



Original: **English**

No.: **ICC-02/05-01/20**

Date: **12 May 2021**

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 *PROSECUTOR* v.
*ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)***

Public

Public Redacted Version of “Prosecution Response to the Defence ‘Mémoire d’appel de la décision ICC-02/05-01/20-338’ (ICC-02/05-01/20-365-Conf)”, 30 April 2021, ICC-02/05-01/20-371-Conf

Source: Office of the Prosecutor

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INTRODUCTION

1. On 12 April 2021, Pre-Trial Chamber II reviewed Mr Abd-Al-Rahman’s detention as required by article 60(3) of the Rome Statute and ordered his continued detention to ensure that he does not obstruct or endanger the investigation or court proceedings (“Decision”).¹ In reaching its Decision, the Chamber recalled its prior rulings on detention;² determined that there was no change in the circumstances requiring it to modify its prior ruling;³ and determined that there was no basis to release Mr Abd-Al-Rahman under article 60(4) of the Statute, or on medical grounds.⁴

2. Mr Abd-Al-Rahman’s appeal against the Decision should be rejected.⁵ His five grounds of appeal are founded on inaccurate interpretations of the Decision and the Appeals Chamber’s judgments on his prior detention appeals; express mere disagreement with the Pre-Trial Chamber’s reasoning; and raise issues that have no impact on the Pre-Trial Chamber’s decision to maintain him in detention.⁶

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SUBMISSIONS

4. The Pre-Trial Chamber rightly found that there had been no change of circumstances since its prior two rulings on detention—both upheld on appeal⁷—that would warrant Mr Abd-Al-Rahman’s release, with or without conditions.⁸ In reaching its Decision, the Pre-Trial Chamber recalled that there were reasonable grounds to believe Mr Abd-Al-Rahman had committed crimes within the Court’s jurisdiction under article 58(1)(a) of the Statute,⁹ and that

¹ ICC-02/05-01/20-338 (“[Decision](#)”), para. 37.

² Decision, paras. 24-25, citing ICC-02/05-01/20-115 (“[First Detention Decision](#)”) and ICC-02/05-01/20-230-Conf (public redacted version: ICC-02/05-01/20-230-Red) (“[Second Detention Decision](#)”).

³ [Decision](#), paras. 28-29, 30-32, 37.

⁴ [Decision](#), paras. 34-36.

⁵ ICC-02/05-01/20-365-Conf (public redacted version: ICC-02/05-01/20-365-Red) (“[Appeal](#)”).

⁶ [Appeal](#), paras. 13-15 (Ground 1), 16-17 (Ground 2), 18-20 (Ground 3), 21-24 (Ground 4), 25-26 (Ground 5).

⁷ See ICC-02/05-01/20-177 (“[First Detention AD](#)”); ICC-02/05-01/20-279-Conf (public redacted version: ICC-02/05-01/20-279-Red) (“[Second Detention AD](#)”).

⁸ [Decision](#), para. 37.

⁹ [Decision](#), paras. 26, 37. See also [First Detention Decision](#), para. 26; [Second Detention Decision](#), para. 27.

his detention appears necessary under article 58(1)(b)(ii) to ensure that he does not obstruct or endanger the investigation or the court proceedings.¹⁰ In so finding, the Chamber reasonably rejected the Appellant's arguments that: his financial situation dispelled the Prosecutor's image of him as the "colonel of colonels" who had a network of supporters capable of threatening witnesses;¹¹ there was no longer an evidentiary basis to support the Prosecution's case given that the Prosecution had not responded to a Defence motion ("Defence Admissibility Motion") requesting all witness statements disclosed by the Prosecution to be declared inadmissible;¹² the Prosecution's slow progress in implementing witness protection measures constituted a changed circumstance,¹³ an abuse of trust and inexcusable delay;¹⁴ and the Chamber's failure to rule on a number of pending motions contributed to his unreasonably long period of detention.¹⁵ Moreover, the Chamber reasonably concluded that there were no grounds to release Mr Abd-Al-Rahman for reasons relating to the Covid-19 pandemic.¹⁶

5. The Pre-Trial Chamber's Decision is reasonable and correct.¹⁷ The Appellant's five grounds of appeal merely repeat arguments made before the Pre-Trial Chamber and misrepresent the Decision as well as the Appeals Chamber's judgments on his two prior detention appeals. Moreover the Appellant's failure to properly substantiate the legal and factual errors he alleges, and to address or demonstrate how they impact the Decision warrants the dismissal of his arguments *in limine*, as shown below.¹⁸

¹⁰ [Decision](#), paras. 24-25, citing [First Detention Decision](#), paras. 28-29, and [Second Detention Decision](#), paras. 29-32.

¹¹ [Decision](#), paras. 27-28.

