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No. ICC-02/05-01/20 OA10

Date: 17 December 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 redacted version of
Judgment
on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I’s
“Decision on the review of detention”**

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of Victims

Ms Natalie von Wistinghausen
Mr Nasser Mohamed Amin Abdalla

The Office of Public Counsel for victims

Ms Paolina Massidda

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 Trial Chamber I entitled “Decision on the review of detention” of 1 November 2021 (ICC-02/05-01/20-502),

After deliberations,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the review of detention” is confirmed.

REASONS

I. INTRODUCTION

1. Following the transfer of this case from Pre-Trial Chamber II to Trial Chamber I (hereinafter: “Trial Chamber”), the Trial Chamber invited submissions on the detention of Ali Muhammad Ali Abd-Al-Rahman (hereinafter: “Mr Abd-Al-Rahman”) from the parties pursuant to article 60(3) of the Statute. After hearing from the parties orally and in writing, the Trial Chamber ruled that there were no new mitigating circumstances justifying interim release, and furthermore the fact that the charges against Mr Abd-Al-Rahman had been confirmed constituted an aggravating factor. The Trial Chamber decided that Mr Abd-Al-Rahman should remain in detention while awaiting his trial. This is an appeal of that decision.

2. The Defence raises four grounds of appeal: first, it alleges that the Trial Chamber committed two distinct factual errors in taking into account that the proceedings had advanced beyond the confirmation of charges; second, the Defence alleges that the Trial Chamber committed an error of law in reversing the principle that pre-trial detention is an exception and liberty is the rule; third, the Defence alleges that the Trial Chamber committed factual errors in relation to its findings about the potential for witness

interference; and fourth, the Defence alleges that the failure to respect Mr Abd-Al-Rahman's right to family visitation renders his detention unlawful. Ultimately, the Defence seeks interim release for Mr Abd-Al-Rahman.

3. The Appeals Chamber will rule on each of these grounds in turn.

II. PROCEDURAL HISTORY

4. On 27 April 2007, Pre-Trial Chamber I decided to issue 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 2004.¹

5. On 16 January 2018, after the case was transferred to Pre-Trial Chamber II, the Chamber granted the Prosecutor's application to amend the first warrant of arrest pursuant to article 58(6) of the Statute,² 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 between on or about 5 and 7 March 2004.³

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

7. On 14 August 2020, Pre-Trial Chamber II, Judge Rosario Salvatore Aitala acting as Single Judge, issued a decision pursuant to article 60(2) of the Statute, finding grounds to detain Mr Abd-Al-Rahman pending trial⁵ (hereinafter: "First Decision on

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 [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](#), 26 June 2020, ICC-02/05-01/20-6-Red2 (original confidential version filed on 3 November 2017).

³ [Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman \("Ali Kushayb"\)](#), 11 June 2020, ICC-02/05-01/20-80-Red, p. 13 (formerly, ICC-02/05-01/07-74-Red; pursuant to Pre-Trial Chamber II's Decision ICC-02/05-01/07-87 from 15 June 2020, this document was transferred to the case file ICC-02/05-01/20 and re-stamped as ICC-02/05-01/20-80-Red; original confidential version filed on 16 January 2018).

⁴ See Pre-Trial Chamber II, [Decision on the review of detention](#), 5 July 2021, ICC-02/05-01/20-430, para. 2.

⁵ [Decision on the Defence Request for Interim Release](#), 14 August 2020, ICC-02/05-01/20-115, p. 11.

Detention”). The Appeals Chamber confirmed the First Decision on Detention⁶ (hereinafter: “*Abd-Al-Rahman* OA2 Judgment”).

8. On 11 December 2020, 12 April 2021, and 5 July 2021, Pre-Trial Chamber II reviewed Mr Abd-Al-Rahman’s detention and rejected the requests of the Defence for Mr Abd-Al-Rahman’s interim release, finding no change in the circumstances underlying the First Decision on Detention⁷ (hereinafter: “First Review Decision”, “Second Review Decision”, and “Third Review Decision”, respectively). The Appeals Chamber confirmed those decisions⁸ (hereinafter: “*Abd-Al-Rahman* OA6 Judgment”, “*Abd-Al-Rahman* OA7 Judgment”, and “*Abd-Al-Rahman* OA9 Judgment”).

9. On 9 July 2021, Pre-Trial Chamber II confirmed the charges against Mr Abd-Al-Rahman,⁹ and the case was subsequently transferred to the Trial Chamber.

10. On 15 September 2021, the Trial Chamber instructed the Prosecutor, the Office of the Public Counsel for Victims, the Legal Representatives of Victims, and the Registry to submit observations on the review of detention, and it instructed the Defence to file a response.¹⁰

11. On 25 October 2021, the Trial Chamber held a hearing on detention pursuant to rule 118(3) of the Rules of Procedure and Evidence¹¹ (hereinafter: “Rules”). Following the hearing on detention, the Prosecutor disclosed a copy of a video to which reference

⁶ [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 (OA2). 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 (OA2).

⁷ [Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118\(2\) of the Rules of Procedure and Evidence](#), ICC-02/05-01/20-230-Red (original confidential version filed on the same date), para. 7, p. 10; [Decision on the review of detention](#), ICC-02/05-01/20-338, para. 37, p. 14; [Decision on the review of detention](#), ICC-02/05-01/20-430, para. 28, p. 10.

⁸ [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”](#), 5 February 2021, ICC-02/05-01/20-279-Red (OA6); [Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s “Decision on the review of detention”](#), 2 June 2021, ICC-02/05-01/20-415 (OA7); [Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s “Decision on the review of detention” of 5 July 2021](#), 27 August 2021, ICC-02/05-01/20-459 (OA9).

