

1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 - ICC-02/05-01/20
6 Presiding Judge Piotr Hofmański
7 Appeals Judgment - Courtroom 1
8 Thursday, 8 October 2020
9 (The hearing starts in open session at 9.32 a.m.)
10 THE COURT USHER: [9:32:23] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE HOFMAŃSKI: (Microphone not activated)
14 THE COURT OFFICER: [9:33:05] Good morning, Mr President.
15 Situation in Darfur, Sudan, case of The Prosecutor versus Ali Muhammad Ali
16 Abd-Al-Rahman, case reference ICC-02/05-01/20.
17 And we are in open session.
18 PRESIDING JUDGE HOFMAŃSKI: [9:33:29](Microphone not activated)
19 THE INTERPRETER: [9:33:32] Microphone, please. Microphone, please. There is
20 no microphone.
21 PRESIDING JUDGE HOFMAŃSKI: [9:33:46] Should I start from the beginning?
22 Yes, okay.
23 I am Judge Piotr Hofmański, Presiding Judge in this appeal arising from the case of
24 the Prosecutor versus Ali Muhammad Ali Abd-Al-Rahman.
25 My fellow judges in this appeal are Judge Chile Eboe-Osuji, Judge Howard Morrison,

1 Judge Luz del Carmen Ibáñez Carranza, and Judge Solomy Balungi Bossa.

2 May I ask the parties to introduce themselves for the record, please, starting with
3 the Defence.

4 MR LAUCCI: [9:34:31](Interpretation) Good morning, Mr President. On the side of
5 the Defence to assist Mr Abd-Al-Rahman this morning, Mr Cyril Laucci, lead counsel.
6 And the various quarantines due to the COVID pandemic have meant that my team
7 members can't be present this morning, but we do have Mr Xavier-Jean Keïta from
8 the OPCD and Ms Vedrana Residovic who are here by my side. Thank you very
9 much.

10 PRESIDING JUDGE HOFMAŃSKI: [9:35:04] Thank you.

11 MR KEÏTA: [9:35:06](Interpretation) Good morning, Mr President. Lead counsel,
12 Mr Xavier-Jean Keïta from the OPCD and with -- by my side, to accompany
13 Mr Cyril Laucci, is Vedrana Residovic who is case manager in the case. Thank you
14 very much.

15 PRESIDING JUDGE HOFMAŃSKI: [9:35:24] Thank you.

16 And the Office of the Prosecutor, please.

17 MS BRADY: [9:35:28] Good morning, your Honour. My name is Helen Brady, I am
18 the senior appeals counsel for the Prosecution. And I'm here today with
19 Mr Matteo Costi, appeals counsel, and Mr Julian Nicholls, the senior trial lawyer in
20 the case. Thank you very much.

21 PRESIDING JUDGE HOFMAŃSKI: [9:35:44] Thank you, Ms Brady. Thank you
22 very much.

23 For the record, I note that Mr Abd-Al-Rahman is also present in the courtroom.

24 Today, the Appeals Chamber will deliver its judgment in the appeal of

25 Mr Abd-Al-Rahman against the decision of the Pre-Trial Chamber II of

1 14 August 2020 entitled "Decision on the Defence Request for Interim Release".

2 This is a non-authoritative summary of the Appeals Chamber's written judgment in
3 the appeal. The latter will be notified after this hearing, together with the separate
4 concurring opinion by Judge Ibáñez Carranza.

5 Before I turn to the matter of today's hearing, I note that, on 5 October 2020, counsel
6 for Mr Abd-Al-Rahman filed a motion requesting that Mr Abd-Al-Rahman be
7 authorised, preferably before the delivery of the present judgment, observe one
8 minute of silence in memory of the victims of the armed conflict in Darfur, Sudan.

9 The purpose of today's hearing is the reading of the summary of the
10 Appeals Chamber's judgment on Mr Abd-Al-Rahman's appeal against the pretrial
11 decision on his request for interim release. In these circumstances,
12 Mr Abd-Al-Rahman's request on 5 October is dismissed *in limine*.