¹² [Decision](#), para. 29.

¹³ [Decision](#), para. 31.

¹⁴ [Decision](#), paras. 32-34.

¹⁵ [Decision](#), para. 35.

¹⁶ [Decision](#), para. 36.

¹⁷ [First Detention AD](#), para. 13 (stating in relation to the standard of review in appeals in relation to decisions granting or denying interim release, that the Appeals Chamber "will not review the findings of the Pre-Trial Chamber de novo, instead, it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision"), 14 (stating that with respect to errors of law, the Appeals Chamber "will not defer to the Trial Chamber's interpretation of the law" and "will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law" and "will only intervene if the error materially affected the Impugned Decision"), 15 (with respect to errors of fact, the Appeals Chamber "will [] 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"). See also [Second Detention AD](#), paras. 11-13.

¹⁸ [First Detention AD](#), para. 16 ("[...] [F]or 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

A. Preliminary issue: The five grounds of appeal stem from the Appellant’s patently inaccurate interpretation of the Appeals Chamber’s prior jurisprudence in this case

6. The Appellant prefaces his appeal by identifying nine “*enseignements*” that he claims emanate from the Appeals Chamber’s two prior judgments on his detention appeals in this case.¹⁹ He devotes a considerable part of the Appeal to interpreting the Appeals Chamber’s jurisprudence and expressing his concerns and disagreements with it.²⁰ These submissions should be disregarded as immaterial to the current appeal.²¹ The Prosecution only addresses and corrects the Appellant’s inaccurate descriptions of the seventh, eighth and ninth *enseignements* insofar as they impact his grounds of appeal.

7. The seventh *enseignement*—impacting the first ground of the Appeal—incorrectly claims that the Appeals Chamber found that article 58(1)(b) is excluded from the scope of review of detention under article 60(3).²² This interpretation is unfounded: the Pre-Trial Chamber expressly considered article 58(1)(b) in its review of detention under article 60(3),²³ and the Appeals Chamber upheld this assessment.²⁴ The Appellant appears to misconstrue the Appeals Chamber’s finding that when determining whether the conditions for continued detention under article 58(1)(b)(ii) were met, it was irrelevant in the circumstances of this case that the Prosecution was not in a position to implement protective measures for witnesses in Sudan.²⁵ This is because the Chamber found that “the safety of witnesses must be considered regardless of whether they are currently reachable by the Prosecutor”.²⁶ This was not a suggestion that article 58(1)(b) is irrelevant to a Chamber’s review of detention; rather, the Appeals Chamber found that risks to witness safety were relevant to article 58(1)(b)(ii) and the Prosecutor’s inability to mitigate those risks does not diminish that assessment. The

decision. Failure 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”); *see also* ICC-0/05-01/20-177-Anx (“[Judge Ibanez Carranza Separate Concurring Opinion](#)”), paras. 2, 15 (stating that the Appellant failed to substantiate a ground of appeal as an error of law and to show a material impact in the decision, and that she would have rejected the ground for lack of substantiation). *See also* [Second Detention AD](#), para. 16; ICC-02/05-01/20-237 (“[Reparations AD](#)”), para. 21.

¹⁹ [Appeal](#), paras. 9-10.

²⁰ *See generally* [Appeal](#), paras. 9-12.

²¹ The Appeals Chamber does not have an advisory function: *see* ICC-01/04-503 (“[DRC Victim Participation Decision](#)”), para. 30, citing ICC-01/04-01/07-3132 (“[Katanga & Ngudjolo Directions Decision](#)”), para. 7; ICC-01/04-01/06-3026 (“[Lubanga Victims Procedural Decision](#)”), para. 4.

²² *Contra* [Appeal](#), para. 9 (second bullet point), citing [Second Detention AD](#), para. 35. *See below* paras. 11-15.

²³ *See e.g.* [Second Detention Decision](#), paras. 24, 28, 32.

²⁴ [Second Detention AD](#), para. 35.

²⁵ [Second Detention AD](#), para. 35; [First Detention AD](#), para. 27.

²⁶ [First Detention AD](#), para. 27.

Appellant's inaccurate interpretation has led him to make submissions on witness safety issues in the context of article 58(1)(a), and not article 58(1)(b)(ii) where such issues belong.²⁷

8. The eighth *enseignement*—relevant to the first ground of appeal—claims that the Appeals Chamber accepted or created a “presumption” that the Appellant has many supporters who may have access to witnesses, in the absence of probative evidence to support the claim.²⁸ The Appeals Chamber did not establish or accept any such presumption and nor did this lead to any reversal of the presumption that pre-trial detention is the exception and not the rule.²⁹ Rather, it upheld the Pre-Trial Chamber's finding that Mr Abd-Al-Rahman's continued detention appeared necessary to ensure that he does not obstruct or endanger the investigation or court proceedings, *in light of its holistic assessment of the available information before it*.³⁰ This information consisted of: a report provided by the Prosecutor highlighting threats allegedly made by the Appellant and his supporters to human rights activists; the information included in the two warrants of arrest; and the Appellant's position and the likelihood that he still has supporters who may have access to actual or potential witnesses.³¹ The Appellant merely disagrees with the Pre-Trial Chamber's assessment, and the Appeals Chamber's endorsement of it, in arguing his first ground of appeal.

