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No. ICC-02/05-01/20 OA7

Date: 2 June 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

Judgment

**on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II'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

Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of Victims

Ms Amal Clooney
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 Pre-Trial Chamber II entitled ‘Decision on the review of detention’ of 12 April 2021 (ICC-02/05-01/20-338),

After deliberations,

Unanimously,

Delivers the following

JUDGMENT

The ‘Decision on the review of detention’ is confirmed.

I. INTRODUCTION

1. On 12 April 2021, Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) found no changed circumstances that would warrant the release of Mr Abd-Al-Rahman, with or without conditions. It thus decided to remand him in detention.

2. Mr Abd-Al-Rahman brings this appeal against the Pre-Trial Chamber’s decision, arguing that the Pre-Trial Chamber committed several errors of law and fact. In particular, he argues that the Pre-Trial Chamber (i) erred in law by establishing an irrefutable presumption and reversing the burden of proof (first ground of appeal); (ii) made an error of fact by changing the reasons it had previously given to postpone the hearing on the confirmation of charges (second ground of appeal); (iii) erred in law by failing to consider that the Prosecutor ceased to support the admissibility of the evidence on which she rested her showing of the criteria for detention under article 58(1)(a) of the Statute because she did not respond to the Defence’s request challenging the admissibility of such evidence (third ground of appeal); (iv) erred in law and fact by misunderstanding his arguments regarding the impact of the Pre-Trial Chamber’s absence of rulings on a number of motions on his rights (fourth ground of appeal); and (v) erred in law by entrusting the Registry with the function of seeking the release of

detained persons when addressing his request to release him on the ground that he might be contaminated with Covid-19 at the Court's Detention Centre (fifth ground of appeal).

3. The Appeals Chamber will review whether or not the Pre-Trial Chamber committed any of these errors, as argued by Mr Abd-Al-Rahman, in finding that the circumstances warranting detention continue to exist.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

4. On 27 April 2007, Pre-Trial Chamber I decided to issue a warrant of arrest against Mr Ali Muhammad Ali 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, the Pre-Trial 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 to 7 March 2004.³

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

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 in 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 [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, para. 37, para. 3.

7. On 1 July 2020, Mr Abd-Al-Rahman filed a request for interim release to the territory of the host State pending trial, pursuant to article 60(2) of the Statute⁵ (the ‘First Request’).
8. On 13 July 2020, the Prosecutor responded to the First Request.⁶
9. On 14 August 2020, the Pre-Trial Chamber, Judge Rosario Salvatore Aitala acting as Single Judge, issued the ‘Decision on the Defence Request for Interim Release’, rejecting the First Request⁷ (the ‘First Decision on Detention’).
10. On 8 October 2020, the Appeals Chamber issued its judgment confirming the First Decision on Detention⁸ (the ‘*Abd-Al-Rahman* OA2 Judgment’).
11. On 2 November 2020, following a request by the Prosecutor, the Pre-Trial Chamber postponed the hearing on the confirmation of charges and set the date for it to commence on 22 February 2021.⁹
12. On 11 December 2020, the Pre-Trial Chamber ordered Mr Abd-Al-Rahman’s continued detention, finding no changes of circumstances in the factors underlying the First Decision on Detention¹⁰ (the ‘Second Decision on Detention’).

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

⁶ [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 with [Annex 1](#) (ICC-02/05-01/20-95-Anx1), [Annex 2](#) (ICC-02/05-01/20-95-Anx2), [Annex 3](#) (ICC-02/05-01/20-95-Anx3).

⁷ [Decision on the Defence Request for Interim Release](#), 14 August 2020, ICC-02/05-01/20-115, p. 11.

⁸ [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’](#), ICC02/05-01/20-177. *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.

⁹ [Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines](#), 2 November 2020, ICC-02/05-01/20-196, p. 20.

¹⁰ [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 (original confidential filed on the same date), para. 7, p. 10. *See also* paras 27-28.

13. On 18 December 2020, following a second request by the Prosecutor, the Pre-Trial Chamber postponed the hearing on the confirmation of charges and set the date for it to commence on 24 May 2021.¹¹

14. On 5 February 2021, the Appeals Chamber issued its judgment confirming the Second Decision on Detention¹² (the ‘*Abd-Al-Rahman* OA6 Judgment’).

15. On 18 March 2021, following an extension of time limit, the Prosecutor filed her observations on the second review of Mr Abd-Al-Rahman’s detention.¹³ On 1 April 2021, Mr Abd-Al-Rahman submitted his observations on the matter of detention, including his reply to the Prosecutor’s observations.¹⁴

16. On 26 March 2021, Mr Abd-Al-Rahman submitted a request to declare the Prosecutor’s witness statements inadmissible (the ‘Admissibility Request’).¹⁵

17. On 9 April 2021, Mr Abd-Al-Rahman filed an urgent request to convene a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence (the ‘Rules’), to discuss the conditions for his immediate release in light of the Prosecutor’s failure to respond to the Admissibility Request (the ‘Hearing Request’).¹⁶

18. On 12 April 2021, the Pre-Trial Chamber issued its decision finding no change in circumstances that requires it to modify its First Decision on Detention, rejecting the Hearing Request and remanding Mr Abd-Al-Rahman in detention¹⁷ (the ‘Impugned Decision’).

¹¹ [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 (hereinafter: ‘Second Postponement Decision’), p. 15.

¹² [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.

¹³ [Prosecution’s observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman \(“ALI KUSHAYB”\)](#), 22 March 2021, ICC-02/05-01/20-309-Red (original confidential version filed on 18 March 2021), p. 6.

¹⁴ [Observations relatives au second réexamen de la détention](#), 1 April 2021, ICC-02/05-01/20-329-Red (confidential version filed on the same date) (hereinafter: ‘Defence Observations to the Second Review’), p. 20.

¹⁵ [1ère Requête aux fins d’exclusion de moyens de preuve](#), 26 March 2021, ICC-02/05-01/20-322, p. 18.

¹⁶ [Nouvelle Requête aux Fins de Convocation Urgente d’une Audience](#), 9 April 2021, ICC-02/05-01/20-336, para. 9.

¹⁷ [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, para. 37, p. 14.

B. Proceedings before the Appeals Chamber

19. On 16 April 2021, the Appeals Chamber issued an order on the conduct of the proceedings, in which it decided to proceed in this appeal by way of written submissions only, and set the time limits for the filing of the appeal brief to 23 April 2021 and for the responses by the Prosecutor and participating victims to 30 April 2021.¹⁸

20. In accordance with the Appeals Chamber's instructions, on 23 April 2021, Mr Abd-Al-Rahman filed his appeal brief against the Impugned Decision¹⁹ (the 'Appeal Brief').

21. On 30 April 2021, the Prosecutor responded to the Appeal Brief²⁰ (the 'Prosecutor's Response').

22. Following a request from the OPCV to file submissions in the present appeal under regulation 81(4)(b) of the Regulations of the Court (the 'Regulations')²¹ and Mr Abd-Al-Rahman's response,²² on 3 May 2021, the Appeals Chamber issued its decision granting such request under regulation 81(4) of the Regulations.²³ On 5 May 2021, the OPCV filed its observations (the 'OPCV's Observations').²⁴

III. STANDARD OF REVIEW

23. With regard to the applicable standard of review for appeals against decisions under article 60 of the Statute, 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

¹⁸ [Order on the conduct of the appeal proceedings](#), 16 April 2021, ICC-02/05-01/20-345, p. 3.

