

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 May 2021

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN DARFUR, SUDAN

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

Public Document

**Victims' Response to the Defence's Appeal against
the "Decision on the review of detention" (ICC-02/05-01/20-338)**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel from the Office of Public Counsel for Victims (the “OPCV” or the “Office”) - appointed to represent the general interests of the victims and to assist applicants in the proceedings - submits that the Defence’s appeal against the “Decision on the review of detention” (the “Impugned Decision”)¹ must be dismissed. The appeal does not demonstrate that Pre-Trial Chamber II (the “Chamber”) committed any error when issuing the Impugned Decision.

2. In particular, Counsel posits that the Chamber (i) properly addressed the evidence on the network of supporters, correctly found that the alleged indigence of Mr Abd-Al-Rahman (also the “Suspect”) does not create a presumption that such network is non-existent, and did not reverse the burden of proof; (ii) rightly considered that the mere lapse of time is not a “*changed circumstance*” in the sense of article 60(3) of the Rome Statute (the “Statute”), and properly balanced the duration of Mr Abd-Al-Rahman’s detention against the safety of witnesses; (iii) correctly concluded that the Defence’s own motions and relevant pending rulings do not constitute changed circumstances warranting the release of Mr Abd-Al-Rahman; and (iv) properly considered the role of the Registry on a potential conditional release on medical grounds.

3. Accordingly, the overall approach of the Chamber is correct and reasonable and the Defence does not show any error likely to warrant the quashing of the Impugned Decision.

4. Finally, Counsel conveys the concerns of the Victims. They indicated that Mr Abd-Al-Rahman has to be maintained in detention to ensure that he will appear before the Court and to avoid any interference with the victims and witnesses. Moreover, Victims indicated that the security situation in Darfur remains volatile and most of them continue to fear for their safety and the one of their families. Victims

¹ See the “Decision on the review of detention” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-338](#), 12 April 2017 (the “Impugned Decision”).

residing outside Sudan also echoed these concerns since they still have relatives living in Darfur.

II. PROCEDURAL BACKGROUND

5. On 18 January 2021 the Single Judge, acting on behalf of Chamber, issued the Decision establishing the principles applicable to victims' participation and representation, appointing, *inter alia*, Counsel from the Office to assist victims in the proceedings leading at the confirmation of charges hearing (the "First Decision").²

6. On 5 February 2021, the Single Judge issued a further decision supplementing the First Decision,³ clarifying that said the appointment of Counsel from the OPCV "*is aimed at ensuring the protection of the interests of applicant victims, as well as to provide assistance and support to applicants within the meaning of regulation 81(4) of the Regulations*".⁴

7. On 12 April 2021, the Chamber issued the Impugned Decision.⁵

8. On 14 April 2021 the Defence filed its Notice of Appeal.⁶

9. On 16 April 2021, the Appeals Chamber issued the Order on the conduct of the appeal proceedings instructing the Defence to file its appeal brief by 23 April 2021 and the Prosecutor and the participating victims to file their responses by 30 April 2021.⁷

² See the "Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-259](#), 18 January 2021 (the "First Decision").

³ See the "Decision supplementing the Chamber's first decision on victims' participation and representation and providing additional guidance" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-277](#), 5 February 2021, para. 11.

⁴*Ibid.*

⁵ See the Impugned Decision, *supra* note 1.

⁶ See the "Acte d'appel de la décision ICC-02/05-01/20-338", [No. ICC-02/05-01/20-342 OA7](#), 14 April 2021.

⁷ See the "Order on the conduct of the appeal proceedings" (Appeals Chamber), [No. ICC-02/05-01/20-345 OA7](#), 16 April 2021.

10. On 21 April 2021, the OPCV requested to appear before the Appeals Chamber on the issues on appeal and to file observations within the deadline established for the Prosecutor and the participating victims (the “OPCV Request to Appear”).⁸

11. On 22 April 2021, the Appeals Chamber issued the Order setting [the] time limit for responses to the OPCV Request to appear by 26 April 2021.⁹

12. On 23 April 2021, the Defence filed its response to the OPCV Request to Appear¹⁰ and its Appeal Brief.¹¹

13. On 30 April 2021, the Prosecution filed its Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-338”.¹²

14. On 3 May 2021, the Appeals Chamber authorised the OPCV to file its observations on the appeal by no later than 7 May 2021.¹³

III. SUBMISSIONS

1. First Ground: the Chamber did not err in its analysis of the network of supporters

15. The Defence alleges that the Chamber was unreasonable in deciding to maintain Mr Abd-Al-Rahman in detention on the basis of an *indisputable presumption* that the Suspect benefits from a network of supporters, and thereby reversed the burden of proof.¹⁴

⁸ See the “Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court”, [No. ICC-02/05-01/20-356 OA7](#), 21 April 2021.