9. The ninth *enseignement*—relevant to the fifth ground of appeal—claims that the Appeals Chamber required the Appellant to anticipate the development of scientific knowledge regarding the Covid-19 virus and bring that knowledge to the Pre-Trial Chamber's attention even before its publication.³² This is incorrect. In finding that the Pre-Trial Chamber did not err in declining to release the Appellant on medical grounds in its Second Detention Decision, the Appeals Chamber observed that the Appellant had not produced any medical records or referred to any scientific information in its submissions before the Pre-Trial Chamber on which the Chamber could base a decision to release him.³³ This does not set a new standard of proof which the Appellant would not know how to satisfy.³⁴

²⁷ ICC-02/05-01/20-329-Conf (public redacted version: ICC-02/05-01/20-329-Red) (“[Third Defence Detention Observations](#)”), paras. 4, 17-25.

²⁸ *Contra Appeal*, para. 9 (third bullet point), citing [First Detention AD](#), para. 26. *See below* paras. 11-15.

²⁹ *Contra Appeal*, para. 9 (third bullet point).

³⁰ [First Detention AD](#), para. 26, citing [First Detention Decision](#), paras. 28-29.

³¹ [First Detention AD](#), paras. 26, 35.

³² *Contra Appeal*, para. 9 (fourth bullet point), citing [Second Detention AD](#), para. 40. *See below* paras. 31-35.

³³ [Second Detention AD](#), paras. 39-40.

³⁴ *Contra Appeal*, para. 9 (fourth bullet point).

10. The extent to which these misinterpretations affect the Appellant's grounds of appeal are addressed as relevant below.

B. Ground 1: The Pre-Trial Chamber did not create an irrefutable presumption that the Appellant has sympathisers who may interfere with witnesses

11. The first ground of appeal incorporates the purported seventh and eighth *enseignements*—regarding the Appeals Chamber's "presumption" that the Appellant had a network of supporters and its relevance to article 58(1)(a)³⁵—and the Appellant's unsuccessful attempt to rebut this presumption with evidence before the Pre-Trial Chamber that he was a man of extremely limited means, and therefore could not have been a warlord or a "colonel of colonels" with a support network capable of endangering witnesses.³⁶ The Pre-Trial Chamber was rightly unpersuaded by the Appellant's arguments, and noted that even if it were established that Mr Abd-Al-Rahman had no assets today, this did not 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.³⁷ The Appellant argues that in rejecting the evidence that he presented to rebut the "presumption", the Pre-Trial Chamber rendered the presumption irrefutable and reversed the burden of proof, thus committing legal error.³⁸ There are two main reasons why this argument should fail.

12. *First*, while the Appellant frames the issue as a legal error, he in fact merely disagrees with the Pre-Trial Chamber's factual assessment that evidence regarding his current financial status has no relevance to his alleged commission of crimes or ability to still garner supporters and sympathisers. That it is a factual disagreement is evident from the Appellant's claim that "[p]our la Défense, l'indigence extrême constatée de Mr Abd-Al-Rahman constituait une preuve suffisante à remettre en cause la présomption simple de l'existence de son réseau de soutien".³⁹ Moreover, the Appellant fails to explain how the Pre-Trial Chamber's consideration and rejection of his submissions and evidence on this issue amounted to a reversal of the burden of proof and created an irrefutable standard of proof. The Appellant's failure to substantiate the

³⁵ See above paras. 7, 8.

³⁶ [Appeal](#), para. 13.

³⁷ [Decision](#), para. 28.

³⁸ [Appeal](#), paras. 13-15.

