unit were able to make regarding the setup of protective measures for witnesses.<sup>21</sup> Nonetheless, it did not agree with Mr Abd-Al-Rahman's contention that the Prosecutor was 'somehow in breach of the [First] Interim Release Decision' as there was 'no indication that the Prosecutor did not take all feasible steps under the circumstances to comply with [the] instruction [to take reasonable steps to put in place mechanisms to protect potential witnesses and/or safeguard potential evidence]'.<sup>22</sup>

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<sup>18</sup> [Gbagbo OA10 Judgment](#), para. 16 (footnotes omitted).

<sup>19</sup> [Impugned Decision](#), para. 26.

<sup>20</sup> [Impugned Decision](#), para. 26.

<sup>21</sup> [Impugned Decision](#), para. 31.

<sup>22</sup> [Impugned Decision](#), para. 31.

17. Finally, the Pre-Trial Chamber considered that Mr Abd-Al-Rahman's health condition which was 'reported to have improved' did not warrant his release on humanitarian grounds.<sup>23</sup>

### **B. Mr Abd-Al-Rahman's submissions**

18. Mr Abd-Al-Rahman raises three grounds of appeal.

19. Under his first ground of appeal, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber erred in rejecting his argument that the inadmissibility of some of the evidence relied upon in the warrants of arrest constitutes a 'change in circumstances' justifying his release.<sup>24</sup> In that regard, he argues that the Pre-Trial Chamber erred in finding that the portion of the evidence he claimed to be inadmissible represented only an insignificant part of the evidence presented in the warrants of arrest and that he was required to direct his submissions to the entirety of the evidence referred to in the warrants of arrest.<sup>25</sup>

20. Under his second ground of appeal, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber erred in concluding that the Prosecutor was not in breach of the First Interim Release Decision regarding the measures taken for the protections of potential witnesses.<sup>26</sup> He claims that the Pre-Trial Chamber contradicted its own conclusion in its decision on the second postponement of the confirmation hearing where it found that the Prosecutor had violated its instructions regarding the protection of her witnesses.<sup>27</sup>

21. Mr Abd-Al-Rahman argues further that the Pre-Trial Chamber erred in not mentioning the absence of an agreement between Sudan and the Court, in violation of articles 4(2) and 68(1) of the Statute, which makes it impossible for the Prosecutor to protect witnesses on the territory of Sudan.<sup>28</sup>

22. Finally, under his third ground of appeal, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber erred in failing to consider the particular circumstances of his detention

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<sup>23</sup> [Impugned Decision](#), para. 34.

<sup>24</sup> [Appeal Brief](#), paras 11-21.

<sup>25</sup> [Appeal Brief](#), paras 8, 12-16, 19, 21.

<sup>26</sup> [Appeal Brief](#), paras 22-25.

<sup>27</sup> [Appeal Brief](#), para. 22.

<sup>28</sup> [Appeal Brief](#), paras 8, 23.

such as his advanced age, [REDACTED].<sup>29</sup> He avers that [REDACTED].<sup>30</sup> He argues also that [REDACTED].<sup>31</sup>

### **C. The Prosecutor's submissions**

23. With respect to the first ground of appeal, the Prosecutor submits that Mr Abd-Al-Rahman fails to show any error in the Impugned Decision as he miscomprehends the nature of the Pre-Trial Chamber's assessment under article 58(1)(a) of the Statute and 'conflates the review of pre-trial detention with the confirmation of the charges'.<sup>32</sup> The Prosecutor adds that Mr Abd-Al-Rahman fails to advance any arguments demonstrating any material impact of the alleged errors raised under his first ground of appeal and his arguments should be dismissed *in limine*.<sup>33</sup>

24. Regarding the second ground of appeal, the Prosecutor argues that Mr Abd-Al-Rahman repeats arguments regarding the Prosecutor's ability to protect witnesses and its impact on article 58(1)(b)(ii) of the Statute which the Appeals Chamber previously rejected.<sup>34</sup>