⁹ [Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman \(“Ali Kushayb”\)](#), 9 July 2021, ICC-02/05-01/20-433.

¹⁰ [Order setting out deadlines for observations on detention of the accused](#), ICC-02/05-01/20-471.

¹¹ See [Order scheduling a hearing on detention](#), 18 October 2021, ICC-02/05-01/20-493; [Transcript of hearing](#), ICC-02/05-01/20-T-015-ENG.

was made during the course of the hearing. The Defence filed observations on the video.¹²

12. On 1 November 2021, the Trial Chamber issued its decision finding that there were no changed circumstances within the meaning of article 60(3) of the Statute that would warrant interim release and thus maintained the detention of Mr Abd-Al-Rahman¹³ (hereinafter: “Impugned Decision”).

13. On 5 November 2021, the Defence appealed the Impugned Decision.¹⁴

14. On 16 November 2021, pursuant to an order of the Appeals Chamber,¹⁵ the Defence filed an appeal brief (hereinafter: “Appeal Brief”) in which it raises four grounds of appeal and requests that the Appeals Chamber reverse the Impugned Decision and order the release of Mr Abd-Al-Rahman.¹⁶

15. On 23 November 2021, the Prosecutor filed a response to the Appeal Brief, opposing the relief sought by the Defence.¹⁷ No response to the Appeal Brief was filed on behalf of victims.

III. STANDARD OF REVIEW

17. 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.¹⁸

¹² [Observations en relation à une vidéo divulguée par le Bureau du Procureur](#), 28 October 2021, ICC-02/05-01/20-500.

¹³ [Decision on the review of detention](#), 1 November 2021, ICC-02/05-01/20-502, paras 32-34.

¹⁴ [Notice of Appeal against Decision ICC-02/05-01/20-502](#), ICC-02/05-01/20-510-tENG.

¹⁵ [Order on the conduct of the appeals proceedings](#), 9 November 2021, ICC-02/05-01/20-515.

¹⁶ [Appeal Brief against Decision ICC-02/05-01/20-502](#), ICC-02/05-01/20-518-tENG, p. 16.

¹⁷ [Prosecution Response to the Defence “Mémoire d’appel de la décision ICC-02/05-01/20-502”](#), 23 November 2021, ICC-02/05-01/20-523.

¹⁸ *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) (hereinafter: “*Gbagbo / Blé Goudé* OA10 Judgment”), para. 15 and references cited therein.

16. 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

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

IV. MERITS

A. First ground of appeal

1. *Relevant part of the Impugned Decision*

18. In the Impugned Decision, the Trial Chamber discussed the effect of the confirmation of charges on the review of pre-trial detention as follows:

[22] In respect of Article 58(1)(b)(i) of the Statute, the Chamber finds that the confirmation of the charges against Mr Abd-Al-Rahman constitutes a change in circumstances. However, contrary to the Defence’s submissions, the confirmation of 31 charges against the accused is a factor that militates in favour of continued detention, rather than conditional release. According to the consistent and longstanding jurisprudence of the Court, the confirmation of charges increases the risk that an accused may abscond and is not a changed circumstance that would support conditional release. The Chamber sees no reason to depart from this established jurisprudence.

[23] Moreover, the number, nature and gravity of the charges means that if convicted, a lengthy sentence is likely to be imposed on the accused. This factor increases the risk that the accused may abscond if released. [footnotes omitted]

¹⁹ [Gbagbo / Blé Goudé OA10 Judgment](#), para. 16 (footnotes omitted). The Appeals Chamber recalls what it stated in recent judgments in appeals under article 81 of the Statute, on the applicable standard of review for errors of fact. In particular, it noted that “[i]n assessing the reasonableness of factual findings, the Appeals Chamber will consider [among other things] whether the trial chamber [...] was mindful of the pertinent principles of law [...]”. See [The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A), para. 68; [The Prosecutor v. Bosco Ntaganda, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled “Judgment”](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A A2), para. 39.

19. The Trial Chamber recalled the Defence's argument that, in surrendering himself, Mr Abd-Al-Rahman was in breach of the law that made cooperation with this Court an offence punishable by the death penalty. The Trial Chamber found that this submission was "irrelevant" and rejected it.²⁰

2. *Submissions of the Defence*

20. The Defence alleges that the Trial Chamber committed two separate errors of fact in its application of the jurisprudence of this Court regarding the impact of the confirmation of charges on the review of detention.

21. First, the Defence alleges that the risk Mr Abd-Al-Rahman faces of being arrested, tortured, and sentenced to death in Sudan for his cooperation with the Court should have been relevant for the Trial Chamber's determination in the Impugned Decision. By ignoring this factor, and by applying without distinction the jurisprudence concerning the impact of the confirmation of charges, the Trial Chamber erred in fact.²¹

22. Second, the Defence alleges that the Trial Chamber erred in fact in not taking into account the information available concerning the continuing risk incurred by Mr Abd-Al-Rahman in the event of his return to Sudan.²² The Defence alleges that the Trial Chamber expressly refused to take this information into account.²³ The Defence further argues that, had the Trial Chamber taken this into account, it would have concluded that the situation of Mr Abd-Al-Rahman is manifestly different from that of other detained persons who were the subject of the decisions referred to by the Trial Chamber.²⁴ Therefore, the Defence argues that the Trial Chamber failed to appreciate that any heightened risk brought about by the confirmation of charges is counterbalanced by the particular circumstances of Mr Abd-Al-Rahman.²⁵

3. *Response of the Prosecutor*

23. The Prosecutor submits that the Defence wrongly interprets the Impugned Decision to say that the fact of the confirmation of charges itself justifies maintaining

²⁰ [Impugned Decision](#), para. 27.