³⁹ [Appeal](#), para. 13.

nature of the *legal* error warrants its dismissal *in limine*.⁴⁰

13. *Second*, even if it is assessed as a factual error, the Appellant fails to demonstrate how the Pre-Trial Chamber's consideration and rejection of his submissions was *unreasonable*.⁴¹ The Chamber reasonably observed that the Appellant's current financial status did not necessarily imply that the allegations about his previous role and status were untrue, or that he could not still have supporters and sympathisers today.⁴² Indeed the Appellant's own submissions before the Pre-Trial Chamber only postulated that it was implausible that a man of his simple financial means could be considered a warlord.⁴³ The Pre-Trial Chamber was not required to accept the Appellant's hypothesis to discount the information it otherwise had before it, as it rightly stated.⁴⁴ This information included the material submitted by the Prosecution in its first and second arrest warrant applications and observations on detention regarding his alleged previous high-ranking position and connections he had in that role,⁴⁵ the likelihood that he still has supporters who may have access to actual or potential witnesses, and details of threats allegedly made by Mr Abd-Al-Rahman and his supporters to human rights activists and potential witnesses⁴⁶ and risks to actual Prosecution witnesses.⁴⁷ As the Appeals Chamber previously found, the Pre-Trial Chamber did not err in relying on these factors holistically in making its assessment under article 58(1).⁴⁸

14. Moreover, while the Appellant argues that the Pre-Trial Chamber committed a further legal error by failing to consider how his continued detention in the Netherlands would impact

⁴⁰ [First Detention AD](#), para. 16 (“[...] [F]or 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. Failure 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”). See also [Judge Ibanez Carranza Separate Concurring Opinion](#), paras. 2, 15 (stating that the Appellant failed to substantiate a ground of appeal as an error of law and to show a material impact in the decision, and that she would have rejected the ground for lack of substantiation).

⁴¹ [First Detention AD](#), para. 15 (stating that 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”). See also [Second Detention AD](#), para. 13.

⁴² [Decision](#), para. 28.

⁴³ [Third Defence Detention Observations](#), paras. 19-20.

⁴⁴ [Decision](#), para. 28 (“The fact that the Prosecutor has not proved its claims about Mr Abd-Al-Rahman yet does not mean that the Chamber therefore has to ignore the available information for the purpose of its review of Mr Abd-Al-Rahman’s detention simply because the Defence contradicts it”).

⁴⁵ [First Detention Decision](#), para. 29; [Second Detention Decision](#), paras. 23-24, 28-30.

⁴⁶ ICC-02/05-01/20-95 (“[First Prosecution Detention Observations](#)”), para. 27, Annex 3; ICC-02/05-01/20-209-Conf (public redacted version: ICC-02/05-01/20-209-Red) (“[Second Prosecution Detention Observations](#)”), paras. 14-15.

⁴⁷ ICC-02/05-01/20-309-Conf (ICC-02/05-01/20-309-Red) (“[Third Prosecution Detention Observations](#)”), paras. 12-15.

⁴⁸ [First Detention AD](#), para. 35.

his capacity to mobilise his suspected networks,⁴⁹ he did not raise this argument in his submissions before the Pre-Trial Chamber. In any event, as shown above, the Chamber reasonably assessed the criteria under article 58(1)(a) and 58(1)(b)(ii), as shown above.⁵⁰

15. The Appellant's first ground of appeal should be rejected for the reasons outlined above.

C. Ground 2: The Chamber was not inconsistent as to its reasons for postponing the confirmation hearing

16. The Appellant argues that the Pre-Trial Chamber erred factually by giving different reasons in its Decision as to why it postponed the confirmation of charges hearing, from the reason it actually gave in its decision postponing the hearing ("Confirmation Postponement Decision").⁵¹ Apart from failing to establish the existence of any such discrepancy in the Chamber's reasoning, the Appellant fails to properly substantiate this ground of appeal by explaining how the purported discrepancy would amount to a factual error. The Appellant's failure warrants the summary dismissal of his second ground of appeal.⁵²

17. There is no contradiction in the Chamber's reasoning in both decisions as to its reasons for partially granting the Prosecution's request to postpone the hearing on the confirmation of charges.⁵³ In the Confirmation Postponement Decision, the Pre-Trial Chamber took note of the Prosecution's submissions that it was facing difficulties due to circumstances beyond its control in contacting witnesses and putting in place the necessary protective measures, and stated:⁵⁴

"The Chamber has taken note of the explanations provided by the Prosecutor. It accepts that the Prosecutor has made genuine efforts under difficult circumstances and that it has proved impossible to resolve all issues. At the same time, the **information provided by the Prosecutor suggests there is hope of making some**

⁴⁹ [Appeal](#), para. 15.

⁵⁰ See above para. 13. See further [Decision](#), paras. 23-25 (recalling its previous findings on detention which were based primarily on the criteria of article 58(1)(b)(ii) being met), 37 (finding that 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).

⁵¹ [Appeal](#), paras. 16-17; ICC-02/05-01/20-238 ("[Confirmation Postponement Decision](#)").