25. Finally, with regard to the third ground of appeal, the Prosecutor argues that Mr Abd-Al-Rahman fails to show that the Pre-Trial Chamber was unreasonable in exercising its discretion to decline releasing Mr Abd-Al-Rahman on humanitarian grounds.<sup>35</sup>

### **D. Determination by the Appeals Chamber**

26. The Appeals Chamber observes that Mr Abd-Al-Rahman's three grounds of appeal challenge the Pre-Trial Chamber's review of the reasons for his continued detention. In particular, he argues that the Pre-Trial Chamber erred in its assessment of changes in the circumstances underlying his detention under article 60(3) of the Statute. This provision states as follows:

The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor

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<sup>29</sup> [Appeal Brief](#), paras 26-29.

<sup>30</sup> [Appeal Brief](#), para. 28.

<sup>31</sup> [Appeal Brief](#), para. 28.

<sup>32</sup> [Prosecutor's Response](#), paras 7-18.

<sup>33</sup> [Prosecutor's Response](#), paras 19-26.

<sup>34</sup> [Prosecutor's Response](#), paras 27-30.

<sup>35</sup> [Prosecutor's Response](#), paras 33-38.

or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

27. The procedure for the review of the ruling on detention arising from article 60(3) of the Statute has been explained by the Appeals Chamber as follows:

First, the Pre-Trial or Trial Chamber must identify the “ruling on release or detention” that needs to be reviewed, i.e. the initial decision made under article 60 (2) of the Statute as well as any potential subsequent modifications made to that decision under article 60 (3) of the Statute. Second, the Pre-Trial or Trial Chamber needs to consider whether there are “changed circumstances”, i.e. whether there is a “change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”. If there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that form the basis for the decision to keep the person in detention. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.<sup>36</sup>

Consequently, the Appeals Chamber will be guided by this jurisprudence when reviewing Mr Abd-Al-Rahman’s arguments raised under his three grounds of appeal.

#### *1. First ground of appeal*

28. Under his first ground of appeal, Mr Abd-Al-Rahman makes two main arguments: (i) the Pre-Trial Chamber committed an error of fact by finding that the challenged evidence is ‘only an insignificant part of the evidence presented in the warrants of arrest’, whereas Mr Abd-Al-Rahman alleges that the challenged evidence constitutes as much as 78 percent of the evidence relied upon for the first warrant of arrest;<sup>37</sup> and (ii) the Pre-Trial Chamber committed an error of law by requiring him to make a showing which encompasses the evidence in its entirety, thereby making it

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<sup>36</sup> *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 6 January 2012 entitled “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’”](#), 5 March 2012, ICC-01/05-01/08-2151-Red (OA10) (confidential version registered on the same date (ICC-01/05-01/08-2151-Conf)), para. 31 (footnotes omitted). *See also* Appeals Chamber, *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 23 December 2014 entitled “Decision on ‘Defence Urgent Motion for Provisional Release’”](#), 20 May 2015, ICC-01/05-01/08-3249-Red (OA11) (confidential version registered on the same date (ICC-01/05-01/08-3249-Conf (OA11))), para. 44, *referring to* Appeals Chamber, *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 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence”](#), 19 November 2010, ICC-01/05-01/08-1019 (OA4), paras 46, 51-53.

<sup>37</sup> [Appeal Brief](#), paras 8, 12-14, 16-17.

impossible for him to discharge his burden for a request of interim release.<sup>38</sup> The Appeals Chamber will address these argument in turn.

29. With respect to Mr Abd-Al-Rahman’s first argument, the Appeals Chamber notes that its scope of review is narrow. While Mr Abd-Al-Rahman challenged some of the evidence underpinning his warrants of arrest and detention as being inadmissible, the Appeals Chamber’s review only concerns the Pre-Trial Chamber’s finding that the volume of impugned evidence is ‘insignificant’. The Appeals Chamber observes that the Pre-Trial Chamber was careful not to pronounce itself on the admissibility of the contested evidence in the Impugned Decision, and the Appeals Chamber has tailored its review accordingly.