²¹ [Appeal Brief](#), paras 3-4.

²² [Appeal Brief](#), para. 5.

²³ [Appeal Brief](#), para. 5.

²⁴ [Appeal Brief](#), para. 6.

²⁵ [Appeal Brief](#), para. 6.

Mr Abd-Al-Rahman in detention.²⁶ To the contrary, the Prosecutor submits that the Trial Chamber found that detention continues to be justified based upon Pre-Trial Chamber II's prior "well-established findings" under article 58(1) of the Statute absent any change in circumstances warranting release.²⁷

24. Finally, the Prosecutor submits that the Trial Chamber reasonably considered that the likelihood of a lengthy sentence "if convicted" increases the risk now that an accused may abscond.²⁸

4. *Determination by the Appeals Chamber*

25. Central to the Defence's first ground of appeal is the question of whether the Trial Chamber failed to take into account the fact of Mr Abd-Al-Rahman's voluntary surrender and the consequences of his surrender for him. The Defence contends that had the Trial Chamber taken this into account, it would not have concluded that the confirmation of 31 charges against Mr Abd-Al-Rahman presents a heightened risk that Mr Abd-Al-Rahman may abscond.

26. The Appeals Chamber recalls that the Defence made submissions about the significance of Mr Abd-Al-Rahman's voluntary surrender before Pre-Trial Chamber II,²⁹ and then again before the Trial Chamber.³⁰ As argued by the Prosecutor, the Trial Chamber recalled Mr Abd-Al-Rahman's voluntary surrender in the Impugned Decision, as well as Pre-Trial Chamber II's findings in the First Decision on Detention.³¹ Thus, the Appeals Chamber considers that the Trial Chamber was well aware of the circumstances of Mr Abd-Al-Rahman's surrender. Indeed, the Trial Chamber determined that the Defence's submissions about the risks Mr Abd-Al-Rahman faced in Sudan resulting from his decision to voluntarily surrender were "irrelevant".³²

²⁶ [Prosecutor's Response](#), para. 12.

²⁷ [Prosecutor's Response](#), paras 12-13.

²⁸ [Prosecutor's Response](#), para. 14.

²⁹ See [First Decision on Detention](#), para. 10.

³⁰ *Réponse aux observations relatives au réexamen de la détention*, 22 October 2021, ICC-02/05-01/20-495, para. 8.

³¹ [Prosecutor's Response](#), para. 9, referring to [Impugned Decision](#), paras 2, 13.

³² [Impugned Decision](#), para. 27.

27. The Appeals Chamber notes that the fact that a suspect surrendered himself voluntarily to the Court can be understood as an indication of his willingness to cooperate with the Court in its proceedings.³³ Additionally, the Appeals Chamber notes that the circumstances that an accused faces in his country of origin – in particular due to an outstanding warrant of arrest – may be relevant to his motivation not to return to that jurisdiction. Both of these considerations should be weighed along with the other considerations that are potentially aggravating under article 58(1)(b) of the Statute in assessing a request for interim release.

28. In this case, the Appeals Chamber notes that the Prosecutor has identified a number of events that suggest that there could be a concrete risk that, if the accused were granted interim release, he or his supporters might interfere with the court proceedings.³⁴ In this regard, the Appeals Chamber would expect the Prosecutor to provide as many concrete elements of fact as possible to the relevant chamber on a regular basis regarding the context of the accused's detention. But for the purposes of the present appeal, the Appeals Chamber is not persuaded that the Trial Chamber assigned insufficient weight to the circumstances of Mr Abd-Al-Rahman's voluntary surrender in its consideration of the criteria under article 58(1)(b) of the Statute.

29. As to the Defence's argument about the difficulties that Mr Abd-Al-Rahman may face should he return to Sudan, the Appeals Chamber observes that the Defence only advances speculative arguments about how these risks may affect Mr Abd-Al-Rahman's motivation to abscond. Nor does the Defence explain how these risks may affect the primary reason for Mr Abd-Al-Rahman's continued detention under article 58(1)(b)(ii) of the Statute. Therefore, the Appeals Chamber finds no error.

30. As a result, the Defence's first ground of appeal is rejected.

³³ See, e.g., Pre-Trial Chamber A, *The Prosecutor v. Paul Gicheru*, [Decision on Mr Gicheru's Request for Interim Release](#), 29 January 2021, ICC-01/09-01/20-90-Red2, para. 43. The Appeals Chamber notes that release on strict conditions was granted in *The Prosecutor v. Paul Gicheru*, in part because the suspect had surrendered to the Court voluntarily. However, in that case, the suspect faced allegations under article 70 of the Statute, which are less severe in nature and attract lighter penalties. Furthermore, the Prosecutor did not oppose release with conditions.

³⁴ [Impugned Decision](#), paras 12-16.

B. Second ground of appeal

1. Relevant part of the Impugned Decision

31. The part of the Impugned Decision relevant to the second ground of appeal is found in paragraphs 22 and 23 of that decision. Those paragraphs are reproduced above, under the first ground of appeal.