¹⁹ [Mémoire d'appel de la décision ICC-02/05-01/20-338](#), 23 April 2021, ICC-02/05-01/20-365-Red (original confidential version filed on the same day).

²⁰ [Prosecution Response to the Defence "Mémoire d'appel de la décision ICC-02/05-01/20-338" \(ICC-02/05-01/20-365-Conf\)](#), 12 May 2021, ICC-02/05-01/20-371-Red (original confidential version filed on 30 April 2021).

²¹ [Request to appear before the Appeals Chamber pursuant to Regulation 81\(4\)\(b\) of the Regulations of the Court](#), 21 April 2021, ICC-02/05-01/20-356, para. 18.

²² [Réponse à la Requête ICC-02/05-01/20-356 OA7](#), 23 April 2021, ICC-02/05-01/20-361.

²³ [Decision on the Office of Public Counsel for victims' request to appear and file observations in the present appeal](#), 3 May 2021, ICC-02/05-01/20-375.

²⁴ [Victims' Response to the Defence's Appeal against the "Decision on the review of detention" \(ICC-02/05-01/20-338\)](#), 5 May 2021, ICC-02/05-01/20-377.

findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision”.²⁵

24. With respect of 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.²⁶

25. 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.²⁷

²⁵ *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) (the ‘Gbagbo OA4 Judgment’), para. 18. See also *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. 62.

²⁶ [Gbagbo OA10 Judgment](#), para. 15 and references cited therein.

²⁷ [Gbagbo 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 *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on 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; *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.

26. The Appeals Chamber further considers it appropriate to emphasise that, ‘for a ground of appeal to be considered by the Appeals Chamber, the appellant must properly substantiate the alleged error and demonstrate how it materially affected the impugned decision’ and that ‘[f]ailure to comply with these requirements may therefore entail the dismissal *in limine* of any ground of appeal or underlying argument that does not comply with these requirements’.²⁸

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

IV. MERITS

A. Relevant part of the Impugned Decision

28. Having recalled the relevant applicable law²⁹ and the main findings of previous decisions related to Mr Abd-Al-Rahman’s detention,³⁰ the Pre-Trial Chamber turned to assess whether there were any changed circumstances that would warrant the release of Mr Abd-Al-Rahman, with or without conditions.³¹

29. The Pre-Trial Chamber first examined Mr Abd-Al-Rahman’s arguments that there are no longer reasonable grounds to believe that Mr Abd-Al-Rahman committed crimes within the jurisdiction of the Court, under article 58(1)(a) of the Statute.³² With respect to Mr Abd-Al-Rahman’s claims that ‘there are no longer reasonable grounds to believe that he committed crimes within the jurisdiction of the Court, on the basis that the image which the Prosecutor has projected of Mr Abd-Al-Rahman as a powerful and influential figure does not correspond to reality’, the Pre-Trial Chamber stated that ‘[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’.³³ With regard to Mr Abd-Al-Rahman’s request that the Pre-Trial Chamber find that there are no longer reasonable grounds to believe that Mr Abd-Al-Rahman has committed crimes within the jurisdiction of the Court on the basis of the

²⁸ [Abd-Al-Rahman OA2 Judgment](#), para. 16.

²⁹ [Impugned Decision](#), paras 17-22.

³⁰ [Impugned Decision](#), paras 23-25.

³¹ [Impugned Decision](#), para. 26.

³² [Impugned Decision](#), paras 26, 27-29.

³³ [Impugned Decision](#), para. 28.

fact that he has requested the Chamber to declare all witness statements disclosed by the Prosecutor so far inadmissible, the Pre-Trial Chamber stated that if it ‘were to grant the Admissibility Request, this would severely undermine the evidentiary basis of the Prosecutor’s allegations’ and added that ‘[h]owever, as noted above, the mere fact that the Defence made this request does not oblige the Chamber to act as if it were already granted’ and that ‘the Chamber will rule on the Defence’s request in due course and draw all necessary consequences from its ruling at that time’.³⁴

30. The Pre-Trial Chamber then determined whether, with regard to article 58(1)(b)(ii), there is still a need to detain Mr Abd-Al-Rahman in order to ensure that he does not obstruct or endanger the investigation or court proceedings.³⁵ The Pre-Trial Chamber took note of the Prosecutor’s submissions and agreed that there were no substantially changed circumstances that would warrant the release of Mr Abd-Al-Rahman.³⁶ The Pre-Trial Chamber stated that it was ‘not persuaded by the Defence’s argument that the slow progress in the implementation of protective mechanisms inside Sudan and elsewhere constitutes a changed circumstance within the meaning of article 60(3) of the Statute’.³⁷ It considered that, ‘[o]n the contrary, the fact that the Prosecutor and VWU still have not been able to put in place adequate measures to protect all witness residing in different locations throughout Sudan is, unfortunately, very much a continuation of the prevailing situation during the previous detention review’.³⁸ The Pre-Trial Chamber rejected Mr Abd-Al-Rahman’s portrayal of the slow progress in this regard as an abuse of trust on the part of the Prosecutor. It stated that ‘[t]here is no indication whatsoever that the Prosecutor and the VWU have not been sufficiently diligent in the implementation of protective mechanisms or that they deliberately misled the Chamber about the expected speed thereof’.³⁹

31. The Pre-Trial Chamber also did not accept Mr Abd-Al-Rahman’s argument that his own motions constitute changed circumstances warranting his release.⁴⁰ It stated

³⁴ [Impugned Decision](#), para. 29.

³⁵ [Impugned Decision](#), paras 26, 30-32.

³⁶ [Impugned Decision](#), paras 30-31.

³⁷ [Impugned Decision](#), para. 31, *referring to* [Defence Observations to the Second Review](#), para. 15.

³⁸ [Impugned Decision](#), para. 31.

³⁹ [Impugned Decision](#), para. 31.

⁴⁰ [Impugned Decision](#), para. 32, *referring to* [Defence Observations to the Second Review](#), para. 30, footnotes 71, 72.

that ‘[i]rrespective 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’.⁴¹ The Pre-Trial Chamber added that, contrary to what Mr Abd-Al-Rahman suggests, ‘[it] will not anticipate its rulings on these motions for the purpose of this decision’.⁴² The Pre-Trial Chamber finally stated that ‘[it did] not subscribe to the Defence’s claim that the Prosecutor’s failure to submit a response to the Defence’s Admissibility Request implies that the Prosecutor does not object to it, much less that the Chamber would *ipso facto* have to accede to the Defence’s request’.⁴³

32. The Pre-Trial Chamber then turned to evaluate Mr Abd-Al-Rahman’s claim that he has been detained for an unreasonable period due to an inexcusable delay caused by the Prosecutor and/or the Chamber, pursuant to article 60(4) of the Statute.⁴⁴ In relation to the alleged delay caused by the Prosecutor, the Pre-Trial Chamber stated that ‘[t]he Defence is right that the need to put in place [...] protective mechanisms [for witnesses] was a major element in the Chamber’s decision to grant the second postponement’; however, the Chamber did not do so ‘in the expectation that all witness protection issues would be resolved in this period’.⁴⁵ It added that ‘[t]he Chamber simply considered it appropriate to give the Prosecutor a final opportunity to attempt to put in place sufficient protective measures to allow the confirmation hearing to take place without unduly endangering witnesses and their relatives’, and that ‘[t]here was no expectation of a specific result in this regard’.⁴⁶ The Pre-Trial Chamber stated that ‘there is no indication that the Prosecutor and the VWU did not use the additional time diligently’ and that ‘[i]t is therefore incorrect to portray the second postponement as unreasonably long’.⁴⁷

33. Concerning Mr Abd-Al-Rahman’s claim that he had been detained for an unreasonably long period due to the fact that the Chamber had not ruled on a number of motions that had been pending for a while, and that these matters were allegedly ‘central to its preparation as well as to Mr Abd-Al-Rahman’s continued detention’, the

⁴¹ [Impugned Decision](#), para. 32.

