

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: ICC-02/05-01/20
Date: 5 November 2021

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański
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. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN
(*"ALI KUSHAYB"*)**

Public Document

Notice of Appeal against Decision ICC-02/05-01/20-502

Source: Mr Cyril Laucci, Lead Counsel

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

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PROCEDURAL HISTORY RELATING TO MR ALI MUHAMMAD ALI ABD-AL-RAHMAN'S DETENTION

1. Mr Ali Muhammad Ali Abd-Al-Rahman ("Mr Abd-Al-Rahman") reported voluntarily to the authorities of the Court in June 2020. He was transferred from the Central African Republic, where he had surrendered, to The Hague and has been in custody continuously since 10 June 2020 at the Court's detention centre. His first appearance hearing was held on 15 June 2020.¹

2. On 1 July 2020, the Defence filed a first request for release under article 60(2) of the Statute ("Initial Request").² The Initial Request was rejected without a hearing, on the basis of the parties' written submissions only, by the Honourable Pre-Trial Chamber II on 14 August 2020³ and by the Honourable Appeals Chamber on 8 October 2020.⁴

3. The Defence reiterated its request for release during the 1st review of Mr Abd-Al-Rahman's detention on 27 November 2020 ("1st Review").⁵ The 1st Review was rejected by the Honourable Pre-Trial Chamber II on 11 December 2020⁶ and by the Honourable Appeals Chamber on 5 February 2021.⁷

4. The Defence again reiterated its request for release during the 2nd review of Mr Abd-Al-Rahman's detention on 1 April 2021 ("2nd Review").⁸ The 2nd Review was rejected by the Honourable Pre-Trial Chamber II on 12 April 2021⁹ and by the Honourable Appeals Chamber on 2 June 2021.¹⁰

5. The Defence again reiterated its request for release during the 3rd review of Mr Abd-Al-Rahman's detention on 16 June 2021 ("3rd Review").¹¹ The 3rd Review was

¹ [ICC-02/05-01/20-T-001](#).

² [ICC-02/05-01/20-12](#).

³ [ICC-02/05-01/20-115](#).

⁴ [ICC-02/05-01/20-177 OA2](#).

⁵ [ICC-02/05-01/20-213-Red](#).

⁶ [ICC-02/05-01/20-230-Red](#).

⁷ [ICC-02/05-01/20-279-Red OA6](#).

⁸ [ICC-02/05-01/20-329-Red](#).

⁹ [ICC-02/05-01/20-338](#).

¹⁰ [ICC-02/05-01/20-415 OA7](#).

¹¹ [ICC-02/05-01/20-423](#).

rejected by the Honourable Pre-Trial Chamber II on 5 July 2021¹² and by the Honourable Appeals Chamber on 27 August 2021.¹³

6. The Defence lastly reiterated its request for release during the 4th review of Mr Abd-Al-Rahman's detention on 22 October 2021¹⁴ and at the hearing convened on 25 October 2021 under rule 118(3) of the Rules of Procedure and Evidence ("RPE")¹⁵ ("4th Review"). The 4th Review was rejected by the Honourable Trial Chamber I on 1 November 2021 ("Decision under Appeal").¹⁶ Against that decision the Defence now appeals pursuant to article 82(1)(b) of the Statute, rule 154(1) of the RPE and regulation 64(5) of the Regulations of the Court ("RoC").

7. Pursuant to regulation 64(5) of the RoC, the Defence states the particulars of the appeal proceedings instituted by this Notice of Appeal:

(a) Name and number of the case: ICC-02/05-01/20, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb");

(b) Title and date of the decision under appeal: ICC-02/05-01/20-502, "Decision on the Review of Detention" (French version not available), 1 November 2021;

(c) The Appeal Brief is directed against paragraphs 22-23 (1st and 2nd Grounds of Appeal), 24, 26 and 27 (3rd Ground of Appeal) and 30 (4th Ground of Appeal) of the Decision under Appeal;

(d) Provision of the Statute pursuant to which the appeal is filed: article 82(1)(b) of the Statute;

(e) Grounds of appeal: the Defence will advance the following four grounds of appeal:

- 1st Ground of appeal – Error of fact: at paragraphs 22 and 23, the Decision under Appeal states, on the basis of decisions rendered in other cases before the Court, that the confirmation of the charges increases the risk of Mr Abd-Al-Rahman's

¹² [ICC-02/05-01/20-430](#).