2. Submissions of the Defence

32. The Defence submits that the Trial Chamber erred in law in its conclusion that the confirmation of charges alone is a changed circumstance increasing the risk that Mr Abd-Al-Rahman may abscond. The Defence submits that the Trial Chamber's application of this factor has the effect of reversing the standard principle that liberty is the rule and detention the exception.³⁵

33. Referring to the *Bemba* case, the Defence submits that because Jean-Pierre Bemba was eventually acquitted of all charges in respect of crimes under article 5 of the Statute, there is precedent for a finding that the risk of absconding that manifests as a result of the confirmation of charges is only speculative.³⁶ Moreover, the Defence argues that the speculative nature of the charges is heightened due to the fact that leave to appeal the confirmation decision was rejected.³⁷

3. Response of the Prosecutor

34. The Prosecutor submits that the confirmation decision is not the basis for detention in this case.³⁸ Furthermore, the Prosecutor submits that the Trial Chamber considered the confirmation of charges only to assess the likelihood now that Mr Abd-Al-Rahman may abscond.³⁹

4. Determination by the Appeals Chamber

35. Under the second ground of appeal, the Defence submits that the consideration of the confirmation of charges as a factor favouring detention pending trial would lead to the conclusion that detention is justified in all cases that have advanced past the pre-

³⁵ [Appeal Brief](#), para. 7.

³⁶ [Appeal Brief](#), para. 9.

³⁷ [Appeal Brief](#), para. 9.

³⁸ [Prosecutor's Response](#), para. 13.

³⁹ [Prosecutor's Response](#), para. 14.

trial stage. This, according to the Defence, would have the effect of reversing the presumption that detention is the exception to the rule, and that the right to liberty must be respected. The Appeals Chamber recalls that the Defence has made similar arguments before the Appeals Chamber in this case,⁴⁰ and appellants have, in the past, made similar arguments in other cases.⁴¹

36. Indeed, the Appeals Chamber observes that the International Covenant on Civil and Political Rights emphasises that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody [...]”.⁴² Human rights jurisprudence holds that individual freedom, as a “basic guarantee”, constitutes the rule in all cases, and any deprivation thereof must be an exception.⁴³ In practice, this means that the burden of proof falls on the prosecuting authority to demonstrate the existence of reasons to maintain the custody of an individual awaiting trial.⁴⁴

37. The Appeals Chamber notes, however, that the presumption of liberty does not mean that detention cannot be imposed where there exists a legal basis for doing so. Although the starting point in all cases is that the person who is subject to criminal proceedings shall enjoy the right to liberty, he or she may be deprived of that liberty as

⁴⁰ [Corrected version of the “Mémoire d’appel de la décision ICC-02/05-01/20-115 en vertu de l’Article 82-1-b du Statut de Rome”](#), 11 September 2020 (original version filed on 19 August 2020), ICC-02/05-01/20-120-Corr-tENG, paras 27, 32; [Abd-Al-Rahman OA2 Judgment](#), para. 51; [Mémoire d’appel de la décision ICC-02/05-01/20-338](#), 23 April 2021, ICC-02/05-01/20-365-Red, para. 10; [Abd-Al-Rahman OA7 Judgment](#), para. 56.

⁴¹ E.g. *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [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) (hereinafter: “*Bemba et al.* OA2 Judgment”), paras 35, 66, 67; concerning the gravity of the charges, *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’”](#), ICC-02/11-01/11-278-Red (OA) (hereinafter: “*Gbagbo* OA Judgment”), paras 34, 54.

⁴² [International Covenant on Civil and Political Rights](#), 16 December 1966, 999 United Nations Treaty Series 14668, art. 9(3); see also [General Comment no. 35: Article 9 \(Liberty and security of person\)](#) CCPR/G/GC/35 (2014), para. 38.

⁴³ Inter-American Court of Human Rights, [Yvon Neptune v. Haiti](#), Judgment (Merits, Reparations and Costs), 6 May 2008, Series C No. 180, para. 90; European Court of Human Rights (hereinafter: “ECtHR”), [Shamayev and others v. Georgia and Russia](#), Judgment, 12 April 2005, App. no. 36378/02, para. 396; ECtHR, [Kurt v. Turkey](#), Judgment, 25 May 1998, App. No. 24276/94, para. 122.

⁴⁴ Human Rights Committee (hereinafter: “HRC”), [Geniuval M. Cagas, Wilson Butin and Julio Astillero v. Philippines](#), Views, 23 October 2001, Comm. No. 788/1997, para. 7.4; ECtHR, Grand Chamber, [Merabishvili v. Georgia](#), Judgment (Merits and Just Satisfaction), 28 November 2017, App. No. 72508/13, para. 234; ECtHR, Grand Chamber, [Bykov v. Russia](#), Judgment (Merits and Just Satisfaction), 10 March 2009, App. No. 4378/02, para. 64.

prescribed by law in a manner that is strictly necessary under the circumstances.⁴⁵ Human rights law recognises that one of the justifications for detention pending trial may be where there is a risk that an individual will evade justice.⁴⁶ In this regard, the Appeals Chamber has consistently held that the importance of securing a person's attendance at trial, as prescribed in article 58(1)(b)(i) of the Statute, constitutes a lawful reason for pre-trial detention.⁴⁷

38. Contrary to the Defence's position, a chamber's assessment of whether a person's right to liberty is respected must be individualised, looking at the presence of concrete risks weighed against the presumption of interim release on a case-by-case basis. Moreover, the right to physical liberty as defined in human rights law is not violated where a chamber has determined that – in addition to the fulfilment of the requirements in article 58(1)(a) of the Statute – pre-trial detention is necessary to prevent the risks enumerated in article 58(1)(b) of the Statute.⁴⁸ The confirmation of charges may, in the opinion of a chamber, be a factor when considering whether the risk in article 58(1)(b)(i) of the Statute continues to exist.⁴⁹ Importantly, this finding does not on its own displace the general rule concerning the exceptionality of pre-trial detention.

39. In fact, the presumption of liberty as a general rule and detention as an exception as derived from internationally recognised human rights under article 21(3) of the

⁴⁵ [General Comment no. 35: Article 9 \(Liberty and security of person\)](#), CCPR/G/GC/35 (2014), paras 22, 38.

⁴⁶ HRC, *Marinich v. Belarus*, 16 July 2010, Comm. No. 1502/2006, para. 10.4.