⁴² [Impugned Decision](#), para. 32.

⁴³ [Impugned Decision](#), para. 32.

⁴⁴ [Impugned Decision](#), para. 33, *referring to* [Defence Observations to the Second Review](#), paras 26-31.

⁴⁵ [Impugned Decision](#), para. 34.

⁴⁶ [Impugned Decision](#), para. 34.

⁴⁷ [Impugned Decision](#), para. 34.

Pre-Trial Chamber noted that ‘it is not for the Defence to dictate in which order the Chamber considers particular requests, much less when it should issue its corresponding rulings’.⁴⁸ The Pre-Trial Chamber considered that Mr Abd-Al-Rahman’s claim that the fact that some of his motions may have been pending for a while had caused him to be detained for an unreasonable period of time ‘is entirely gratuitous and lacks any substantiation’.⁴⁹

34. Finally, the Pre-Trial Chamber assessed Mr Abd-Al-Rahman’s claim that he must be released to prevent him from being contaminated with Covid-19 at the Court’s Detention Centre.⁵⁰ In this regard, the Pre-Trial Chamber noted 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’.⁵¹ It further stated that it had been regularly updated by the Registry but had ‘not been given any indication that Mr Abd-Al Rahman’s current situation [was] particularly concerning’.⁵²

35. Based on the above considerations, the Pre-Trial Chamber found that ‘there are still reasonable grounds to believe that Mr Abd-Al-Rahman has committed crimes within the Court’s jurisdiction [and] that there are no changed circumstances requiring the Chamber to modify its prior ruling’.⁵³ It further added that ‘[i]ndeed, there still exists a significant likelihood that if Mr Abd-Al-Rahman were to be released he might pose a threat – directly or indirectly – to victims and witnesses in this case’ and that ‘this risk cannot be sufficiently minimised with the imposition of conditions’.⁵⁴

B. Mr Abd-Al-Rahman’s submissions

36. Mr Abd-Al-Rahman raises five grounds of appeal.⁵⁵

⁴⁸ [Impugned Decision](#), para. 35.

⁴⁹ [Impugned Decision](#), para. 35.

⁵⁰ [Impugned Decision](#), paras 26, 36.

⁵¹ [Impugned Decision](#), para. 36.

⁵² [Impugned Decision](#), para. 36.

⁵³ [Impugned Decision](#), para. 37.

⁵⁴ [Impugned Decision](#), para. 37.

⁵⁵ [Appeal Brief](#), paras 13-26.

37. Under his first ground of appeal, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber erred in law by considering that '[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' and that '[n]either would it imply that he could not still have supporters and sympathisers today'.⁵⁶ Mr Abd-Al-Rahman submits that, contrary to the rebuttable presumption that the Appeals Chamber had allegedly established, such a sentence implies an irrefutable presumption of the existence of sympathisers,⁵⁷ and that this presumption requires the proof of a negative fact, thereby reversing the burden of proof.⁵⁸ He also submits that the Pre-Trial Chamber erred in law by refusing to release him on the basis of the presumption that he has sympathisers, without ascertaining the impact of his continued detention on his presumed ability to mobilise them.⁵⁹

38. Under his second ground of appeal, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber made an error of fact by departing from the reasoning contained in the decision granting the second postponement of the confirmation hearing, and replacing it with new reasons,⁶⁰ stating that it was appropriate 'to give the Prosecutor a final opportunity to attempt to put in place sufficient protective measures to allow the confirmation hearing to take place without unduly endangering witnesses'.⁶¹ Mr Abd-Al-Rahman submits that the second postponement of the confirmation hearing was based on 'promises' made by the Prosecutor of an imminent agreement with the Sudanese authorities resolving witness protection.⁶² In particular, Mr Abd-Al-Rahman seems to be challenging the Pre-Trial Chamber's finding that the second postponement of the confirmation hearing was not due to an inexcusable delay attributable to the Prosecutor under article 60(4) of the Statute.⁶³

39. Under his third ground of appeal, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber erred in law by failing to take into account that the Prosecutor did not respond

⁵⁶ [Impugned Decision](#), para. 28.

⁵⁷ [Appeal Brief](#), para. 14.

⁵⁸ [Appeal Brief](#), para. 15.

⁵⁹ [Appeal Brief](#), para. 15.

⁶⁰ [Appeal Brief](#), para. 17.

⁶¹ [Appeal Brief](#), para. 17, referring to [Impugned Decision](#), para. 34.

⁶² [Appeal Brief](#), paras 16-17.

⁶³ [Appeal Brief](#), para. 17.

to Mr Abd-Al-Rahman's request to exclude the Prosecutor's testimonial evidence, and that this lack of response implied that she no longer defended the admissibility of such evidence and thus affected the continuation of his detention.⁶⁴ Mr Abd-Al-Rahman submits that the Pre-Trial Chamber misinterpreted his submissions when it noted, in the Impugned Decision, that it 'does not subscribe to the Defence's claim that the Prosecutor's failure to submit a response to the Defence's Admissibility Request implies that the Prosecutor does not object to it, much less that the Chamber would *ipso facto* have to accede to the Defence's request'.⁶⁵ Mr Abd-Al-Rahman considers that this statement amounts to an error of law because it ignores that the burden of proof to meet the criterion of article 58(1)(a) of the Statute, for the purposes of continued detention, rests solely with the Prosecutor, and that her lack of response to the abovementioned request shows that she no longer defends the admissibility of the evidence supporting such a criterion.⁶⁶

40. Under his fourth ground of appeal, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber erred in fact by misinterpreting his submissions as an attempt to impose on the Pre-Trial Chamber a time and/or order in which it considers the matters before it.⁶⁷ Mr Abd-Al-Rahman argues that he limited himself to pointing out the impact of the absence of rulings on his pending motions on the time available for his preparation of the confirmation hearing and on the compliance with article 67(1)(b) of the Statute.⁶⁸ Mr Abd-Al-Rahman further avers that he was left in detention for the duration of the second postponement of the confirmation hearing, for reasons attributable only to speculations of the Prosecutor as to the impact of her Memorandum of Understanding with Sudan.⁶⁹ Mr Abd-Al-Rahman submits that this error of fact resulted in an error of law, as the Pre-Trial Chamber did not consider the impact of the absence of decisions on a number of pending motions when deliberating on the Impugned Decision.⁷⁰ He also submits that the Pre-Trial Chamber committed a second error of law, by failing to take into account the impact of the outstanding decisions on his right to appear within

⁶⁴ [Appeal Brief](#), para. 18.

⁶⁵ [Appeal Brief](#), paras 19-20, referring to [Impugned Decision](#), para. 32.

⁶⁶ [Appeal Brief](#), para. 20.

⁶⁷ [Appeal Brief](#), para. 23.

⁶⁸ [Appeal Brief](#), para. 23.

⁶⁹ [Appeal Brief](#), para. 23.

