

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 (Ali

5 Kushayb) - ICC-02/05-01/20

6 Presiding Judge Piotr Hofmański

7 Appeals Judgment - Courtroom 3

8 Friday 17 December 2021

9 (The hearing starts in open session at 4.00 p.m.)

10 THE COURT USHER: [16:00:48] All rise. The International Criminal Court is now  
11 in session. Please be seated.

12 PRESIDING JUDGE HOFMAŃSKI: [16:01:06] Good afternoon.

13 Would the court officer please call the case.

14 THE COURT OFFICER: [16:01:31] Good afternoon, Mr President. The situation in  
15 Darfur, Sudan, in the case of The Prosecutor versus Ali Muhammad Ali  
16 Abd-Al-Rahman ("Ali Kushayb"), case reference ICC-02/05-01/20.

17 And we are in open session.

18 PRESIDING JUDGE HOFMAŃSKI: [16:01:46] Thank you.

19 I'm Judge Piotr Hofmański, presiding in this appeal arising from the case of the  
20 Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman. My fellow judges in this appeal  
21 are Judge Luz del Carmen Ibáñez Carranza, Judge Perrin de Brichambaut, Judge  
22 Solomy Balungi Bossa and Judge Gocha Lordkipanidze.

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

25 Mr Laucci.

1 MR LAUCCI: [16:02:28](Interpretation) Good afternoon, Mr President. For the  
2 Defence of Mr Abd-Al-Rahman, assisting at a distance, but in the courtroom, we have  
3 Mr Ahmad Issa, who is the case manager; Ms Eva Kalb, who is assistant reviewer of  
4 evidence; and Mr Mohammad El Rahi, who's also in charge of analysing evidence.  
5 And I'm lead counsel, Mr Cyril Laucci.

6 PRESIDING JUDGE HOFMAŃSKI: [16:02:58] Thank you, Mr Laucci.  
7 And the Office of the Prosecutor, please.

8 MR GALLMETZER: [16:03:04] Good afternoon, your Honour. The Office of the  
9 Prosecutor is represented by Mr Edward Jeremy and myself, Reinhold Gallmetzer.

10 PRESIDING JUDGE HOFMAŃSKI: [16:03:17] Thank you, Mr Gallmetzer.  
11 The legal representation for the victims, please.

12 MS VON WISTINGHAUSEN: [16:03:25] Yes, good afternoon, Mr President.  
13 Natalie von Wistinghausen, I'm appearing on behalf of the Common Legal  
14 Representatives of Victims, and our case manager, Idriss Anbari's in the courtroom.  
15 Thank you very much.

16 PRESIDING JUDGE HOFMAŃSKI: [16:03:29] Thank you -- thank you very much,  
17 Madam Wistinghausen.  
18 Thank you all.

19 For the record, I note that Mr Abd-Al-Rahman participates from the remote location.  
20 Today, the Appeals Chamber will deliver its judgment in the appeal of  
21 Mr Abd-Al-Rahman against the decision of Trial Chamber I entitled, "Decision on the  
22 review of detention". This is a non-authoritative summary of the Appeals Chamber's  
23 written judgment in the appeal. The written judgment will be notified after this  
24 hearing.

25 I will now briefly explain the context of this appeal.

1 Following the issuance of an arrest warrant on 9 June 2020, Mr Abd-Al-Rahman  
2 surrendered himself and was transferred to the detention centre of the Court.  
3 On 14 August 2020, Pre-Trial Chamber II issued a decision under Article 60(2) of the  
4 Statute, finding grounds to detain Mr Abd-Al-Rahman pending trial due to the risk  
5 that Mr Abd-Al-Rahman or his supporters may interfere with the victims or potential  
6 witnesses in the proceedings.  
7 The Pre-Trial Chamber reviewed its decision on detention in December of that year,  
8 and then again in April and July of 2021. The Chamber found that the reasons for  
9 Mr Abd-Al-Rahman's detention had not changed in favour of his release pending  
10 trial.  
11 On 9 July 2021, the Pre-Trial Chamber confirmed the charges against  
12 Mr Abd-Al-Rahman. After the case was transferred to the Trial Chamber, the  
13 Chamber held a hearing on the review of detention.  
14 On 1 November 2021, the Trial Chamber issued its decision finding that there were no  
15 changed circumstances within the meaning of Article 60(3) of the Statute that would  
16 warrant interim release, and the Trial Chamber decided to maintain the detention of  
17 Mr Abd-Al-Rahman. I will call this the impugned decision.  
18 The Defence appealed the impugned decision, raising four grounds of appeal.  
19 First, the Defence alleges that the Trial Chamber committed two distinct factual errors  
20 in taking into account that the proceedings had advanced beyond the confirmation of  
21 charges.  
22 Second, the Defence alleges that the Trial Chamber committed an error of law in  
23 reversing the principle that pretrial detention is an exception and liberty is the rule.  
24 Third, the Defence alleges that the Trial Chamber committed factual errors in relation  
25 to its findings about the potential for witness interference.