⁴⁷ *E.g. The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"](#), 13 February 2007, ICC-01/04-01/06-824 (OA7), para. 136; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [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 (OA4) (hereinafter: "*Katanga and Ngudjolo* OA4 Judgment"), para. 21; *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.

⁴⁸ *Bemba et al. OA2 Judgment*, para. 67.

⁴⁹ *See 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), para. 70. Chambers of this Court have, in the past, also considered the confirmation of charges to be relevant to article 58(1)(a) of the Statute (*e.g.* Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Third Decision on Bosco Ntaganda's Interim Release](#), 17 July 2014, ICC-01/04-02/06-335, para. 24; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Second Review of the Decision on the Conditions of Detention of Germain Katanga](#), 12 December 2008, ICC-01/04-01/07-794-tENG, para. 9).

Statute is itself a part of the nuanced normative approach that the latter adopts to the reasons justifying detention. In this context, the Appeals Chamber observes that the presumption in favour of the right to liberty is, at the stage of the review of detention under article 60(3) of the Statute, actualised through the requirement under the Statute that a chamber must periodically assess whether there are changed circumstances justifying release. As the review under article 60(3) is more limited in scope than the assessment conducted for the purposes of the initial decision on detention under article 60(2) of the Statute, the reality is that a chamber's decision on detention will continue to stand unless it is reversed on account of changed circumstances or an unreasonable period of detention due to inexcusable delay.⁵⁰ If in its assessment a chamber does not find such circumstances, the chamber is "not required to further review the ruling on release or detention".⁵¹

40. Therefore, the Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber committed an error of law in reversing the principle that liberty is the rule and detention the exception. To the contrary, the Appeals Chamber observes that the Trial Chamber correctly ordered the continuation of Mr Abd-Al-Rahman's detention on the basis of several factors relating to the risks described in article 58(1)(b)(i) and (ii) of the Statute.⁵²

41. However, in so finding, the Appeals Chamber emphasises that the fact of the confirmation of charges itself is not a sufficient basis for detention pending trial. Rather, detention pending trial depends upon whether a chamber determines that one or more of the risks enumerated in article 58(1)(b) of the Statute is present. The presumption of innocence and the right to liberty require that detention take place only as prescribed in the Statute, and for a period that is proportionate and necessary given the circumstances. The fact of the confirmation of charges may cause a chamber to conclude that, given the gravity of the charges, an accused may experience an increased incentive to abscond. This relates to the interest that an accused be present at his or her trial in accordance with article 58(1)(b)(i) of the Statute. However, detention pending trial remains only a precautionary measure, which is temporary in nature and subject to

⁵⁰ Article 60(4) of the Statute.

⁵¹ [Gbagbo OA Judgment](#), para. 23.

⁵² See [Impugned Decision](#), paras 22-23, 26, 28.

periodic review. In this sense, the Trial Chamber could have provided fuller reasons as to how the confirmation of charges relates to the original findings justifying detention, rather than isolating it as a “changed circumstance”.

42. Turning to the Defence’s second argument, the Appeals Chamber finds that the fact that in a prior case an accused who was ultimately acquitted was detained during trial in part in order to ensure his attendance is irrelevant to the Trial Chamber’s determination in this case.⁵³ As explained in prior appeals of this nature, the focus of the inquiry is whether detention “appears” necessary.⁵⁴ This requires an assessment of the risks that have crystallised at the time of the review, including any risks that arise from the perception, albeit subjective, that a penalty may loom large.

43. The Defence’s second ground of appeal is therefore rejected.

C. Third ground of appeal

1. Relevant part of the Impugned Decision

44. In the Impugned Decision, the Trial Chamber recalled the Defence’s submission that the investigator’s report that the Defence annexed to its written observations on detention before the Trial Chamber (hereinafter: “Annex I”) refutes the Prosecutor’s allegations of potential threats to witnesses. The Defence argued that the report in Annex I corroborates the Defence’s earlier position that Mr Abd-Al-Rahman was in hiding until the date of his surrender, and that this fact constituted a change in circumstances justifying release.⁵⁵

45. The Trial Chamber found that the content of the report was not capable of providing such corroboration, and it rejected the Defence’s argument.⁵⁶

46. The Trial Chamber then addressed the Defence’s submissions about a video disclosed by the Prosecutor in support of its allegation that Mr Abd-Al-Rahman posed a threat to potential witnesses due to his previous position of power and the likelihood that he still has supporters.⁵⁷ The Trial Chamber found that, contrary to the Defence’s

⁵³ See [Appeal Brief](#), paras 9-11.

⁵⁴ [Katanga and Ngudjolo OA4 Judgment](#), para. 21.

⁵⁵ [Impugned Decision](#), para. 24.

⁵⁶ [Impugned Decision](#), para. 24.

⁵⁷ [Impugned Decision](#), paras 25-26.

submissions, the video was “capable of lending support” to the Prosecutor’s allegation in that regard, and it did not in any event undermine the probative value of the other evidence tendered by the Prosecutor on that issue (as previously accepted by the Pre-Trial Chamber and the Appeals Chamber).⁵⁸

47. Finally, the Trial Chamber determined that the Defence’s submission about the potential penal liability that Mr Abd-Al-Rahman may incur as a result of his “cooperation” with the Court was “irrelevant to the issue at hand”, and it rejected that submission.⁵⁹

2. *Submissions of the Defence*

48. Under the third ground of appeal, the Defence alleges three errors of fact. The Defence also argues that the Trial Chamber failed to provide reasons for the decision not to take into account certain evidence and inconsistencies pointed out by the Defence, which the Defence presented in support of its arguments in favour of interim release.⁶⁰ The Defence refers to the jurisprudence of the Appeals Chamber in this case holding that a chamber must indicate with sufficient clarity the grounds on which it bases its decisions.⁶¹

49. The Defence then takes issue with three specific factual circumstances that it alleges the Trial Chamber did not take into consideration.