⁷⁰ [Appeal Brief](#), para. 23.

a reasonable time at the confirmation hearing, pursuant to article 61(1) of the Statute, and on his right not to be held in detention for an unreasonable period of time due to inexcusable delay by the Prosecutor, pursuant to article 60(4) of the Statute.⁷¹

41. Finally, under his fifth ground of appeal, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber erred in law by assigning to the Registry the task of seeking the release of detained persons.⁷² He argues that the task of requesting the release of Mr Abd-Al-Rahman falls exclusively within the prerogative of the Prosecutor or the Defence under Rule 118 of the Rules. He submits that the Registry is in charge of the administration of the detention centre under regulation 90 of the Regulations, and that this function does not imply that it can seek the release of detained persons.⁷³ He further submits that the Pre-Trial Chamber erred in law by dismissing *in limine* his detailed submissions on this matter, without considering them.⁷⁴

C. The Prosecutor's Response

42. The Prosecutor submits that the Impugned Decision is reasonable and correct. In particular, she argues that Mr Abd-Al-Rahman's five grounds of appeal merely repeat arguments made before the Pre-Trial Chamber and misrepresent the Impugned Decision as well as the Appeals Chamber's judgments on his two prior detention appeals.⁷⁵ She further submits that Mr Abd-Al-Rahman's failure to properly substantiate the legal and factual errors he alleges, and to address or demonstrate how they impact the Impugned Decision warrants the dismissal of his arguments *in limine*.⁷⁶

43. As a preliminary issue, the Prosecutor submits that the five grounds of appeal stem from Mr Abd-Al-Rahman's 'patently inaccurate' interpretation of the Appeals Chamber's prior jurisprudence in this case.⁷⁷

44. As for the first ground of appeal, the Prosecutor first submits that Mr Abd-Al-Rahman erred in framing the issue as a legal error, and that in fact he merely disagrees

⁷¹ [Appeal Brief](#), para. 24.

⁷² [Appeal Brief](#), paras 25-26.

⁷³ [Appeal Brief](#), para. 26.

⁷⁴ [Appeal Brief](#), para. 26.

⁷⁵ [Prosecutor's Response](#), paras 6-10.

⁷⁶ [Prosecutor's Response](#), para. 5. *See also* paras 12, 16.

⁷⁷ [Prosecutor's Response](#), paras 6-10.

with the Pre-Trial Chamber's factual assessment that his current financial status has no relevance to his alleged commission of crimes or ability to still garner supporters and sympathisers.⁷⁸ The Prosecutor further argues that, even considered as a factual error, Mr Abd-Al-Rahman does not demonstrate that the Pre-Trial Chamber's consideration and subsequent rejection of his submissions was unreasonable.⁷⁹ The Prosecutor finally argues that the further alleged legal error – consisting of the Pre-Trial Chamber's alleged failure to consider the impact of his detention in The Netherlands on his ability to mobilise his suspected networks – was not raised before the Pre-Trial Chamber, and that, in any event, the Pre-Trial Chamber reasonably assessed the criteria under article 58(1)(a) and 58(1)(b)(ii) of the Statute.⁸⁰

45. With respect to the second ground of appeal, the Prosecutor argues that Mr Abd-Al-Rahman failed to establish the existence of a discrepancy between the Pre-Trial Chamber's decision on the postponement of the confirmation of charges hearing and the Impugned Decision,⁸¹ and that, in any event, he failed to demonstrate how this purported discrepancy would amount to a factual (or legal) error.⁸² According to the Prosecutor, such failure warrants the summary dismissal of this ground of appeal.⁸³ The Prosecutor further argues that Mr Abd-Al-Rahman wrongly interprets the Pre-Trial Chamber's reasoning on the postponement of the confirmation hearing and the consequences of a purported 'inexcusable delay'.⁸⁴ She submits that Mr Abd-Al-Rahman made no submissions before the Pre-Trial Chamber that his detention was of an unreasonable length.⁸⁵ The Prosecutor also submits that even if the Pre-Trial Chamber had found that the Prosecutor had reneged on her 'promises' to implement witness protection measures, there is no indication that this would have resulted in the Pre-Trial Chamber finding the length of detention to be unreasonable, or that this was caused by the Prosecutor's inexcusable delay.⁸⁶

⁷⁸ [Prosecutor's Response](#), para. 12.

⁷⁹ [Prosecutor's Response](#), para. 13.

⁸⁰ [Prosecutor's Response](#), para. 14.

⁸¹ [Prosecutor's Response](#), paras 16-20.

⁸² [Prosecutor's Response](#), paras 16, 20.

⁸³ [Prosecutor's Response](#), para. 16.

⁸⁴ [Prosecutor's Response](#), para. 20.

⁸⁵ [Prosecutor's Response](#), para. 20.

⁸⁶ [Prosecutor's Response](#), para. 21.

46. As for the third ground of appeal, the Prosecutor argues that the Pre-Trial Chamber reasonably found that the Prosecutor's lack of response to the Admissibility Request was irrelevant to the Pre-Trial Chamber's assessment under article 58(1)(a) of the Statute.⁸⁷ The Prosecutor submits that Mr Abd-Al-Rahman merely repeats on appeal the same arguments which the Pre-Trial Chamber considered and rejected, and fails to identify any error in the Pre-Trial Chamber's reasoning.⁸⁸

47. With regard to the fourth ground of appeal, the Prosecutor submits that the Pre-Trial Chamber reasonably found that there was no impact of Mr Abd-Al-Rahman's pending motions on his detention.⁸⁹ In particular, she first argues that contrary to that alleged by Mr Abd-Al-Rahman,⁹⁰ the Pre-Trial Chamber had correctly interpreted Mr Abd-Al-Rahman's observations on detention.⁹¹ Second, the Prosecutor submits that Mr Abd-Al-Rahman does not explain how the abovementioned alleged error of fact would give rise to an error of law and that it is unclear how any such error would impact the Pre-Trial Chamber's decision to keep Mr Abd-Al-Rahman in detention.⁹² Third, with regard to Mr Abd-Al-Rahman's allegation that the Pre-Trial Chamber erred in law by failing to take into account the impact of the outstanding decisions on his right to appear within a reasonable time for the confirmation hearing and his right not to be detained for an unreasonable time due to unjustified delay attributable to the Prosecution, the Prosecutor argues that this appears to be a 'permutation of the arguments already made' in his appeal.⁹³ The Prosecutor argues that Mr Abd-Al-Rahman merely disagrees with the Impugned Decision and fails to show any error.⁹⁴

48. With regard to the fifth ground of appeal, the Prosecutor submits that the Pre-Trial Chamber reasonably found that there were no grounds to warrant Mr Abd-Al-Rahman's release on medical grounds,⁹⁵ and that the Pre-Trial Chamber's observation

⁸⁷ [Prosecutor's Response](#), paras 22-25.

⁸⁸ [Prosecutor's Response](#), paras 22, 25.

⁸⁹ [Prosecutor's Response](#), paras 26-30.

⁹⁰ [Prosecutor's Response](#), para. 27.

⁹¹ [Prosecutor's Response](#), para. 27, referring to [Defence Observations to the Second Review](#), para. 28, (Mr Abd-Al-Rahman stated that 'le délai excessif pris pour la délibération sur des requêtes pendantes est également susceptible de fonder le caractère déraisonnable de ce délai, indépendamment du BdP').

⁹² [Prosecutor's Response](#), para. 28.

⁹³ [Prosecutor's Response](#), para. 29.

⁹⁴ [Prosecutor's Response](#), para. 30.