30. The Appeals Chamber emphasises that, as argued by the Prosecutor,<sup>39</sup> any assessment of whether the conditions under article 58(1) are met would necessarily concern a qualitative – and not just quantitative – review of the evidence. Nevertheless, for the purposes of this appeal, the Appeals Chamber confines its determination to the arguments raised by the appellant. In this regard, the Appeals Chamber concurs with the Prosecutor that Mr Abd-Al-Rahman’s computations are ‘based on an arbitrarily narrow reading of the [first warrant of arrest]’.<sup>40</sup>

31. The Appeals Chamber observes, contrary to Mr Abd-Al-Rahman’s assertion,<sup>41</sup> that the Prosecutor relied upon 278 items of evidence for the summons to appear or alternatively the first and second warrants of arrest.<sup>42</sup> On appeal, Mr Abd-Al-Rahman rather obliquely claims that there were 16 items of evidence accompanying the applications for warrants of arrest that should be found to be inadmissible.<sup>43</sup> He also argues, without referring to any documents or discussing their significance, that there are an additional 25 items of inadmissible evidence that followed in subsequent disclosures.<sup>44</sup> In light of the fact that the Prosecutor relied on 278 items of evidence,

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<sup>38</sup> [Appeal Brief](#), paras 8, 19.

<sup>39</sup> [Prosecutor’s Response](#), para. 7.

<sup>40</sup> [Prosecutor’s Response](#), para. 14.

<sup>41</sup> [Appeal Brief](#), paras 12-14.

<sup>42</sup> [Prosecutor’s Response](#), para. 13. *See also* Prosecution’s ninth progress report on the evidence review, translation and disclosure process, 8 January 2021, ICC-02/05-01/20-249, paras 4-5.

<sup>43</sup> [Appeal Brief](#), paras 12-13.

<sup>44</sup> [Appeal Brief](#), para. 14.

the Appeals Chamber finds that the Pre-Trial Chamber's conclusion was reasonable that the amount of contested evidence is insignificant.

32. Concerning his second argument, that the Pre-Trial Chamber required Mr Abd-Al-Rahman to make a showing which encompasses the evidence in its entirety,<sup>45</sup> the Appeals Chamber finds that he mischaracterises the Impugned Decision. The relevant section of the Impugned Decision states that

the amount of evidence that is claimed to be inadmissible on the basis of the alleged violation of the Court's Information Protection Policy is *relatively insignificant compared to the entirety of the evidence in support of the warrants of arrest*. Consequently, the Chamber does not need to rule on the merits of the Defence's arguments.<sup>46</sup>

The Appeals Chamber finds that the above statement of the Pre-Trial Chamber in no way required Mr Abd-Al-Rahman to direct his submissions to the entirety of the evidence, nor to make a showing which encompassed the entirety of the evidence.<sup>47</sup> Consequently, Mr Abd-Al-Rahman's argument is rejected.

33. In light of the foregoing, the Appeals Chamber finds no error in the Pre-Trial Chamber's conclusion that the so-called 'new circumstances' argued by Mr Abd-Al-Rahman do not amount to changed circumstances under article 60(3) of the Statute and, accordingly do not warrant a modification of the First Interim Release Decision. Therefore, Mr Abd-Al-Rahman's first ground of appeal is rejected.

## 2. *Second ground of appeal*

34. Under the second ground of appeal, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber erred in fact and law by erroneously and inconsistently finding that the Prosecutor did not breach its orders regarding witness protection efforts.<sup>48</sup> He argues that the Prosecutor could not have met these obligations without an agreement between the Court and Sudan as required under article 4(2) of the Statute.<sup>49</sup> In that regard, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber contradicted its finding made

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<sup>45</sup> [Appeal Brief](#), paras 8, 19.