50. Concerning the first factual circumstance, the Defence addresses the news report disclosed by the Prosecutor in support of the allegation that Mr Abd-Al-Rahman made threats of violence to certain professional human rights workers in January 2020. The Defence argues that this report is contradicted by i) the information provided by the Prosecutor indicating that Mr Abd-Al-Rahman was, at that time, subject to a warrant of arrest issued by the transitional Sudanese government, ii) the fact that Mr Abd-Al-Rahman was fleeing Sudan and seeking the protection of the ICC, and iii) the fact that

⁵⁸ [Impugned Decision](#) para. 26, referring to [First Decision on Detention](#), para. 28; [Abd-Al-Rahman OA2 Judgment](#), paras 31-36.

⁵⁹ [Impugned Decision](#), para. 27.

⁶⁰ [Appeal Brief](#), para. 14.

⁶¹ [Appeal Brief](#), para. 15, referring to [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled ‘Decision on the Defence Request to provide written reasoning for two oral decisions’](#), 18 December 2020, ICC-02/05-01/20-236 (OA5), paras 1, 15.

the circumstances in the video annexed to the news report tend to contradict the veracity of the report itself.⁶² On this last aspect, the Defence contends that if the person filmed was indeed Mr Abd-Al-Rahman, he would have been arrested by the Sudanese officers who surrounded him in the video, as Mr Abd-Al-Rahman was subject to a warrant of arrest at the time. Thus, the Defence submits that the man in the video is not Mr Abd-Al-Rahman. The Defence argues that the Trial Chamber erred in failing to consider these alleged contradictions.⁶³

51. Second, the Defence argues that there is an incompatibility between the video and its official transcription (tendered by the Prosecutor), and also between the video and its description as found in the written news report.⁶⁴

52. In particular, the Defence submits that, in the video recording, the man speaking did not threaten to kill human rights lawyers, but merely expressed general disapproval of anyone opposing the city of Rehed al-Birdi and its teachers. The Defence also argues that the transcript of the video adds new elements not shown in the recording and that the Trial Chamber erred in fact when it did not find the inconsistency between the video and the transcript.⁶⁵

53. Third, the Defence refers to the findings in the Impugned Decision addressing the Defence's argument that Mr Abd-Al-Rahman would not go back to his country, for his life and physical integrity would be threatened due to his cooperation with the ICC.⁶⁶ The Defence submits that, had the Trial Chamber better analysed the evidence and better reasoned its decision to disregard it, the Trial Chamber would have appreciated that Mr Abd-Al-Rahman was not a threat to witnesses and to the investigation having regard to the risks he takes by fleeing to Sudan.⁶⁷

3. *Response of the Prosecutor*

54. The Prosecutor submits that the Appeals Chamber noted in a previous appeal that Pre-Trial Chamber II's findings justifying detention are not based on just one piece of

⁶² [Appeal Brief](#), para. 17.

⁶³ [Appeal Brief](#), para. 17.

⁶⁴ [Appeal Brief](#), para. 18.

⁶⁵ [Appeal Brief](#), para. 18.

⁶⁶ [Appeal Brief](#), para. 19.

⁶⁷ [Appeal Brief](#), para. 19.

evidence, but rather on “various factors holistically”.⁶⁸ In any event, the Prosecutor argues that the Defence fails to substantiate its submission and explain why the information about being “on the run” contradicts the evidence of the Prosecutor suggesting that there were threats to human rights activists.⁶⁹ Moreover, the Prosecutor points out that this information is not new, and it was already discussed before Pre-Trial Chamber II.⁷⁰

55. In respect of the video in question, the Prosecutor submits that the fact that the video may not be entirely aligned with the Prosecutor’s written evidence in the form of a press article does not in any way undermine the credibility of that article.⁷¹

56. Finally, the Prosecutor submits that the Trial Chamber reasonably concluded that the information that Mr Abd-Al-Rahman was in breach of Sudanese law is irrelevant to the review of his detention.⁷²

4. *Determination by the Appeals Chamber*

57. The Defence argues under the third ground of appeal that the Trial Chamber ignored its submission that evidence of the Prosecutor concerning the potential threat that Mr Abd-Al-Rahman may pose to witnesses is contradicted by other circumstances. First, the Defence argues that the Trial Chamber’s reliance on the Prosecutor’s evidence was unreasonable in part because Mr Abd-Al-Rahman faced a warrant of arrest issued by the transitional government at the time of the events described in the Prosecutor’s evidence.⁷³ The Defence also refers to the investigative report in Annex I, first disclosed by the Prosecutor in December of 2020,⁷⁴ in support of its submission that Mr Abd-Al-Rahman was “at large” at the relevant time.⁷⁵ The Defence argues that the Trial Chamber erred in failing to appreciate that the Prosecutor’s allegation concerning the risk of witness interference is incompatible with these circumstances.⁷⁶

⁶⁸ [Prosecutor’s Response](#), para. 17.

⁶⁹ [Prosecutor’s Response](#), para. 19.

⁷⁰ [Prosecutor’s Response](#), para. 19.

⁷¹ [Prosecutor’s Response](#), paras 20-22.

⁷² [Prosecutor’s Response](#), paras 23-24.

⁷³ [Appeal Brief](#), para. 17.

⁷⁴ [Transcript of Hearing](#), 25 October 2021, ICC-02/05-01/20-T-015-ENG, p. 14, lines 13-15.