⁵² [Reparations AD](#), para. 21 ("[I]n order to justify interference with the decision under appeal, an appellant must demonstrate that the alleged error materially affected the decision"); [First Detention AD](#), para. 16 ("[...] [F]or 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. Failure 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"). See also [Second Detention AD](#), para. 16; ICC-01/04-02/06-2666-Red ("[Ntaganda AJ](#)"), para. 48; ICC-02/11-01/15-1400 ("[Gbagbo & Blé Goudé NCTA AJ](#)"), para. 74.

⁵³ *Contra* [Appeal](#), para. 17.

⁵⁴ [Confirmation Postponement Decision](#), paras. 18-19.

significant further progress in the relatively near future in relation to the 23 witnesses whose security situation has not yet been resolved. Under these circumstances, the Chamber is prepared to grant the Prosecutor some additional time.”⁵⁵

18. Subsequently when considering the Appellant’s submissions on detention, it stated in paragraph 34 of its Decision that:

“the need to put in place [] protective mechanisms was a major element in the Chamber’s decision to grant the second postponement. However the Defence is wrong to suggest that the Chamber did so in the expectation that all witness protection issues would be resolved in this period. The 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. **There was no expectation of a specific result** in this regard.”⁵⁶

19. There is no contradiction in the Chamber’s reasoning in the two decisions. Contrary to the Appellant’s assertion, the Chamber did not refer to or rely upon any “promise” by the Prosecution to implement all necessary witness protection measures by a particular date (nor did the Prosecution convey any such “promise” in requesting the postponement),⁵⁷ and the Chamber did not express any “expectation” that the Prosecution would do so.⁵⁸ The Appellant’s misreading of the Chamber’s reasoning in this regard is regrettable, not least because he relies upon it to make serious and gratuitous accusations against the Prosecution. The Appellant’s claims that the Prosecution made “fallacious” submissions and “abused the confidence” of the Pre-Trial Chamber are manifestly wrong—as is clear from the Chamber’s reasoning—and should be dismissed.⁵⁹

20. There is accordingly no support for the claim that the Pre-Trial Chamber “substituted” new reasons for granting the postponement.⁶⁰ But even if it had done so, it is unclear how this would amount to a factual (or legal) error that had any impact on the Chamber’s decision regarding the Appellant’s continued detention. The Appellant appears to argue that, had the Chamber adhered to its original reasoning in its decision postponing the confirmation hearing, the Chamber would have found that the Prosecution had since reneged on its promises and that

⁵⁵ [Confirmation Postponement Decision](#), para. 23. (emphasis added)

⁵⁶ [Decision](#), para. 34. (emphasis added)

⁵⁷ See generally ICC-02/05-01/20-218-Conf (public redacted version: ICC-02/05-01/20-218-Red) (“[Prosecution Postponement Request](#)”), paras. 16-19.

⁵⁸ [Appeal](#), para. 17.

⁵⁹ *Contra* [Appeal](#), para. 16.

⁶⁰ *Contra* [Appeal](#), para. 17.

the postponement of the confirmation hearing on the basis of those promises constituted an unjustifiable delay attributable to the Prosecution, satisfying the criteria under article 60(4) and warranting Mr Abd-Al-Rahman's release.⁶¹ Setting aside the Appellant's erroneous interpretation of the Chamber's reasoning as discussed above, this argument overlooks that the article 60(4) determination involves two components: (i) a finding that the overall period of pre-trial detention has been unreasonable; and (ii) a finding that this unreasonably long detention was due to the inexcusable delay caused by the Prosecution.⁶² Moreover, even if these two elements are established, release is not automatic: the Trial Chamber *shall consider* releasing the person, with or without conditions.⁶³

21. In this regard, the Appellant made no submissions before the Pre-Trial Chamber to establish that his detention was of an unreasonable length.⁶⁴ Indeed, the unreasonableness of the length of pre-trial detention depends on a variety of factors such as the actual length of detention, the nature of the alleged offences and penalties to be expected in the event of conviction, the difficulties in the investigation of the case and its complexity in respect of the facts and the number of witnesses and the need to obtain evidence abroad, and the manner in which the investigation was conducted.⁶⁵ The challenges faced by the Prosecution in this case were singular, and include *inter alia* the severe limitations on the Prosecution's ability to carry out investigations on the territory of Sudan due to 13 years of non-cooperation from the Government of Sudan,⁶⁶ the time needed to resolve grave witnesses security concerns,⁶⁷ the immense volume of material to be reviewed and disclosed,⁶⁸ and the obstacles in carrying out investigations and preparing for the confirmation hearing in the midst of the Covid-19 pandemic.⁶⁹ Given the unique challenges of this case, there is no indication—nor has the Appellant provided any—that even if the Pre-Trial Chamber found that the Prosecution had somehow reneged on its promises to implement witness protection measures, it would have

⁶¹ [Appeal](#), para. 17.