⁹ See the “Order setting a time limit for responses” (Appeals Chamber), [No. ICC-02/05-01/20-360 OA7](#), 22 April 2021.

¹⁰ See the “Réponse à la Requête ICC-02/05-01/20-356 OA7”, [No. ICC-02/05-01/20-361 OA7](#), 23 April 2021.

¹¹ See the “Mémoire d’appel de la décision ICC-02/05-01/20-338”, [No. ICC-02/05-01/20-365-Conf OA7](#), 23 April 2021 (the “Defence’s Appeal”). A redacted version thereof was issued on the same day. See [No. ICC-02/05-01/20-365-Red OA7](#).

¹² See the “Prosecution Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-338” (ICC-02/05-01/20-365-Conf)”, [No. ICC-02/05-01/20-371-Conf](#), 30 April 2021.

¹³ See the “Decision on the Office of Public Counsel for victims’ request to appear and file observations in the present appeal” (Appeals Chamber), No. ICC-02/05-01/20-375, 3 May 2021.

¹⁴ See the Defence’s Appeal, *supra* note 11, para. 13.

16. The Defence's arguments are based on a misrepresentation of both the letter of the Impugned Decision and of the applicable law. Indeed, the Chamber observed that the mere allegations that Mr Abd-Al-Rahman is indigent cannot create a presumption that a network of supporters is non-existent. In the words of the Chamber: "[e]ven if it were established that Mr Abd-Al-Rahman really had no assets today, this would by no means imply that he could never have been a leadership figure in a local militia before. Neither would it imply that he could not still have supporters and sympathisers today".¹⁵ Accordingly, the Chamber did not create any *indisputable presumption* in relation to the existence of a network. On the contrary, it analysed the arguments on the Suspect's lacks of means together with its alleged impact on the existing network of supporters, and properly concluded that Mr Abd-Al-Rahman's supposed indigence would not prove or disprove the elements brought by the Prosecution on the existence of such network.

17. In relation to the arguments on the applicable burden of proof, the Appeals Chamber has previously indicated that in proceedings under article 60(3) of the Statute, "*although the Prosecutor does not have to re-establish circumstances that have already been established she must however show that there has been no change in those circumstances that previously justified detention and '[s]he must bring to the attention of the Chamber any other relevant information of which [s]he is aware that relates to the question of detention or release'*".¹⁶

18. There is no doubt that, in proceedings under article 60(3) of the Statute, the onus is on the Prosecutor to demonstrate that there has been no change in the circumstances justifying detention. In this view, the Chamber correctly found that, on the basis of the Prosecution's submissions, there was no change in the circumstances underpinning the previous ruling on detention and that the Defence's arguments on the alleged

¹⁵ See the Impugned Decision, *supra* note 1, para. 28.

¹⁶ See the "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" (Appeals Chamber), [No. ICC-01/05-01/08-1019 OA 4](#), 25 November 2010, para. 51 (the "*Bemba* OA 4 Judgment").

indigence of the Suspect would not constitute one. This was a reasonable approach and the Defence does not show any error that invalidates the Impugned Decision.

2. Second ground: the Chamber rightly weighted the duration of Mr Abd-Al-Rahman's detention against the safety of witnesses

19. The Defence alleges that the Chamber erred in considering that the Prosecution's delay in implementing relevant protective measures did not unreasonably affected the duration of Mr Abd-Al-Rahman's detention.¹⁷

20. The Defence's arguments are ill-construed. The Chamber rightly took into account the information before it on the security situation of certain witnesses. In considering this information for the purpose of its determination, the Chamber acted in line with its obligation under article 68 of the Statute to ensure the protection of victims and witnesses. In the present case, and in respect to similar arguments raised by the Defence, the Appeals Chamber has already found that *"when determining whether the condition for continued detention under article 58(1)(b)(ii) of the Statute is met, the safety of witnesses must be considered regardless of whether they are currently reachable by the Prosecutor"*.¹⁸ Accordingly, the Defence has not demonstrated any error in this regard.

21. In addition, the Appeals Chamber clarified that the requirement of changed circumstances *"imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary"*.¹⁹ The mere lapse of time does not satisfy either of these requirements.