⁷⁵ [Appeal Brief](#), para. 17.

⁷⁶ [Appeal Brief](#), para. 17.

58. The Appeals Chamber recalls that the review of detention conducted pursuant to article 60(3) of the Statute is an opportunity for the relevant chamber to modify the original ruling on detention “if it is satisfied that changed circumstances so require”. Underlying this review is a recognition that the circumstances justifying detention may change over time, and the objective of the review is to “ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention”.⁷⁷ A change in circumstances may be 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”.⁷⁸

59. With this in mind, the Appeals Chamber notes that the Prosecutor first presented the evidence impugned in the present appeal regarding the risk of witness intimidation in an annex to his observations leading to the original decision of Pre-Trial Chamber II pursuant to article 60(2) of the Statute.⁷⁹ Pre-Trial Chamber II also received written submissions regarding the fact of the Sudanese arrest warrant issued in December 2019 and its impact on Mr Abd-Al-Rahman’s motivation to surrender to the Court.⁸⁰ The Chamber considered the circumstances and found that interim release, if granted, would present an unacceptable risk that Mr Abd-Al-Rahman may exert pressure on witnesses, either directly or indirectly through his supporters.⁸¹

60. In the Impugned Decision, after recalling the finding of Pre-Trial Chamber II regarding the likelihood that Mr Abd-Al-Rahman still had supporters who may have had access to potential witnesses,⁸² the Trial Chamber found that the report in Annex I did not provide evidence mitigating the potential risk posed by Mr Abd-Al-Rahman

⁷⁷ *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) (hereinafter: “*Bemba OA4 Judgment*”), para. 47.

⁷⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled “Decision on ‘Mr Bemba’s Request for provisional release’”](#), 29 May 2015, ICC-01/05-01/13-970 (OA10), para. 31; *Bemba OA4 Judgment*, para. 51.

⁷⁹ See [Annex 3 to the 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-Anx3.

⁸⁰ [Prosecutor’s Response](#), para. 19.

⁸¹ [First Decision on Detention](#), para. 29.

⁸² [Impugned Decision](#), para. 13.

and his supporters.⁸³ Indeed, the Appeals Chamber observes that the information in Annex I constitutes [REDACTED]. The Appeals Chamber is not persuaded by Mr Abd-Al-Rahman’s argument that this information leads inevitably to the conclusion that he was “on the run” and therefore incapable of engaging in the acts alleged.

61. Moreover, as noted above, the potential cause for concern in January 2020 resulting from the warrant of arrest issued against Mr Abd-Al-Rahman is a factor that was known when Pre-Trial Chamber II made its original findings about the impugned evidence of the Prosecutor. As this is not a new fact constituting a change in circumstances, it was not incumbent upon the Trial Chamber to take this argument into account in the Impugned Decision. Therefore, the Defence’s arguments in this regard are rejected.

62. Second, the Defence challenges the Trial Chamber’s conclusions about the probative value of the Prosecutor’s evidence by referring to a video that depicts what the Defence claims are Sudanese officials in close proximity to a man issuing threats.⁸⁴ The Defence also submits that this video reveals that the alleged “threats” are only rhetoric in the sense that they constitute vague hyperbole.⁸⁵ According to the Prosecutor, this video was already disclosed to the Defence.⁸⁶ However, the Prosecutor does not indicate when it was disclosed. Nor does the Prosecutor address the Defence’s argument about the appearance of Sudanese officials in the video and the improbability that those persons would stand in the presence of Mr Abd-Al-Rahman without effecting his arrest.⁸⁷

63. Nevertheless, the Appeals Chamber notes that the Defence made similar arguments about the content of this video and its negative impact on the probative value of the Prosecutor’s evidence before the Trial Chamber.⁸⁸ The Trial Chamber concluded that, contrary to the Defence’s position, the video was “capable of lending support to

⁸³ [Impugned Decision](#), para. 24.

⁸⁴ [Appeal Brief](#), para. 17.

⁸⁵ [Appeal Brief](#), para. 18.

⁸⁶ [Transcript of hearing](#), 25 October 2021, ICC-02/05-01/20-T-ENG, p. 19, lines 21-25 – p. 20, lines 1-4.

⁸⁷ See [Appeal Brief](#), para. 17.

⁸⁸ See [Observations en relation à une vidéo divulguée par le Bureau du Procureur](#), 28 October 2021, ICC-02/05-01/20-500, paras 8-11.

the Prosecution’s submissions that the accused, if granted conditional release, presents a potential or actual risk to witnesses [...]”.⁸⁹ On appeal, the Defence merely disagrees with this conclusion without indicating how the Trial Chamber weighed its submissions improperly nor how the Chamber’s ultimate conclusion was unreasonable. The Appeals Chamber further considers that even if, *arguendo*, the press article relied upon by the Prosecutor is itself insufficient, this was not the only evidence indicating the potential for witness interference.⁹⁰ Therefore, the Appeals Chamber finds no error.

64. As the Appeals Chamber has found no error in the reasons given by the Trial Chamber, the Defence’s argument that the Trial Chamber provided insufficient reasons is rejected.⁹¹ Thus, the Appeals Chamber rejects the third ground of appeal.