<sup>46</sup> [Impugned Decision](#), para. 26 (emphasis added).

<sup>47</sup> [Appeal Brief](#), paras 18-21.

<sup>48</sup> [Appeal Brief](#), para. 22, referring to [Impugned Decision](#), para. 31.

<sup>49</sup> [Appeal Brief](#), para. 23.

in the decision to postpone the confirmation hearing where it held that the Prosecutor violated its instructions regarding the protection of her witnesses in Sudan.<sup>50</sup>

35. The Appeals Chamber recalls that, in the *Abd-Al-Rahman* OA2 judgment, it determined that the ‘Prosecutor’s inability to protect witnesses in Darfur/Sudan cannot be assessed in isolation as the Pre-Trial Chamber’s determination [as to whether detention is necessary to avoid any obstruction of the investigation or court proceedings] is also based on other considerations’.<sup>51</sup> In particular, the Appeals Chamber found that, under the circumstances, it was irrelevant to a determination under article 58(1)(b)(ii) of the Statute that the Prosecutor may or may not be in a position to implement protective measures for witnesses.<sup>52</sup> Consequently, Mr Abd-Al-Rahman’s arguments asserting that the lack of an agreement between the Court and Sudan render it impossible for the Prosecutor to protect witnesses merely re-litigates a matter already addressed by the Appeals Chamber.

36. Regarding the Pre-Trial Chamber’s decision to postpone the confirmation hearing, the Appeals Chamber finds that Mr Abd-Al-Rahman mischaracterises the Pre-Trial Chamber’s finding. In that decision, the Pre-Trial Chamber did not find that the Prosecutor had violated its instructions in relation to the setting up of mechanisms for the protection of her witnesses; rather, it found that the Prosecutor had violated its instruction on applying for an extension of time.<sup>53</sup> In the relevant section of the decision, the Pre-Trial Chamber noted the Prosecutor’s explanations regarding the situation about witness protection measures and stated that

[i]t accepts that the Prosecutor has made genuine efforts under difficult circumstances and that it has proved impossible to resolve all issues. At the same time, the information provided by the Prosecutor suggests that there is hope of making some significant further progress in the relatively near future in relation to the 23 witnesses whose security situation has not yet been resolved. Under these circumstances, the Chamber is prepared to grant the Prosecutor some additional time.<sup>54</sup>

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<sup>50</sup> [Appeal Brief](#), paras 22, 24, *referring to* Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits, 18 December 2020, ICC-02/05-01/20-238, (the ‘[Decision on Confirmation Postponement](#)’).

<sup>51</sup> [Abd-Al-Rahman OA Appeals Judgment](#), para. 26.

<sup>52</sup> [Abd-Al-Rahman OA Appeals Judgment](#), para. 27.

<sup>53</sup> [Decision on Confirmation Postponement](#), paras 10-11, 25.

<sup>54</sup> [Decision on Confirmation Postponement](#), para. 23.

This is consistent with the Pre-Trial Chamber's finding in the Impugned Decision holding that there was 'no indication that the Prosecutor did not take all feasible steps under the circumstances to comply with [the instruction about the witness protection measures]'.<sup>55</sup> Therefore, the Appeals Chamber finds Mr Abd-Al-Rahman's arguments regarding the Pre-Trial Chamber's contradictory findings about the Prosecutor's protection of witnesses to be unfounded.

37. In light of the foregoing, Mr Abd-Al-Rahman failed to show an error on the part of the Pre-Trial Chamber and, accordingly, his second ground of appeal is rejected.