¹⁷ See the Defence's Appeal, *supra* note 11, paras. 16-17.

¹⁸ See "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'" (Appeals Chamber), [No. ICC-02/05-01/20-177 OA2](#), 8 October 2020, para. 27.

¹⁹ See the "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'" (Appeals Chamber), [No. ICC-02/11-01/15-992-Red](#), 19 July 2017, OA10, para. 39. See also the "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'", Appeals Chamber), [No. ICC-01/05-01/08-631-Red OA2](#), 2 December 2009, para. 60; and the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled 'Ninth decision on the

Moreover, this interpretation cannot be accepted as it would imply that the detention of a suspect would always entail “*changed circumstances*” within the meaning of article 60(3) of the Statute due to the mere elapse of time from the start of his or her detention.

22. The purpose and context of article 60(3) of the Statute confirm this conclusion. The Appeals Chamber already ruled that “*if there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention*”.²⁰ Accordingly, related provisions, such as rule 118(2) of the Rules of Procedure and Evidence, require a periodic examination of the person’s detention in order to determine whether the circumstances justifying it have changed over time.

23. In conclusion, the very passing of time spent in detention may not be considered as a “*changed circumstance*” when deciding on a request for *interim* release under article 60(3) of the Statute, but may be taken into account if it has an impact on other factors related to a person’s detention, such as his or her age, or his or her medical condition. Counsel submits *infra* that the Chamber made no error in its consideration of either of said factors.

3. Third and Fourth grounds: the Chamber rightly considered that the Defence’s own motions do not constitute changed circumstances warranting the release of Mr Abd-Al-Rahman

24. The Defence claims that the Chamber’s and Prosecution’s failure to respectively rule on, and entertain, certain Defence’s motions would warrant the release of the Suspect.²¹

review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (Appeals Chamber), [No. ICC-02/11-01/15-208 OA6](#), 8 September 2015, para. 45.

²⁰ See the “Public redacted version - 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*’” (Appeals Chamber), [No. ICC-02/11-01/11-278-Red OA](#), 26 October 2012, para. 23, referring to the “Public redacted version - 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*’” (Appeals Chamber), [No. ICC-01/05-01/08-2151-Red OA10](#), 5 March 2012, paras. 1 and 31.

²¹ See the Appeal Brief, paras. 18-24.

25. The Defence's arguments in this regard are based on mere speculations. The Chamber noted that the Defence was correct that, if the Chamber were to grant the request to declare inadmissible all witness statements disclosed by the Prosecutor so far, *"this would severely undermine the evidentiary basis of the Prosecutor's allegations"*.²² However, it also rightly considered that *"the mere fact that the Defence made this request does not oblige the Chamber to act as if it were already granted. The Chamber will rule on the Defence's request in due course and draw all necessary consequences from its ruling at that time"*.²³ The Chamber correctly assessed that *"irrespective of the merits of these motions, their mere submission is incapable of changing the factual or legal situation of Mr Abd-Al-Rahman, let alone the security threats faced by the witnesses"*.²⁴

26. Therefore, the Chamber properly dismissed the Defence's arguments in this regard as not constituting a change of circumstances warranting Mr Abd-Al-Rahman's release.

4. Fifth Ground: the Chamber correctly considered the role of the Registry on a potential conditional release on medical grounds

27. The Defence claims that the Chamber erred in vesting the Registry with the authority of deciding on the (conditional) release of the Suspect on medical grounds.

28. The Defence's arguments are based on a misreading of the Impugned Decision. The Chamber indicated that *"it belongs to the Registry to monitor the individual situation of all detainees and to inform the Chamber if certain measures, including their (conditional) release, are required on medical grounds"*.²⁵ However, the Chamber also made clear that it is its duty to decide on such a release on the basis of the information received from the Registry. In this regard, the Chamber further noted that it had *"not been given any indication that Mr Abd-Al-Rahman's current situation is particularly concerning"*.²⁶ Accordingly, it properly remanded Mr Abd-Al-Rahman in detention.

²² See the Impugned Decision, *supra* note 1, para. 29.

²³ *Ibid.*

²⁴ *Idem*, para. 32.

²⁵ See the Impugned Decision, *supra* note 1, para. 36.

²⁶ *Ibid.*

29. This was a reasonable approach and the Defence does not show any error that invalidates the Impugned Decision.

IV. CONCLUSION

30. For the foregoing reasons, Counsel respectfully requests the Appeals Chamber to dismiss the Defence's Appeal in its entirety.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 5th day of May 2021

At The Hague, The Netherlands