D. Fourth ground of appeal

1. Relevant part of the Impugned Decision

65. In the Impugned Decision, the Trial Chamber held as follows regarding the right to family visits in the detention centre:

[30] The Chamber acknowledges Mr Abd-Al-Rahman’s right to family visits and that there is a positive obligation upon the Court to render such right effective. However, this right does not outweigh the other factors considered above. The Chamber further notes that the Defence has not made a request to the Registry for the organisation of video-calls between Mr Abd-Al-Rahman and his family. Accordingly, the Chamber rejects the Defence’s submission that the right of the accused to have contact with his family is inoperative or that this is a factor compelling the Chamber to order his immediate release. [footnotes omitted]

2. Submissions of the Defence

66. The Defence submits that the Trial Chamber committed an error of law by “continuing to detain Mr Abd-Al-Rahman in conditions that have become illegal for not respecting his right to family visits”.⁹² It submits that if detainees enjoy a positive right to family visits, the violation of this right necessarily affects the legality of the detention.⁹³ Second, regarding the Defence’s decision not to request a video conference

⁸⁹ [Impugned Decision](#), para. 17.

⁹⁰ [Prosecutor’s Response](#), para. 17.

⁹¹ See [Appeal Brief](#), paras 15, 18.

⁹² [Appeal Brief](#), para. 22.

⁹³ [Appeal Brief](#), para. 22.

under the Court’s new policy, the Defence argues that it had clearly set out the reasons why it had not made such a request. Nevertheless, the Defence argues that organising a video conference “cannot replace or satisfy the right of Mr Abd-Al-Rahman to receive a visit from his family, nor the right of his family – foremost his children – to visit him”.⁹⁴

3. *Response of the Prosecutor*

67. The Prosecutor submits that the appropriate recourse under the Court’s regulatory framework to ensure the right to family visits is under regulation 100(1) of the Regulations of the Court.⁹⁵ In this case, the Defence started this administrative procedure. However, the Defence did not pursue the option of requesting video-conferencing with his family and it had no basis not to do so.⁹⁶ Thus, the Prosecutor argues that the Defence “failed to exhaust the administrative process before bringing the matter up with the [Trial] Chamber”.⁹⁷

4. *Determination by the Appeals Chamber*

68. The Appeals Chamber recalls that the Court has a positive obligation to render the right to family visits effective.⁹⁸ However, as argued by the Prosecutor,⁹⁹ the Court’s regulatory framework governing “Detention matters” provides an avenue for a detained person to secure his or her visitation rights. This avenue is separate from the procedure for the review of detention under article 60(3) of the Statute. In particular, a detained person is entitled to receive visits and to arrange for such visits upon application to the Registrar.¹⁰⁰ A detained person may make a complaint against any matter concerning his or her detention at any time to the Chief Custody Officer or to the Registrar, as the

⁹⁴ [Appeal Brief](#), para. 23.

⁹⁵ [Prosecutor’s Response](#), para. 30.

⁹⁶ [Prosecutor’s Response](#), para. 33.

⁹⁷ [Prosecutor’s Response](#), para. 34.

⁹⁸ [Impugned Decision](#), para. 30, referring to Presidency, [Decision on the “Application to review the ‘Decision on Complaint to the Registrar by \[REDACTED\] concerning Supported Family Visit’ dated \[REDACTED\] 2016”](#), 11 August 2016, ICC-RoR221-02/16-3-Red, para. 42; see also Presidency, [Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221\(1\) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”](#), 10 March 2009, ICC-RoR217-02/08-8, para. 38.

⁹⁹ [Prosecutor’s Response](#), paras 30-31.

¹⁰⁰ Regulation 101(1) of the Regulations of the Court; regulation 179 of the Regulations of the Registry.

case may be.¹⁰¹ Judicial review of a decision of the Registrar on detention matters is taken up by the Presidency.¹⁰²

69. The Appeals Chamber notes that the Defence has already seised the Registry of the consultative process concerning Mr Abd-Al-Rahman’s visitation rights while in detention.¹⁰³ This consultation is ongoing.¹⁰⁴ Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in rejecting the Defence’s argument that Mr Abd-Al-Rahman’s right to family visits was “inoperative”.¹⁰⁵ Moreover, the Appeals Chamber recalls that both Pre-Trial Chamber II and the Presidency have warned the Defence in this case against bringing parallel proceedings that are duplicative in nature.¹⁰⁶ The Appeals Chamber finds it appropriate to reiterate, here, that such a practice is wasteful of this Court’s limited resources and it should not continue.

70. The Defence’s fourth ground of appeal is rejected.

V. APPROPRIATE RELIEF

71. In an appeal pursuant to article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.¹⁰⁷ In the present case, it is appropriate to confirm the Impugned Decision.

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



Judge Piotr Hofmański
Presiding

¹⁰¹ Regulations 217(1) and 218(1)-(5) of the Regulations of the Registry.

¹⁰² Regulation 220 of the Regulations of the Registry.

¹⁰³ See Transcript of Hearing, 25 October 2021, [ICC-02/05-01/20-T-015-ENG](#), pp. 18-19; Annex II to the *Réponse aux observations relatives au réexamen de la détention*, 22 October 2021, ICC-02/05-01/20-495-Conf-Anx2.

¹⁰⁴ See [Prosecutor’s Response](#), para. 32; Annex III to the *Réponse aux observations relatives au réexamen de la détention*, 22 October 2021, ICC-02/05-01/20-495-Conf-Anx3; Transcript of Hearing, 25 October 2021, [ICC-02/05-01/20-T-015-ENG](#), pp. 18-19.

¹⁰⁵ [Impugned Decision](#), para. 30.

¹⁰⁶ See Pre-Trial Chamber II, [Decision on the Defence “Exception d’incompétence” \(ICC-02/05-01/20-302\)](#), 17 May 2021, ICC-02/05-01/20-391, para. 30.

¹⁰⁷ Rule 158(1) of the Rules of Procedure and Evidence.




Judge Luz del Carmen Ibáñez Carranza



Judge Marc Perrin de Brichambaut



Judge Solomy Balungi Bossa



Judge Gocha Lordkipanidze

Dated this 17th day of December 2021

At The Hague, The Netherlands