¹³ [ICC-02/05-01/20-459 OA9](#).

¹⁴ ICC-02/05-01/20-495 (despite being classified as public, this document has not been uploaded to the Court's site or to Legal Tools and so no link is available to date).

¹⁵ [ICC-02/05-01/20-T-015-FRA](#).

¹⁶ [ICC-02/05-01/20-502](#).

absconding. The Defence will argue that the reference to decisions in the other cases of the Court discounts certain essential factual particulars specific to the instant case – namely, particulars related to the circumstances of Mr Abd-Al-Rahman’s voluntary surrender and to the risks he faces in the event of his return to Sudan – and therefore errs in fact.

- 2nd Ground of appeal – Error of law: at paragraphs 22 and 23, the Decision under Appeal relies on what it perceives as the “consistent and longstanding jurisprudence of the Court” to assert that confirmation of the charges increases the risk that Mr Abd-Al-Rahman will abscond. The decisions of the Court referenced in the Decision under Appeal cannot have had the effect of inverting, once the charges have been confirmed, the principle that liberty is the rule and detention the exception. The Defence will therefore argue that the Decision under Appeal erred in law by so interpreting them.
- 3rd Ground of appeal – Error of law resulting in three errors of fact: at paragraphs 24, 26 and 27, the Decision under Appeal rejects, in turn, three factual submissions advanced by the Defence in support of the request for release, relating to (i) the fact that Annex A to its Observations¹⁷ confirmed that Mr Abd-Al-Rahman was at large at the alleged date of the event reported in the Office of the Prosecutor’s (“OTP”) Annex 3¹⁸ (para. 24); (ii) the fact that the content of the video included in the OTP’s Annex 3¹⁹ is inconsistent with and refutes the allegations made in that annex (para. 26); and (iii) the risk of Mr Abd-Al-Rahman’s facing criminal prosecution and the death sentence for his voluntary surrender to the Court (para. 27). Each of these factual considerations is rejected; no reasoning is provided except that the Honourable Trial Chamber I is unable to accept the first (para. 24), is unpersuaded by the second (para. 26) and considers the third to be irrelevant (para. 27). No reasons are given for any of these three conclusions. In its OA5 judgment,

¹⁷ ICC-02/05-01/20-495-Conf-AnxA.

¹⁸ [ICC-02/05-01/20-95-Anx3](#).

¹⁹ DAR-OTP-0215-2697.

the Honourable Appeals Chamber recalled the principle that “Chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions”.²⁰ The Decision under Appeal erred in law by not providing reasons for its conclusions on these three points. That error of law gave rise to three errors of fact in respect of the clearly erroneous conclusions of fact reached by the Decision under Appeal on each of those three points.

- 4th Ground of appeal – Errors of law: the Defence will argue, lastly, that the Decision under Appeal erred twice in law at paragraph 30 by considering that the impossibility of respecting Mr Abd-Al-Rahman’s right to family visits was not a factor which undermined the legality of his continued detention and by considering that the arrangement of a simple video call – had such a call been requested and been possible – could have sufficed for that right to be respected.

(f) Relief sought: the Defence moves the Honourable Appeals Chamber to (i) reverse of the Decision under Appeal and (ii) order the immediate release of Mr Ali Muhammad Ali Abd-Al-Rahman to the territory of the host State, subject to any conditions necessary to ensure that he remains available to the Court.

5. Turning to the suitability of a hearing on the present appeal under regulation 64(6)(a) of the RoC, the Defence again defers to the infinite wisdom of the Honourable Appeals Chamber with regard to choosing the option conducive to the swiftest and most efficient resolution of this appeal.

[signed]

Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 5 November 2021,

At The Hague, Netherlands

²⁰ [ICC-02/05-01/20-236 OA5](#), para. 1.