⁹⁵ [Prosecutor's Response](#), paras 31-35.

accurately reflects the duties and obligations of the Registry in relation to the physical and mental health of detainees, as set out in the Regulations of the Registry.⁹⁶ The Prosecutor argues that, contrary to Mr Abd-Al-Rahman's allegation, the Pre-Trial Chamber did not ignore Mr Abd-Al-Rahman's submissions on Covid-19 or dismiss them *in limine*; it rather took note of them and found in the circumstances that there was no reason to release Mr Abd-Al-Rahman on medical grounds.⁹⁷ With regard to his reference to the Council of Europe's statement of principles relating to the treatment of detainees in the context of the Covid-19 pandemic, the Prosecutor recalled that, as the Appeals Chamber has held, this statement of principles is non-binding and does not require the release of detainees, but in fact suggests measures that can be taken to protect the health and safety of detained persons while in detention.⁹⁸

D. OPCV's Observations

49. With respect to the first ground of appeal, the OPCV considers that Mr Abd-Al-Rahman's arguments are based on a misrepresentation of the Impugned Decision and of the applicable law.⁹⁹ As such, it recalls that the Pre-Trial Chamber did not create any indisputable presumption as to the existence of a network, as argued by Mr Abd-Al-Rahman, but rather concluded that Mr Abd-Al-Rahman's supposed indigence would not prove or disprove the Prosecutor's elements on existence of such a network.¹⁰⁰ The OPCV also notes that there was no change in the circumstances underpinning the previous ruling on detention, and that the purported indigence of Mr Abd-Al-Rahman does not constitute any such change.¹⁰¹

50. As for the second ground of appeal, the OPCV submits that the Pre-Trial Chamber rightly took into account the information before it on the security situation of certain witnesses and that, in considering this information for the purpose of its determination, it acted in line with its obligation under article 68 of the Statute.¹⁰² It further recalls the Appeals Chamber's findings in the present case, according to which 'when determining

⁹⁶ [Prosecutor's Response](#), para. 31.

⁹⁷ [Prosecutor's Response](#), para. 32. *See also* para. 33.

⁹⁸ [Prosecutor's Response](#), para. 34.

⁹⁹ [OPCV's Observations](#), paras 15-18.

¹⁰⁰ [OPCV's Observations](#), para. 16.

¹⁰¹ [OPCV's Observations](#), para. 18.

¹⁰² [OPCV's Observations](#), paras 19-23.

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'.¹⁰³ Referring to relevant Appeals Chamber case-law, the OPCV submits that the lapse of time spent in detention does not fulfil any of the requirements of changed circumstances,¹⁰⁴ and does not qualify as a 'changed circumstance' in the assessment of a request for interim release.¹⁰⁵

51. With respect to Mr Abd-Al-Rahman's arguments under his third and fourth grounds of appeal, that the Pre-Trial Chamber's and the Prosecutor's failure to respectively rule on, and entertain, certain Defence motions allegedly warrant his release, the OPCV submits that these arguments are 'based on mere speculations',¹⁰⁶ and that the Pre-Trial Chamber properly dismissed them as they did not amount to a change of circumstances warranting Mr Abd-Al-Rahman's release.¹⁰⁷

52. With regard to the fifth ground of appeal, the OPCV submits that the Pre-Trial Chamber correctly considered the role of the Registry on a potential conditional release on medical grounds and that Mr Abd-Al-Rahman's arguments are based on a misreading of the Impugned Decision.¹⁰⁸

E. Determination by the Appeals Chamber

53. Having considered the Impugned Decision in light of the parties and participants' submissions and the standard of review set out above, the Appeals Chamber finds, for the reasons set out below, that Mr Abd-Al-Rahman's submissions advanced in his five grounds of appeal do not show any error by the Pre-Trial Chamber.

1. Preliminary issue

54. The Appeals Chamber notes that in the appeal brief, the Defence makes submissions as to the previous rulings of the Appeals Chamber in this case, in particular, *Abd-Al-Rahman* OA2 and *Abd-Al-Rahman* OA6, providing its interpretation

¹⁰³ [OPCV's Observations](#), para. 20, referring to [Abd-Al-Rahman OA2 Judgment](#), para. 27

¹⁰⁴ [OPCV's Observations](#), para. 21, referring, *inter alia*, to [Gbagbo OA10 Judgment](#), para. 39.

¹⁰⁵ [OPCV's Observations](#), para. 23.

¹⁰⁶ [OPCV's Observations](#), paras 24-25.

¹⁰⁷ [OPCV's Observations](#), para. 26.

¹⁰⁸ [OPCV's Observations](#), paras 27-29.

and opinions.¹⁰⁹ The Appeals Chamber further notes the Prosecutor's submissions in response to this section.¹¹⁰ The Appeals Chamber will entertain the Defence's submissions only to the extent that they are relevant to the grounds of appeal, and disregard the remainder. The Appeals Chamber further notes that a number of arguments made by Mr Abd-Al-Rahman's counsel appear to be premised on a misinterpretation of the Appeals Chamber's jurisprudence and of the Pre-Trial Chamber's Impugned Decision.

2. *Analysis of the grounds of appeal*

(a) **First Ground**

55. Under this ground of appeal, Mr Abd-Al-Rahman argues that, contrary to the rebuttable presumption that the Appeals Chamber had allegedly established in *Abd-Al-Rahman* OA2, the Pre-Trial Chamber erred in law by establishing an irrefutable presumption that he has supporters with potential access to witnesses.¹¹¹ He argues that the Pre-Trial Chamber required him to prove a negative fact, namely that he does not have sympathisers who wish to influence witnesses, thereby reversing the burden of proof regarding the criteria of article 58(1) of the Statute.¹¹²

56. At the outset, the Appeals Chamber notes that Mr Abd-Al-Rahman's submissions under this ground of appeal start from an incorrect premise. He wrongly submits that, in paragraph 26 of the *Abd-Al-Rahman* OA2 Judgment, the Appeals Chamber supposedly considered the information in the arrest warrants and the likelihood that he still has supporters who may have access to actual or potential witnesses to be sufficient to outweigh what he considers to be the absence of probative value of a document produced by the Prosecutor in her response to his First Request.¹¹³ He wrongly avers that the Appeals Chamber changed the Court's jurisprudence that pre-trial detention is exceptional,¹¹⁴ by introducing a presumption, rebuttable with proof to the contrary, that

¹⁰⁹ [Appeal Brief](#), paras 9-12.

¹¹⁰ [Prosecutor's Response](#), paras 6-10.

¹¹¹ [Appeal Brief](#), para. 15. *See also* paras 9, 13, 14.

¹¹² [Appeal Brief](#), para. 15.

¹¹³ [Appeal Brief](#), para. 9, referring to [Abd-Al-Rahman OA2 Judgment](#), para. 26.

¹¹⁴ [Appeal Brief](#), para. 9, referring to Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the powers of the Pre-Trial Chamber to review proprio motu the pretrial detention of Germain Katanga*, 18 March 2008, ICC-01/04-01/07-330, pp. 6-7; Pre-Trial

the person charged ‘still has supporters who may have access to actual or potential witnesses’.¹¹⁵ Contrary to these submissions, the Appeals Chamber, in the relevant part of its judgment, simply noted that the Pre-Trial Chamber reached its finding that continued detention appeared necessary not only on the basis of the Prosecutor’s inability to protect witnesses in Darfur but also on the basis of further considerations.¹¹⁶ The Appeals Chamber noted that the Pre-Trial Chamber additionally referred to the document produced by the Prosecutor in her response to the First Request, and that it ‘also noted, [...] on the basis of the information included in the two warrants of arrest, [Mr Abd-Al-Rahman’s] position and the likelihood that he still has supporters who may have access to actual or potential witnesses’.¹¹⁷ The Appeals Chamber concluded that ‘the Pre-Trial Chamber considered the available information holistically for the purposes of its finding’.¹¹⁸ Thus, Mr Abd-Al-Rahman’s submission that the Appeals Chamber created a presumption or changed its jurisprudence is simply far-fetched.