### 3. *Third ground of appeal*

38. Under his third ground of appeal, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber erred in law and fact in failing to consider the particular circumstances relating to his detention and its impact on his health.<sup>56</sup> In this regard, the Pre-Trial Chamber held that, as Mr Abd-Al-Rahman's health condition had improved, there was no basis for release on humanitarian grounds.<sup>57</sup>

39. The Appeals Chamber recalls that the release from detention on humanitarian grounds is not expressly addressed in the Statute. The Impugned Decision concerned a review of detention under article 60(3) of the Statute. Neither articles 58 nor 60 of the Statute, nor rule 199 of the Rules refer to the medical condition of the detained person when a chamber is considering interim or conditional release. Furthermore, regulation 103 of the Regulations of the Court assumes that medical problems of detained persons are treated within the detention centre.<sup>58</sup> Here, the Appeals Chamber observes that Mr Abd-Al-Rahman did not produce any medical records upon which the Pre-Trial Chamber could base a decision to release him, with conditions or otherwise. In his

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<sup>55</sup> [Impugned Decision](#), para. 31.

<sup>56</sup> [Appeal Brief](#), paras 26-29.

<sup>57</sup> [Impugned Decision](#), para. 34.

<sup>58</sup> Appeals Chamber, *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) (confidential version registered on the same date (ICC-02/11-01/11-278-Conf (OA)), para. 86.

submissions, he simply made an unsubstantiated claim that [REDACTED].<sup>59</sup> The Appeals Chamber finds these claims to be speculative.

40. In addition, Mr Abd-Al-Rahman refers to [REDACTED] and argues that the Pre-Trial Chamber committed an error of fact in disregarding [REDACTED].<sup>60</sup> The Appeals Chamber rejects this argument because Mr Abd-Al-Rahman did not refer to [REDACTED] in his submissions before the Pre-Trial Chamber and it, therefore, could not have taken into account that information.

41. Finally, Mr Abd-Al-Rahman also argues that the Pre-Trial Chamber erred in law by not taking into account the statement of the Council of Europe on the treatment of detained persons during the COVID-19 pandemic.<sup>61</sup> The Appeals Chamber notes that Mr Abd-Al-Rahman did not raise this argument before the Pre-Trial Chamber; hence it could not have consider it when carrying out its review. In any event, even if this argument had been before the Pre-Trial Chamber, the Appeals Chamber observes that this non-binding statement of principles suggests that ‘efforts should be made’ to resort to ‘alternatives to deprivation of liberty’ to avoid close personal contact, in particular in ‘situations of overcrowding’.<sup>62</sup> This is stated in one of the ten principles.<sup>63</sup> The other nine principles relate to the proper treatment of detained persons in the context of the COVID-19 pandemic while in detention, with special medical attention for those detained persons who are older. Far from requiring release, the Appeals Chamber finds that these principles in fact suggest that measures can be taken to protect the health and safety of detained persons while in detention. The Appeals Chamber notes that Mr Abd-Al-Rahman did not request any special measures in his submissions before the Pre-

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<sup>59</sup> [Appeal Brief](#), para. 26.

<sup>60</sup> [Appeal Brief](#), para. 28.

<sup>61</sup> [Appeal Brief](#), para. 29.

<sup>62</sup> Council of Europe, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, issued on 20 March 2020, CPT/Inf(2020)13.

<sup>63</sup> Principle no. 5: ‘As close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation; reassess the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate, residents of social care homes; and refrain, to the maximum extent possible, from detaining migrants’.

Trial Chamber. Therefore, the Appeals Chamber finds that the Pre-Trial Chamber did not err in law by failing to take into account these principles.

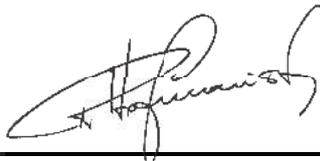
42. Accordingly, the Appeals Chamber rejects Mr Abd-Al-Rahman's third ground of appeal.

## V. APPROPRIATE RELIEF

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 rejects Mr Abd-Al-Rahman's three grounds of appeal, and confirms the Impugned Decision.

Judge Eboe-Osuji appends a separate opinion to this judgment.

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



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**Judge Piotr Hofmański**  
**Presiding**

Dated this 5<sup>th</sup> day of February 2021

At The Hague, The Netherlands