13 I shall now turn to the summary of the judgment and I will briefly outline
14 the procedural history of this appeal.

15 On 14 August 2020 the Pre-Trial Chamber rejected Mr Abd-Al-Rahman's request for
16 interim release to the territory of the host state pending trial, pursuant to Article 60(2)
17 of the Statute. In this decision, which I shall referred to as the "Impugned Decision",
18 that is the object of Mr Abd-Al-Rahman's appeal, the Impugned Decision is based on
19 the Pre-Trial Chamber's conclusion that Mr Abd-Al-Rahman's continued detention
20 appears necessary to ensure that the investigation of the Court proceeding are not
21 obstructed or endangered.

22 In this regard, the Pre-Trial Chamber considered:

23 First, the Prosecutor's submission that she is not yet in a position to protect witness in
24 Darfur.

25 Second, the report of threats allegedly made by Mr Abd-Al-Rahman and his

1 supporters to human rights activists.

2 And, third, the alleged high-ranking position previously held by Mr Abd-Al-Rahman
3 in Darfur, his connections, and the likelihood that he still has supporters who may
4 have access to actual and potential witnesses.

5 The Pre-Trial Chamber further found that any risk to the investigation,
6 the proceedings and the safety of witnesses would not be sufficiently mitigated by
7 imposing conditions upon interim release. Furthermore, the Pre-Trial Chamber held
8 that, for the purpose of its decision, it did not consider it necessary to seek
9 observation from the host state.

10 Mr Abd-Al-Rahman filed his appeal brief on 19 August 2020 and the Prosecutor filed
11 her response on 31 August 2020.

12 Mr Abd-Al-Rahman requests the Appeals Chamber to reverse the Impugned Decision,
13 order his interim release to the territory of the host state, subject to any relevant
14 conditions, and to order, and I quote, "the immediate commencement of the
15 consultations with the host state".

16 For that purpose, Mr Abd-Al-Rahman raises five grounds of appeal, which I will
17 address in turn:

18 First ground of appeal, Mr Abd-Al-Rahman submits *inter alia* that
19 the Pre-Trial Chamber erred in relying on the Prosecutor's inability to protect her
20 witnesses in Darfur. In this regard, Mr Abd-Al-Rahman argues that this inability
21 must not adversely affect his right to interim release. Further, he submits that
22 the Prosecutor currently has no means of conducting investigations in Darfur.

23 The Appeals Chamber finds, by majority, that this ground fails. First,
24 the Appeals Chamber notes that the Pre-Trial Chamber's reliance on the Prosecutor's
25 inability to protect witnesses in Darfur cannot be assessed in isolation. This is

1 because, for the purpose of its finding, the Pre-Trial Chamber considered the available
2 information holistically. And in addition to the Prosecution's ability to protect
3 witnesses, this information included a report on threats allegedly made by
4 Mr Abd-Al-Rahman and his supporters to human rights activists. It also relied on
5 the information provided in the two warrants of arrest concerning
6 Mr Abd-Al-Rahman's position and the likelihood that he still has supporters who
7 may have access to actual and potential witness.

8 Second, the Appeals Chamber finds that the Pre-Trial Chamber, in considering
9 the Prosecutor's alleged inability to protect witnesses in Darfur, acted in line with its
10 obligation under Article 68 of the Statute to ensure the protection of victims and
11 witnesses.

12 I shall now turn to the second ground of appeal. Mr Abd-Al-Rahman argues that
13 the Pre-Trial Chamber erred in relying on an NGO report appended to
14 the Prosecutor's response as annex 3 for its finding that there was an appearance that
15 Mr Abd-Al-Rahman and his supporters have threatened human rights activists.
16 The Appeals Chamber finds that, contrary to Mr Abd-Al-Rahman's argument,
17 the Pre-Trial Chamber did not commit any error of law concerning the standard
18 applied when relying on annex 3. It also notes that Mr Abd-Al-Rahman's
19 submission that annex 3 was the sole basis underlying the Pre-Trial Chamber's
20 conclusion, appears to be based on a misreading of the Impugned Decision. In this
21 regard, I recall that, for the purpose of its finding, the Pre-Trial Chamber relied on
22 various factors holistically. As a result, any limitations concerning the evidentiary
23 value that annex 3 might have if it were to be considered in isolation are irrelevant.
24 The Appeals Chamber also finds that the Impugned Decision is not impacted by any
25 factual errors allegedly committed in this respect.