57. The Appeals Chamber notes that the remainder of Mr Abd-Al-Rahman’s arguments under this ground of appeal are premised on his misunderstanding that the *Abd-Al-Rahman* OA2 Judgment established a presumption. As such, these arguments should be dismissed. However, considering the nature of the decision, dealing with detention of the suspect, the Appeals Chamber will assess such arguments.

58. As for Mr Abd-Al-Rahman’s submission that the Pre-Trial Chamber established an irrefutable presumption and that, by doing so, it reversed the burden of proof and required him to prove a negative fact,¹¹⁹ the Appeals Chamber is not persuaded by this argument. First, the Appeals Chamber notes that Mr Abd-Al-Rahman fails to explain how the Pre-Trial Chamber, by considering and rejecting his submissions, reversed the burden of proof and created an irrefutable presumption. Also, the Appeals Chamber considers that while Mr Abd-Al-Rahman frames this ground as an error of law, his arguments mainly challenge the Pre-Trial Chamber’s assessment of the facts.

Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on application for interim release](#), 14 April 2009, ICC-01/05-01/08-403, para. 36.

¹¹⁵ [Appeal Brief](#), para. 9, referring to [Abd-Al-Rahman OA2 Judgment](#), para. 26.

¹¹⁶ [Abd-Al-Rahman OA2 Judgment](#), para. 26.

¹¹⁷ [Abd-Al-Rahman OA2 Judgment](#), para. 26.

¹¹⁸ [Abd-Al-Rahman OA2 Judgment](#), para. 26.

¹¹⁹ [Appeal Brief](#), para. 15.

59. The Appeals Chamber considers that Mr Abd-Al-Rahman's argument appears to be based on a misunderstanding of the Pre-Trial Chamber's statement that '[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' or that 'he could not still have supporters and sympathisers today'.¹²⁰ The Pre-Trial Chamber did not create an irrefutable presumption in relation to the existence of a network of supporters. Rather, it considered the arguments related to the alleged indigence of the suspect and the impact, if any, on the existence of a network of supporters, as established by the Prosecutor. The Pre-Trial Chamber concluded that it was irrelevant to establish that Mr Abd-Al-Rahman has no assets today, because even if confirmed, it would not eliminate the possibility that he *never* had a leadership role *before* or that he could not *still* have supporters and sympathisers *today*.¹²¹ Contrary to Mr Abd-Al-Rahman's argument, rather than reversing the burden of proof – which in proceedings under article 60(3) of the Statute, requires the Prosecutor to demonstrate that there has been no change in the circumstances justifying detention – the Pre-Trial Chamber found that, on the basis of the Prosecutor's submissions, there was no change in the circumstances underpinning the previous ruling on detention. It did so after considering Mr Abd-Al-Rahman's submissions about his alleged indigence and the impact of such allegation on its previous finding that he benefits from a network of supporters and sympathisers who may be able to influence witnesses. In the Pre-Trial Chamber's view, Mr Abd-Al-Rahman's allegation did not constitute a change in the circumstances.

60. In light of the above, the Appeals Chamber considers that Mr Abd-Al-Rahman seems to disagree with the Pre-Trial Chamber's factual assessment that evidence of his current monetary condition is irrelevant, and that he failed to show that the Pre-Trial Chamber erred in law or was unreasonable in its assessment of the facts before it.

61. Finally, the Appeals Chamber is not persuaded by Mr Abd-Al-Rahman's argument that the Pre-Trial Chamber erred in law by failing to verify the impact of his continued detention on his presumed ability to mobilise any sympathisers.¹²² Mr Abd-

¹²⁰ [Appeal Brief](#), para. 14, referring to [Impugned Decision](#), para. 28.

¹²¹ [Impugned Decision](#), para. 28.

¹²² [Appeal Brief](#), para. 15.

Al-Rahman avers that his alleged sympathisers are in Sudan, while he has requested to be released in The Netherlands, and he seems to argue that the Pre-Trial Chamber should have explained (and the Prosecutor should have addressed) how the fact that Mr Abd-Al-Rahman was in detention limited his ability to communicate, particularly by telephone, with his alleged network.¹²³ The Appeals Chamber first notes the Prosecutor's submission that Mr Abd-Al-Rahman did not raise this argument before the Pre-Trial Chamber.¹²⁴ In any event, Mr Abd-Al-Rahman has failed to establish that the Pre-Trial Chamber committed the alleged error when assessing the criteria under article 58 of the Statute. Furthermore, the Appeals Chamber finds Mr Abd-Al-Rahman's argument to be inapposite. The fact that Mr Abd-Al-Rahman currently has access to telephone communication in the detention centre, where the Court is in principle able to passively monitor his calls, under regulation 174 of the Regulations of the Registry, cannot be equated with his being released in The Netherlands. The Appeals Chamber thus rejects this argument.

62. In light of the above, Mr Abd-Al-Rahman's first ground of appeal is rejected.

(b) Second Ground

63. Under this ground of appeal, Mr Abd-Al-Rahman avers that in the Impugned Decision, the Pre-Trial Chamber provided different reasons from those it had previously given to postpone, for the second time, the confirmation hearing, and that this amounts to an error of fact.¹²⁵

64. The Appeals Chamber notes that Mr Abd-Al-Rahman has not met his burden of substantiation with regards to errors of fact.¹²⁶ The Appeals Chamber notes that Mr Abd-Al-Rahman limited himself to repeating his argument that the Prosecutor's request to postpone the confirmation hearing for a second time resulted in an unreasonable delay of the proceedings, thereby justifying his release, and to noting what he believes to be an inconsistency between the reasoning in the Pre-Trial Chamber's decision to grant such a request for postponement and the Impugned Decision. According to Mr

¹²³ [Appeal Brief](#), para. 15.

¹²⁴ [Prosecutor's Response](#), para. 14.

¹²⁵ [Appeal Brief](#), para. 17.

¹²⁶ See *supra* para. 25.

Abd-Al-Rahman, the criterion of ‘inexcusable delay by the Prosecutor’ pursuant to article 60(4) of the Statute was met and he should have been released.¹²⁷ The only reason he was not released was, in his view, the Pre-Trial Chamber’s alleged variation of its reasoning, which, he submits, amounts to an error of fact.¹²⁸ Mr Abd-Al-Rahman failed to explain how the alleged discrepancy would amount to a factual error. In the Appeals Chamber’s view, Mr Abd-Al-Rahman did not properly substantiate this ground of appeal.

65. The Appeals Chamber recalls that a party’s failure to comply with its substantiation requirements may entail ‘dismissal *in limine* of any ground of appeal or underlying argument that does not comply with these requirements’.¹²⁹ Having determined that Mr Abd-Al-Rahman did not properly substantiate the error of fact he alleges, the Appeals Chamber dismisses this ground of appeal *in limine*.

(c) Third Ground

66. Mr Abd-Al-Rahman submits that the Pre-Trial Chamber erred in law by failing to consider that the Prosecutor ceased to defend the admissibility of the evidence on which she rested her showing of the criteria for detention under article 58(1)(a) because she did not respond to the Admissibility Request, challenging the admissibility of such evidence.¹³⁰ Mr Abd-Al-Rahman presupposes that the Prosecutor’s failure to respond to his challenge to the admissibility of such evidence means that the Prosecutor conceded that the evidence on which her showing pursuant to article 58(1)(a) of the Statute is based is in fact inadmissible.¹³¹ The Pre-Trial Chamber rejected this argument and, on appeal, Mr Abd-Al-Rahman considers that the Pre-Trial Chamber erred in law by failing to require the Prosecutor to meet her burden of proof.¹³² For the reasons that follow, the Appeals Chamber does not consider that the Pre-Trial Chamber erred in law by rejecting Mr Abd-Al-Rahman’s argument that the Prosecutor, by not responding, declined to defend the admissibility of her evidence.