1 Fourth, the Defence alleges that the failure to respect Mr Abd-Al-Rahman's right to  
2 family visitation in the detention centre renders his detention unlawful.

3 Ultimately, the Defence seeks interim release for Mr Abd-Al-Rahman.

4 I will now address the merits of the appeal.

5 Under the first ground of appeal, the Defence alleges that the Trial Chamber failed to  
6 consider that the accused had surrendered himself to the Court, even though in doing  
7 so he faced punishment in Sudan.

8 The Defence also alleges that the Trial Chamber failed to consider that the risks the  
9 accused faces in Sudan would deter him from trying to abscond today.

10 Contrary to the Defence's position, the Appeals Chamber considers that the  
11 Trial Chamber was well aware of the circumstances of Mr Abd-Al-Rahman's  
12 surrender. Indeed, the Trial Chamber determined that the Defence's submissions  
13 about the risks Mr Abd-Al-Rahman faced in Sudan resulting from his decision to  
14 voluntarily surrender were irrelevant.

15 The Appeals Chamber notes that the fact that a suspect surrendered himself  
16 voluntarily to the Court can be understood as an indication of his willingness to  
17 cooperate with the Court in its proceedings.

18 However, in this case, the Appeals Chamber notes that the Prosecutor has identified  
19 a number of events that suggest that there could be a concrete risk that, if the accused  
20 were granted interim release, he or his supporters might interfere with the Court's  
21 proceedings. Therefore, the Appeals Chamber is not persuaded that the  
22 Trial Chamber assigned insufficient weight to the circumstances of  
23 Mr Abd-Al-Rahman's voluntary surrender.

24 As to the Defence's argument about the difficulties that Mr Abd-Al-Rahman may face  
25 should he return to Sudan, the Appeals Chamber observes that the Defence only

1 advances speculative arguments about how these risks may affect

2 Mr Abd-Al-Rahman's motivation to abscond. Nor does the Defence explain how

3 these risks may affect the primary reason for Mr Abd-Al-Rahman's continued

4 detention under Article 58(1)(b)(ii) of the Statute.

5 Therefore, the Appeals Chamber finds no error, and the first ground of appeal is

6 rejected.

7 Under the second ground of appeal, the Defence submits that the consideration of the

8 confirmation of charges as a factor favouring detention pending trial would lead to

9 the conclusion that detention is justified in all cases that have advanced past the

10 pretrial stage. This, according to the Defence, would have the effect of reversing the

11 presumption that detention is the exception to the rule, and that the right to liberty

12 must be respected.

13 The Appeals Chamber observes the human rights jurisprudence holds that individual

14 freedom, as a basic guarantee, constitutes the rule in all cases, and any deprivation

15 thereof must be an exception. In practice, this means that the burden of proof falls

16 on the prosecuting authority to demonstrate the existence of reasons to maintain the

17 custody of an individual awaiting trial.

18 The Appeals Chamber notes, however, that the presumption of liberty does not mean

19 that detention cannot be imposed where there exists a legal basis for doing so.

20 Although the starting point in all cases is that the person who is subject to criminal

21 proceedings shall enjoy the right to liberty, he or she may be deprived of that liberty

22 as prescribed by law in a manner that is strictly necessary under the circumstances.

23 Contrary to the Defence's position, a chamber's assessment of whether a person's right

24 to liberty is respected must be individualised, looking at the presence of concrete risks

25 weighed against the presumption of interim release on a case-by-case basis.

1 Moreover, the right of physical liberty as defined in human rights law is not violated  
2 where a chamber has determined that -- in addition to the fulfilment of the  
3 requirements in Article 58(1)(a) of the Statute -- pretrial detention is necessary to  
4 prevent the risks enumerated in Article 58(1)(b) of the Statute.

5 In this regard, the confirmation of charges may, in the opinion of a chamber, be  
6 a factor when considering whether the risk that an accused may evade justice  
7 continues to exist. Importantly, this finding does not on its own displace the general  
8 rule concerning the exceptionality of pretrial detention.