⁶² ICC-01/04-01/10-428 (“[Mbarushimana Third Interim Release Decision](#)”), para. 38 (stating that the article 60(4) determination involves two components: (i) whether the overall period of pre-trial detention has been unreasonable; and, if so (ii) whether this unreasonably long detention was due to ‘inexcusable delay’ caused by the Prosecution).

⁶³ Article 60(4), [Statute](#).

⁶⁴ See generally [Third Defence Detention Observations](#), paras. 26-31.

⁶⁵ K. Khan, “Article 60” in K. Ambos & O. Triffterer (eds.), *The Rome Statute of the International Criminal Court A Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 1482, mn. 18, citing jurisprudence of the European Court of Human Rights.

⁶⁶ [Prosecution Postponement Request](#), paras. 13, 21.

⁶⁷ [Prosecution Postponement Request](#), para. 12.

⁶⁸ [Prosecution Postponement Request](#), paras. 31-32.

⁶⁹ [Prosecution Postponement Request](#), paras. 40-47.

found the Appellant's length of detention to be unreasonable, and that this was caused by the Prosecution's inexcusable delay. The second ground of appeal should accordingly be rejected.

D. Ground 3: The Pre-Trial Chamber reasonably found that the Prosecution's lack of response to the Defence Admissibility Motion was irrelevant to the Chamber's assessment under article 58(1)

22. In his third ground of appeal, the Appellant argues that the Pre-Trial Chamber erred in law by failing to find that there was no longer evidence to support a finding under article 58(1)(a) because the Prosecution had not filed a response to the Defence Admissibility Motion which challenged the admissibility of all witness statements disclosed by the Prosecution to-date.⁷⁰ According to the Appellant, the Prosecution's lack of response to the Motion was a new circumstance which indicated that the Prosecution no longer supported the admissibility of its evidence which would be required to meet the standard in article 58(1)(a).⁷¹ The Appellant merely repeats on appeal the same arguments that he made before the Pre-Trial Chamber both in his observations and his request to convene an urgent hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence,⁷² which the Chamber reasonably considered and rejected.⁷³ The Appellant's third ground of appeal fails to identify any error in the Chamber's reasoning and should be rejected.

23. *First*, the Pre-Trial Chamber correctly found that the mere filing of the Defence Admissibility Motion "is incapable of changing the factual or legal situation of Mr Abd-Al-Rahman, let alone the security threats faced by witnesses,"⁷⁴ and the Chamber is not obliged to act as if it had already granted the Motion.⁷⁵ And as the Chamber stated, once it has ruled on the Motion, it will draw all the necessary consequences from that ruling at that time.⁷⁶ The Appellant fails to identify any error in this approach.

24. Instead, the Appellant claims that the Pre-Trial Chamber misunderstood his submissions which alleged that the change of circumstance was the *Prosecution's failure to respond* to the

⁷⁰ [Appeal](#), paras. 18-20.

⁷¹ [Appeal](#), para. 20.

⁷² [Third Defence Detention Observations](#), paras. 16, 22; ICC-02/05-01/20-336 ("[Defence Urgent Hearing Request](#)"), paras. 2-8.

⁷³ [Decision](#), para. 29.

⁷⁴ [Decision](#), para. 32.

⁷⁵ [Decision](#), para. 29.

⁷⁶ [Decision](#), para. 29.

Motion.⁷⁷ But this claim rests on the incorrect belief that the Prosecution’s lack of response must necessarily be interpreted as a concession by the Prosecution regarding the inadmissibility of its own evidence; that the lack of response necessarily strengthens his arguments in the Motion; and/or that this should lead the Pre-Trial Chamber to grant the Motion. However the fact that the Prosecution did not respond to a Defence filing does not imply that the Prosecution does not object to it, much less that the Chamber would have to accede to the Defence’s request, as the Chamber rightly acknowledged.⁷⁸

25. *Second*, the Appellant is well aware that the Prosecution does not accept the Appellant’s arguments in the Defence Admissibility Motion. The Defence Admissibility Motion⁷⁹ raises the same arguments that the Defence raised in its previous observations on detention and its appeal of the Second Detention Decision.⁸⁰ The Prosecution set out its opposition to this argument in its response to that appeal in January 2021.⁸¹ The mere fact that the Prosecution considered it unnecessary to repeat its views by filing a response to the Defence Admissibility Motion does not signal a change in its position, much less that it has abandoned support for the admissibility of its evidence. While the Prosecution intended to file a response opposing the Appellant’s urgent request to convene a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence, the Pre-Trial Chamber rejected that request before the Prosecution had an opportunity to file its response.⁸² Moreover, while the Appellant claims that the Prosecution’s lack of response demonstrates a waiver of the support for the admissibility of its evidence under the Court’s jurisprudence, the *Katanga* decision that he cites does not support, let alone relate to, this proposition.⁸³ In the circumstances, it is an overstretch for the Appellant

⁷⁷ [Appeal](#), para. 19.