¹²⁷ [Appeal Brief](#), para. 17.

¹²⁸ [Appeal Brief](#), para. 17.

¹²⁹ See *supra* para. 26, referring to [Abd-Al-Rahman OA2 Judgment](#), para. 16.

¹³⁰ [Appeal Brief](#), paras 18, 20.

¹³¹ [Appeal Brief](#), paras 18, 20.

¹³² [Appeal Brief](#), paras 19-20.

67. The Appeals Chamber recalls that the burden of proof under article 60(2) and (3) of the Statute lies with the Prosecutor.¹³³ This notwithstanding, the Appeals Chamber notes that, once the burden of proof has been met and a suspect has been detained, a chamber must periodically review its decision to detain the suspect and it may only modify its ruling if there has been a change in the circumstances underpinning the decision, namely, the discovery of a new fact that is capable of satisfying the chamber that detention is no longer necessary.¹³⁴

68. The Appeals Chamber notes that, in the case at hand, the Pre-Trial Chamber observed that it ‘does not subscribe to the Defence’s claim that the Prosecutor’s failure to submit a response to the Defence’s Admissibility Request implies that the Prosecutor does not object to it, much less that the Chamber would *ipso facto* have to accede to the Defence’s request’.¹³⁵

69. The Appeals Chamber does not consider that, with these statements, the Pre-Trial Chamber failed to require the Prosecutor to meet her burden of proof, nor does it consider that the failure of the Prosecutor to respond to the Admissibility Request amounts to a change in circumstances. First, the Appeals Chamber notes that in her response, on appeal, the Prosecutor explains why she did not file a response to that motion, that her position opposing the Defence’s arguments has not changed,¹³⁶ and that the fact that she found it unnecessary to repeat her views cannot be interpreted as a change in her position or that she abandoned support for the admissibility of her

¹³³ See e.g. *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, para. 51.

¹³⁴ See *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, para. 14; *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, paras 1, 51. See also Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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](#), 28 July 2010, ICC-01/05-01/08-843, para. 31.

¹³⁵ [Impugned Decision](#), para. 32.

¹³⁶ The Prosecutor submits, *inter alia*, that in the request to which she did not respond, Mr Abd-Al-Rahman ‘raise[d] the same arguments that [he had] raised in [his] previous observations on detention and [his] appeal of the Second Detention Decision’. See [Prosecutor’s Response](#), para. 25.

evidence.¹³⁷ In any event, the Prosecutor's failure to object to the Admissibility Request cannot, in the Appeals Chamber's view, constitute a change in circumstances. Contrary to Mr Abd-Al-Rahman's submissions,¹³⁸ neither regulation 34(b) of the Regulations, nor the decision he cites, support his view that a party's failure to respond to a request to dismiss its evidence as inadmissible implies its declining to support the admissibility of such evidence. Regulation 34(b) of the Regulations simply states the period of time to file a response; it does not provide for a consequence for not filing a response.¹³⁹ Therefore, the Appeals Chamber is not persuaded by Mr Abd-Al-Rahman's argument in this regard.

70. Accordingly, Mr Abd-Al-Rahman's third ground of appeal is rejected.

(d) Fourth Ground

71. With this ground of appeal, Mr Abd-Al-Rahman challenges the Pre-Trial Chamber's rejection of his argument that the fact that some of his motions have been pending for a while has caused him to be detained for an unreasonable period of time.¹⁴⁰ Mr Abd-Al-Rahman submits that the Pre-Trial Chamber made (i) an error of fact, by misinterpreting his arguments as an attempt to impose on the Pre-Trial Chamber the pace at which, and/or the sequence in which it considers the matters before it, and (ii) two errors of law, consisting in (a) failing to consider the impact of the outstanding decisions during its deliberations on the Impugned Decision,¹⁴¹ and (b) failing to consider such impact on his rights under articles 61(1) and 60(4) of the Statute.¹⁴²

72. The Appeals Chamber is not persuaded by Mr Abd-Al-Rahman's submission that the Pre-Trial Chamber made an error of fact by allegedly misinterpreting his arguments as an imposition of timeframes for considering the matters before it.¹⁴³ Mr Abd-Al-Rahman argues that he did not submit or consider any such thing but that his submissions were rather limited to pointing out the impact that the Pre-Trial Chamber's

¹³⁷ [Prosecutor's Response](#), para. 25.

¹³⁸ [Appeal Brief](#), para. 18.

¹³⁹ Regulation 34(b) of the Regulations reads: '[a] response referred to in regulation 24 shall be filed within 10 days of notification in accordance with regulation 31 of the document to which the participant is responding'.

¹⁴⁰ [Impugned Decision](#), para. 35.

¹⁴¹ [Appeal Brief](#), para. 23.

¹⁴² [Appeal Brief](#), para. 24.

¹⁴³ [Appeal Brief](#), para. 23.

absence of rulings on his motions had on the time available to prepare for the confirmation hearing, and on compliance with article 67(1)(b) of the Statute, and the fact that he was left in detention for the duration of the second postponement of the hearing, for reasons attributable only to speculations of the Prosecutor, without having the benefit of the additional time afforded for the preparation of his defence.¹⁴⁴

73. First, the Appeals Chamber finds that, contrary to Mr Abd-Al-Rahman's allegation, the Pre-Trial Chamber did not misinterpret his submissions. As noted by the Prosecutor, Mr Abd-Al-Rahman's observations on detention show that he did argue that the time taken by the Pre-Trial Chamber to deliberate on pending motions was 'excessive' and highlighted the unreasonable nature of the delay.¹⁴⁵ Second, Mr Abd-Al-Rahman fails to explain how the alleged error of fact – that the Pre-Trial Chamber failed to consider the impact that its absence of rulings on Mr Abd-Al-Rahman's motions had on his ability to prepare for the confirmation hearing – could have a bearing on the Impugned Decision. Therefore, the Appeals Chamber is not persuaded by Mr Abd-Al-Rahman's allegation that the Pre-Trial Chamber committed an error of fact.

74. Turning to the first error of law, Mr Abd-Al-Rahman submits, in one sentence, that, as a result of the alleged error of fact, the above alleged impact could not be taken into account by the Pre-Trial Chamber when deliberating on the Impugned Decision, and this failure, in his view, amounts to an error of law.¹⁴⁶ However, Mr Abd-Al-Rahman fails to explain how the Pre-Trial Chamber's alleged failure to consider his submissions on the impact of the pending motions when determining the Impugned Decision would amount to an error of law and, in any event, how considering any such submissions would have led the Pre-Trial Chamber to issue a substantially different decision. Therefore, the Appeals Chamber finds no merit in Mr Abd-Al-Rahman's allegations regarding the first error of law under this ground of appeal.

75. With regard to the second error of law, the Appeals Chamber is not persuaded by Mr Abd-Al-Rahman's allegation that the Pre-Trial Chamber failed to take into account

¹⁴⁴ [Appeal Brief](#), para. 23.

¹⁴⁵ [Prosecutor's Response](#), para. 27, referring to [Defence Observations to the Second Review](#), para. 28.