9 Therefore, the Appeals Chamber is not persuaded by the Defence's argument that the  
10 Trial Chamber committed an error of law in reversing the principle that liberty is the  
11 rule and detention is the exception.

12 For these reasons, the Appeals Chamber rejects the Defence's second ground of  
13 appeal.

14 Under the third ground of appeal, the Defence alleges that the Trial Chamber failed to  
15 consider that the accused was on the run at the time that the evidence of the  
16 Prosecutor was recorded, and therefore he was incapable of issuing threats at the time.

17 In support of this argument, the Defence emphasises that there was a warrant for his  
18 arrest at the relevant time in Sudan, and there is new evidence demonstrating that he  
19 was on the run. Moreover, the Defence argues that the Trial Chamber failed to  
20 appreciate that a video disclosed by the Prosecutor contradicts the Prosecutor's other  
21 evidence.

22 The Appeals Chamber recalls that the review of detention conducted pursuant to  
23 Article 60(3) of the Statute is an opportunity for the relevant chamber to modify the  
24 original ruling on detention if it is satisfied that changed circumstances so require.

25 Here, the Appeals Chamber is not persuaded that the Trial Chamber erred in failing

1 to conclude that the information that the Defence refers to leads inevitably to the  
2 conclusion that Mr Abd-Al-Rahman was on the run and therefore incapable to engage  
3 in the acts alleged.

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

10 Regarding the video evidence in question, the Appeals Chamber notes that the  
11 Defence made similar arguments about the content of this video and its negative  
12 impact on the probative value of the Prosecutor's evidence before the Trial Chamber.  
13 The Trial Chamber concluded that, contrary to the Defence's position, the video was  
14 capable of lending support to the Prosecutor's submissions that the accused, if  
15 granted conditional release, presents a potential or an actual risk to witnesses.

16 On appeal, the Defence merely disagrees with this conclusion without indicating how  
17 the Trial Chamber weighed its submissions improperly; nor how the Chamber's  
18 ultimate conclusion was unreasonable. The Appeals Chamber further considers that  
19 even if, *arguendo*, the press article relied upon by the Prosecutor is itself insufficient,  
20 this was not the only evidence indicating the potential for witness interference.

21 Therefore, the Appeals Chamber finds no error and it rejects the third ground of  
22 appeal.

23 Finally, under the fourth ground of appeal, the Appeals Chamber recalls that the  
24 Court has a positive obligation to render the right to family visits effective for persons  
25 in the detention centre. However, as argued by the Prosecutor, the Court's

1 regulatory framework governing detention matters provides an avenue for a detained  
2 person to secure his or her visitation rights. This avenue is separate from the  
3 procedure for the review of detention under Article 60(3) of the Statute.

4 In particular, under the applicable regulations, a detained person is entitled to receive  
5 visits and to arrange for such visits upon application to the Registrar. A detained  
6 person may make a complaint against any matter concerning his or her detention at  
7 any time to the Chief Custody Officer or to the Registrar as the case may be. Judicial  
8 review of a decision of the Registrar on detention matters is taken up by the  
9 Presidency.

10 The Appeals Chamber notes that the Defence has already seized the Registry of the  
11 consultative process concerning Mr Abd-Al-Rahman's visitation rights while in  
12 detention. This consultation is ongoing.

13 Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in  
14 rejecting the Defence's argument that Mr Abd-Al-Rahman's right to family visits was  
15 inoperative.

16 Thus, the Appeals Chamber rejects the Defence's fourth ground of appeal.

17 Moreover, the Appeals Chamber recalls that both the Pre-Trial Chamber II and the  
18 Presidency have warned the Defence in this case against bringing parallel  
19 proceedings that are duplicative in nature. The Appeals Chamber finds it  
20 appropriate to reiterate here, that such a practice is wasteful of this Court's limited  
21 resources and it should not continue.

22 For these reasons -- and for the reasons stated more fully in the written  
23 judgment -- the Appeals Chamber unanimously rejects the appeal and confirms the  
24 impugned decision maintaining Mr Abd-Al-Rahman's detention.

25 This brings us to the end of the summary of the Appeals Chamber's judgment.



- 1 I would like to thank the court reporters, the interpreters and other Registry staff for
- 2 their valuable assistance today in holding this hearing.
- 3 The hearing is adjourned.
- 4 THE COURT USHER: [16:20:49] All rise.
- 5 (The hearing ends in open session at 4.20 p.m.)