⁷⁸ [Decision](#), para. 32. *Contra* [Appeal](#), paras. 18-19.

⁷⁹ ICC-02/05-01/20-322 (“[Defence Admissibility Motion](#)”).

⁸⁰ ICC-02/05-01/20-213-Conf (public redacted version: ICC-02/05-01/20-213-Red) (“[Second Defence Detention Observations](#)”), paras. 16, 30-37; ICC-02/05-01/20-247-Conf (public redacted version: ICC-02/05-01/20-247-Red) (“[Second Detention Appeal](#)”), paras. 11, 13 (alleging that the Prosecution’s failure to physically mark its witness statements as “confidential” violated the Court’s Information Protection Policy and undermines the integrity and probative value of the evidence, rendering it inadmissible).

⁸¹ ICC-02/05-01/20-252-Conf (public redacted version: ICC-02/05-01/20-252-Red) (“[Prosecution Second Detention Appeal Response](#)”), para. 15(b) (explaining that the Prosecution indicates the confidentiality of the statements *via* their metadata in e-court where the Appellant receives disclosure of them and that the Appellant is expressly notified of the statements’ confidential status when they are notified to him).

⁸² [Decision](#), p. 14.

⁸³ [Appeal](#), para. 18 (fn. 77), citing ICC-01/04-01/07-1135-tENG (“[Katanga Witness Decision](#)”), paras. 2, 9, 12, 16-17 (this decision concerned time limits for disclosure, and the Chamber found that while the Prosecution’s deadline for disclosure had lapsed for a number of documents, they nonetheless merited disclosure as the Defence would not suffer any prejudice).

to claim that the “*seule réponse logique*” for the Chamber was to find that article 58(1)(a) was no longer supported.⁸⁴ The Appellant’s third ground of appeal should be rejected.

E. Ground 4: The Pre-Trial Chamber reasonably found that there was no impact of the pending Defence motions on the Appellant’s detention

26. The Appellant argues in his fourth ground of appeal that the Pre-Trial Chamber’s failure to render decisions on pending Defence motions “aggravates” the prejudice caused by the undue delay attributable to the Prosecution under article 60(4) of the Statute.⁸⁵ The Appellant claims that the Pre-Trial Chamber misinterpreted the Appellant as dictating to the Chamber when it must issue its decisions, and that this misinterpretation led the Chamber to ignore the impact of its outstanding decisions on the Appellant’s rights.⁸⁶ This, the Appellant claims, gave rise to an error of fact and two errors of law.⁸⁷ The Appellant’s arguments regarding the nature of the errors and their impact on the Decision are unclear, unpersuasive and rely on inaccurate interpretations of the Decision.

27. *First*, the Appellant claims that the Chamber erred in fact by misinterpreting his submissions as attempting to impose timeframes on the Chamber, and that the Defence had only observed that the lack of decisions impacted on his time and ability to prepare for the confirmation hearing.⁸⁸ However in his observations on detention, the Appellant 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*”.⁸⁹ The Pre-Trial Chamber had therefore *correctly* interpreted the Appellant as arguing that the time taken to deliberate on pending Defence motions was “excessive” and underscored the unreasonable nature of the delay.⁹⁰

28. *Second*, the Appellant does not explain how the abovementioned alleged error of fact would give rise to an error of law.⁹¹ To the extent that a delay in deciding on outstanding Defence motions impacts the Appellant’s ability to prepare for the confirmation hearing, it is unclear how this would impact the Pre-Trial Chamber’s decision to maintain the Appellant in

⁸⁴ *Contra* [Appeal](#), para. 20.

⁸⁵ [Appeal](#), para. 21.

⁸⁶ [Appeal](#), para. 22.

⁸⁷ [Appeal](#), paras. 23-24.

⁸⁸ [Appeal](#), para. 23.

⁸⁹ [Third Defence Detention Observations](#), para. 28.

⁹⁰ *Contra* [Appeal](#), para. 23.