1 I will now address the third ground of appeal.

2 Mr Abd-Al-Rahman avers that the Pre-Trial Chamber's conclusion to keep him in
3 detention due to existence of an unacceptable risk that he may exert pressure on
4 witnesses is erroneous in fact and law because it fails to take into account a series of
5 factors.

6 The Appeals Chamber is satisfied the Pre-Trial Chamber considered all relevant
7 factors and provided sufficient reason for its conclusion. Specifically,
8 the Appeals Chamber notes Mr Abd-Al-Rahman's arguments that
9 the Pre-Trial Chamber erred by failing to distinguish between witnesses residing in
10 Darfur and witnesses residing in other countries. In this regard,
11 the Appeals Chamber observes that the Pre-Trial Chamber found that the interim
12 release would expose any kind of witnesses to an unacceptable risk.

13 Consequently, the Appeals Chamber considers that Mr Abd-Al-Rahman failed to
14 articulate how the alleged or lack of distinction would amount to an error.

15 I will continue with the fourth ground of appeal.

16 Mr Abd-Al-Rahman avers that the Pre-Trial Chamber reverse the principle that
17 detention is an exception and not the rule. The Appeals Chamber finds that most of
18 the arguments under this ground have already been brought under the first three
19 grounds of appeal and warrant no further consideration.

20 Regarding the remaining arguments, Mr Abd-Al-Rahman elaborates on
21 the circumstances of his surrender to the Court and his willingness to comply with
22 stringent security conditions which, in his view, would militate in favour of his
23 release.

24 The Appeals Chamber notes that the Pre-Trial Chamber explicitly recalled
25 the principle that detention remains the exception and dully considered all the factors

1 relied upon by Mr Abd-Al-Rahman.

2 The Appeals Chamber finds no error in the Pre-Trial Chamber's conclusion that these
3 factors were insufficient to mitigate the risk to the integrity of the investigation and
4 the proceedings and the safety of witnesses.

5 I will continue with the fifth ground of appeal.

6 Mr Abd-Al-Rahman argues that the Pre-Trial Chamber committed an error in
7 law -- of law by failing to seek observations from the host state as required under
8 Regulation 51 of the Regulations of the Court.

9 The Appeals Chamber finds, by majority, that his argument is unsupported by
10 the applicable legal framework and the case law of this court. Rather,
11 the Appeals Chamber finds that the Chamber hearing an application for interim
12 release, and in the absence of any prospect for the application to succeed, has no
13 general obligation to seek observation from the host state and/or of the state on
14 the territory of which interim release is sought.

15 Finally, in an appeal pursuant to Article 82(1)(a) of the Statute, the Appeals Chamber
16 might confirm, reverse or amend the decision appealed. In the present case, given
17 that the Appeals Chamber has rejected all five grounds of appeal, it is appropriate to
18 confirm the Impugned Decision.

19 Judge Ibáñez Carranza's appending separate concurring opinion on the issues on the
20 recharacterisation of the alleged error presented by Mr Abd-Al-Rahman under
21 the first ground of appeal, and on the interpretation of Regulation 51 of the
22 Regulations of the Court under the fifth ground of appeal.

23 This brings us so the end of the summary of the Appeals Chamber judgment.

24 I would like to thank you, thank the court reporters, interpreters, and the Registry
25 staff for the valuable assistance today in holding the hearing.

- 1 The hearing is adjourned.
- 2 THE COURT USHER: [9:48:55] All rise.
- 3 (The hearing ends in open session at 9.48 a.m.)