¹⁴⁶ [Appeal Brief](#), para. 23.

the impact that the outstanding decisions may have had on his right to appear within a reasonable time for the confirmation hearing and his right not to be detained for an unreasonable time due to unjustified delay attributable to the Prosecution.¹⁴⁷ Mr Abd-Al-Rahman has not sufficiently demonstrated the impact of the outstanding decisions on article 61(1) and article 60(4) of the Statute. Also, as noted by the Prosecutor,¹⁴⁸ Mr Abd-Al-Rahman replicates, under this argument, some of the submissions he made under his second ground of appeal to the effect that the Pre-Trial Chamber allegedly failed to consider that the second postponement of the confirmation hearing amounts to an unjustified delay attributable to the Prosecutor.¹⁴⁹ In this regard, the Appeals Chamber notes the Prosecutor's submissions that the unreasonableness of length of pre-trial detention depends on a variety of factors, which are case-specific and which were not argued before the Pre-Trial Chamber, and that in this case she was faced with 'unique challenges'.¹⁵⁰ The Appeals Chamber further notes that, even if the alleged delay were established, it would at most have had an impact on Mr Abd-Al-Rahman's detention during the time of the postponement of the confirmation hearing, and not during the overall period of pre-trial detention.¹⁵¹ The Appeals Chamber considers that Mr Abd-Al-Rahman has not established that, even if the Pre-Trial Chamber had considered differently the impact of those outstanding decisions, it would have found Mr Abd-Al-Rahman's length of detention to be unreasonable, or that this was caused by an inexcusable delay by the Prosecutor, in terms of article 60(4) of the Statute. In any event, the Appeals Chamber considers that Mr Abd-Al-Rahman has not demonstrated the impact, if any, that the outstanding decisions had on the decision to keep him in detention.

¹⁴⁷ [Appeal Brief](#), para. 24.

¹⁴⁸ [Prosecutor's Response](#), para. 29.

¹⁴⁹ It is recalled in this regard that the Trial Chamber stated that 'there is no indication that the Prosecutor and the VWU did not use the additional time diligently' and that '[i]t is therefore incorrect to portray the second postponement as unreasonably long'. [Impugned Decision](#), para. 34.

¹⁵⁰ [Prosecutor's Response](#), para. 21.

¹⁵¹ It is recalled that article 60(4) of the Statute requires (i) that the overall pre-trial detention is unreasonable and (ii) that such unreasonable detention is caused by an inexcusable delay attributed to the Prosecutor. See for example, Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Review of Detention and Decision on the 'Third Defence request for interim release'](#), 16 September 2011, ICC-01/04-01/10-428, para. 38.

76. In light of the above, Mr Abd-Al-Rahman failed to demonstrate any of the alleged errors on the part of the Pre-Trial Chamber. Accordingly, his fourth ground of appeal is rejected.

(e) Fifth Ground

77. Under this ground of appeal, Mr Abd-Al-Rahman challenges the Pre-Trial Chamber's determination concerning his request that the Pre-Trial Chamber release him on the ground that he might be contaminated with Covid-19 at the Court's Detention Centre.¹⁵² In his view, the Pre-Trial Chamber erred in law by assigning to the Registry the task of seeking the release of detained persons, a task that, in his view, falls exclusively within the prerogative of the parties under rule 118 of the Rules.¹⁵³ He further submits that the Pre-Trial Chamber erred in law by dismissing *in limine* his submissions on this matter, without considering them.¹⁵⁴

78. As for the first error of law alleged under this ground of appeal, the Appeals Chamber considers that Mr Abd-Al-Rahman once again misinterprets the Impugned Decision. The Pre-Trial Chamber did not consider, as Mr Abd-Al-Rahman alleges, that it is for the Registry to seek release on medical grounds of a detainee, in this case of Mr Abd-Al-Rahman. Instead, the Pre-Trial Chamber stated 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'.¹⁵⁵ It further noted that it had 'not been given any indication that Mr Abd-Al-Rahman's current situation is particularly concerning'.¹⁵⁶

79. In the Appeals Chamber's view, the Pre-Trial Chamber properly described the functions and responsibilities of the Registry in relation to the physical and mental health of detainees, as set out in the Regulations of Court and the Regulations of the Registry.¹⁵⁷

¹⁵² [Impugned Decision](#), para. 36.

¹⁵³ [Appeal Brief](#), para. 26.

¹⁵⁴ [Appeal Brief](#), para. 26.

¹⁵⁵ [Impugned Decision](#), para. 36.

¹⁵⁶ [Impugned Decision](#), para. 36.

¹⁵⁷ See in particular, regulation 90(1) of the Regulations of the Court ('1. Subject to the Statute, Rules and these Regulations, the Registrar shall have overall responsibility for all aspects of management of the detention centre including security and order, and shall make all decisions relating thereto'). See also

80. The Appeals Chamber is also not persuaded by Mr Abd-Al-Rahman's argument that the abovementioned error on the role of the Registry caused the Pre-Trial Chamber to dismiss his submissions and, notably, the '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 2020.¹⁵⁸ Instead, the Appeals Chamber notes that the Pre-Trial Chamber, after taking into account Mr Abd-Al-Rahman's submissions on Covid-19, found that, in the circumstances, there was no reason to order Mr Abd-Al-Rahman's release on medical grounds, with or without conditions. With regard to his reference to the Council of Europe's statement of principles relating to the treatment of detainees in the context of the Covid-19 pandemic, as the Appeals Chamber has previously held, these principles '[f]ar from requiring release [of detainees], in fact suggest that measures can be taken to protect the health and safety of detained persons while in detention'.¹⁵⁹ The Appeals Chamber considers that Mr Abd-Al-Rahman has failed to show any error by the Pre-Trial Chamber in this regard.

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

regulation 155(3) and (4) of the Regulations of the Registry ('3. The medical officer shall inform the Chief Custody Officer in writing whenever he or she considers that the physical or mental health of a detained person has been or will be adversely affected by any condition of or treatment in detention. In particular, the medical officer shall pay particular attention to the health of a detained person held in segregation pursuant to regulations 201, 202 and 202 *bis*, confined to a cell pursuant to regulation 213, sub-regulation (f) or isolated pursuant to regulation 205. The medical officer, or other medical staff designated by him or her, shall visit such a detained person at least on a daily basis and ensure prompt medical assistance and treatment at the request of the detained person. 4. The Chief Custody Officer shall in turn inform the Registrar without delay. The Chief Custody Officer shall confirm such information to the Registrar in writing. The Registrar shall take all action considered necessary and subsequently inform the Presidency and the Chamber in writing').

¹⁵⁸ [Appeal Brief](#), para. 26.

¹⁵⁹ [Abd-Al-Rahman OA6 Judgment](#), para. 41.

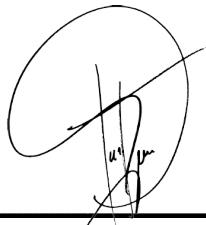
V. APPROPRIATE RELIEF

82. 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 has dismissed Mr Abd-Al-Rahman's five grounds of appeal, and confirms the Impugned Decision.

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



Judge Piotr Hofmański
Presiding



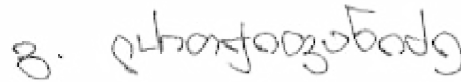
Judge Luz del Carmen Ibáñez Carranza



Judge Marc Perrin de Brichambaut



Judge Solomy Balungi Bossa



Judge Gocha Lordkipanidze

Dated this 2nd day of June 2021

At The Hague, The Netherlands