⁹¹ [Appeal](#), para. 23.

detention. As set out by the Pre-Trial Chamber, the applicable law relevant to maintaining the Appellant in detention does not include as a relevant consideration the impact on a suspect's preparation for the confirmation hearing.⁹² To the extent that the Appellant suggests that the outstanding decisions might force him to seek a postponement of the confirmation hearing (thus prolonging his pre-trial detention), that argument is purely speculative and could have had no bearing on the Chamber's decision to maintain him in detention.⁹³

29. *Third*, the Appellant alleges that the Chamber erred in law by failing to take into account the impact on the outstanding decisions on his right to appear within a reasonable time for confirmation hearing and his right not to be detained for an unreasonable time due to unjustified delay attributable to the Prosecution.⁹⁴ This appears to be a permutation of the arguments already made by the Appellant in his Appeal. As noted above, to the extent the Appellant foreshadows a need to further postpone the confirmation hearing due to the Chamber's delay, this consideration is speculative and could not have had an impact on the Decision;⁹⁵ the Appellant's allegation regarding unjustified delay attributable to the Prosecution is unfounded;⁹⁶ and the Appellant has not otherwise demonstrated the relevance to the decision to maintain him in detention of the impact of the outstanding decisions and his ability to prepare for the confirmation hearing.⁹⁷

30. The Appellant merely disagrees with the Decision and fails to show any error. His fourth ground of appeal should be rejected.

F. Ground 5: The Pre-Trial Chamber reasonably found that there were no grounds to warrant the Appellant's release on medical grounds

31. The Appellant claims in his fifth ground of appeal that the Pre-Trial Chamber erred in law by concluding that the Registrar is exclusively vested with the function of monitoring and informing the Chamber of detainees' health and requesting their liberty.⁹⁸ The Appellant misinterprets the Decision. The Chamber did not find that the Registrar has such a role, let alone that it has this role exclusively. The Chamber only noted that the Registrar is competent

⁹² [Decision](#), paras. 17-22.

⁹³ [Appeal](#), para. 24 (suggesting that the start date of the confirmation hearing is placed at risk given the number of pending motions).

⁹⁴ [Appeal](#), para. 24.

⁹⁵ *See above* para. 28.

⁹⁶ *See above* paras. 20-21.

⁹⁷ *See above* para. 28.

⁹⁸ [Appeal](#), para. 26.

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”.⁹⁹ There is nothing controversial in the Chamber’s observation; it 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.¹⁰⁰

32. The Appellant’s argument that this error caused the Chamber to ignore his submissions on Covid-19 are unsubstantiated.¹⁰¹ The Chamber did not ignore the Appellant’s arguments on Covid-19 or dismiss them *in limine*.¹⁰² It took note of the Appellant’s arguments¹⁰³ and found in the circumstances that there was no reason to release Mr Abd-Al-Rahman on medical grounds.¹⁰⁴

33. The Chamber’s conclusion was reasonable in light of the following factors: [REDACTED];¹⁰⁵ [REDACTED];¹⁰⁶ despite having received appellate guidance to do so,¹⁰⁷ the Appellant did not refer to or produce any medical records in its submissions before the Pre-Trial Chamber on which the Chamber could base a decision to release him on medical grounds;¹⁰⁸ the Appellant did not produce any records to substantiate his claim that [REDACTED];¹⁰⁹ and the Appellant offered speculative opinion [REDACTED].¹¹⁰ The Appellant’s failure to properly substantiate his submissions on Covid-19 can also not be justified by his reliance on the inaccurately portrayed ninth *enseignement*.¹¹¹

34. In the circumstances, it was reasonable for the Chamber not to order Mr Abd-Al-Rahman’s release on medical grounds, with or without conditions. The Appellant’s reference to the Council of Europe’s statement of principles relating to the treatment of detainees in the

⁹⁹ [Decision](#), para. 36. (emphasis added)

¹⁰⁰ See e.g. [Regulations of the Registry](#), regulation 155(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. [...]”), regulation 155(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”).

¹⁰¹ [Appeal](#), para. 26.

¹⁰² *Contra* [Appeal](#), para. 26.

¹⁰³ [Decision](#), paras. 15, 36, citing to [Third Defence Detention Observations](#), paras. 32-37.

¹⁰⁴ [Decision](#), para. 36.

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [Second Detention AD](#), paras. 39-40.

¹⁰⁸ See generally [Third Defence Detention Observations](#), paras. 32-37.

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ See *above* para. 9.

context of the Covid-19 pandemic¹¹² adds no weight to his appeal. As the Appeals Chamber has held, this statement of principles is non-binding and does not *require* the release of detainees, but in fact suggest measures that can be taken to protect the health and safety of detained persons *while in detention*.¹¹³ The Appellant again ignores this aspect of the Council of Europe guidance.

35. The Appellant's fifth ground of appeal merely reflects his disagreement with the Pre-Trial Chamber's assessment, and should be rejected.

CONCLUSION AND RELIEF SOUGHT

36. For the foregoing reasons the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal and affirm the Decision.



Fatou Bensouda, Prosecutor

Dated this 12th day of May 2021
At The Hague, The Netherlands

¹¹² [Appeal](#), para. 26, citing Council of Europe, "[Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease \(COVID-19\) pandemic](#)", 20 March 2020.

¹¹³ [Second Detention AD](#), para. 41.