



Original: English

No.: ICC-02/05-01/20
Date: 23 November 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

**Prosecution Response to the Defence
“*Mémoire d’appel de la décision ICC-02/05-01/20-502*”**

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INTRODUCTION

1. Mr Abd-Al-Rahman's appeal¹ against the decision of Trial Chamber I ("Chamber") to maintain his detention² should be rejected.
2. In its Decision, the Chamber accurately summarised and incorporated the findings on detention by the Pre-Trial Chamber in its previous four decisions on detention, all upheld by the Appeals Chamber.³ It then correctly recalled that under article 60(3), a chamber may modify a previous ruling on detention if it is satisfied that changed circumstances (*i.e.* a new fact or a change in some or all of the facts underlying a previous decision on detention) so require.⁴ It also correctly held that the Prosecution does not have to re-establish the same underlying facts.⁵
3. On this basis the Chamber carefully reviewed the observations submitted by the Parties and found: *first*, that the confirmation of 31 charges against Abd-Al-Rahman is not a changed circumstance that would support conditional release;⁶ *second*, that neither the 7 December 2020 Investigator's Report⁷ nor the video showing Abd-Al-Rahman talking to a crowd⁸ undermine the reliability of Annex 3⁹ (an article reporting Abd-Al-Rahman's threat to human rights activists, which was relied upon by the Pre-Trial Chamber in its Interim Release Decision);¹⁰ *third*, that the information that Abd-Al-Rahman was in breach of Sudanese law when surrendering himself to the Court is irrelevant to the Chamber's review of his detention;¹¹ *fourth*, that in light of the limited information available, the events currently taking place in Sudan have no impact on the Decision;¹² and *fifth*, that the fact that the trial is set to commence on 5 April 2022 does not constitute a change in circumstances warranting the release of the Accused.¹³ Based on this legally sound and factually reasonable analysis, the Chamber concluded that there was no change in circumstances warranting Abd-Al-Rahman's release, with or without

¹ ICC-02/05-01/20-518 ("[Appeal](#)").

² ICC-02/05-01/20-502 ("[Decision](#)").

³ [Decision](#), paras. 12-16.

⁴ [Decision](#), paras. 20-21.

⁵ [Decision](#), para. 21.

⁶ [Decision](#), paras. 22-23.

⁷ ICC-02/05-01/20-495-Conf-Anx1 ("[Investigator's Report](#)").

⁸ DAR-OTP-0215-2697 ("Video"); DAR-OTP-0215-7148 ("Video English Transcripts").

⁹ [Decision](#), paras. 24-26.

¹⁰ ICC-02/05-01/20-115 ("[Interim Release Decision](#)"), para. 29 referring ICC-02/05-01/20-95-Anx3 ("[Annex 3](#)") to ICC-02/05-01/20-95 ("[Prosecution's Response to Request for Interim Release](#)").

¹¹ [Decision](#), para. 27.

¹² [Decision](#), para. 28.

¹³ [Decision](#), para. 31.

conditions.¹⁴ The Chamber further properly held that Abd-Al-Rahman's right to family visits does not outweigh the factors necessitating continued detention under article 58(1)(b).¹⁵

4. The Defence fails to show any error of law or fact in the Decision. Its arguments misrepresent the Chamber's reasoning,¹⁶ express mere disagreements with the Decision,¹⁷ and in any event fail to show any error.¹⁸

SUBMISSIONS

A. Grounds 1 and 2: the Chamber correctly found that the confirmation of charges against Abd-Al-Rahman does not support his conditional release

5. On 9 July 2021, the Pre-Trial Chamber confirmed 31 charges against Abd-Al-Rahman including multiple charges of murder, rape, torture and persecution as war crimes and/or crimes against humanity.¹⁹ In its Decision, the Chamber correctly found, *first*, that "the confirmation of 31 charges against the accused is a factor that militates in favour of continued detention"²⁰ and, *second*, that "the number, nature and gravity of the charges means that if convicted, a lengthy sentence is likely to be imposed on the accused [a factor that] increases the risk that the accused may abscond if released".²¹ The Chamber rejected the Defence submissions²² and concluded that "the confirmation of charges [...] is not a changed circumstance that would support conditional release".²³

6. In his first and second grounds of appeal the Defence argues that the Chamber erred in fact and in law by finding that the confirmation of 31 charges against Abd-Al-Rahman is a factor that militates in favour of his continued detention. As explained below, the Defence fails to show any error warranting appellate intervention.

¹⁴ [Decision](#), para. 32.

¹⁵ [Decision](#), para. 30.

¹⁶ See for instance below paras. 12, 14, 15, 17, 22.

¹⁷ See for instance below paras. 16, 24.

¹⁸ See for instance below paras. 11, 15, 16, 26.

¹⁹ [Confirmation Decision](#), para. 133.

²⁰ [Decision](#), para. 22.

²¹ [Decision](#), para. 23.

²² ICC-02/05-01/20-495 ("[Defence Observations](#)"), para. 12.

²³ [Decision](#), para. 22.

i. Ground 1: The Chamber made no factual errors

7. The Defence submits that the Chamber erred in fact because it reached its conclusion based on “decisions taken in other cases” (“*sur la base de décisions rendues dans d’autres affaires devant la Cour*”) without “balancing” the confirmation of charges with circumstances unique to Abd-Al-Rahman²⁴—*e.g.* his surrender to the Court and the alleged risks of incurring in criminal prosecution if returning to Sudan.²⁵ The Defence’s arguments misrepresent the Decision, as well as the test under article 60(3).²⁶

8. *First*, contrary to the Defence’s contention,²⁷ the Chamber did not uncritically apply the Court’s jurisprudence and did not ignore the circumstances of the case at hand. Rather, having incorporated the previous findings on detention made by the Pre-Trial Chamber,²⁸ the Chamber considered whether the recent Confirmation Decision in this case,²⁹ as well as the number, nature and gravity of the charges confirmed against Abd-Al-Rahman,³⁰ supported his release (with or without conditions). Thus, the Chamber did not “base its conclusion” on the Court’s previous jurisprudence, but on the facts of this case. The Chamber then properly noted that its findings regarding the increased risk of absconding in this case were consistent with “longstanding jurisprudence of the Court.”³¹ There is no error in the Chamber’s reasoning.

9. *Second*, contrary to the Defence’s submission,³² the Chamber was not required to re-address Abd-Al-Rahman’s voluntary surrender in its assessment under article 60(3). The Pre-Trial Chamber took into account Abd-Al-Rahman’s voluntary surrender when it denied his interim release in August 2020.³³ The Chamber, in turn, recalled Abd-Al-Rahman’s voluntary surrender,³⁴ as well as the Pre-Trial Chamber’s Interim Release Decision,³⁵ and was thus well aware of this circumstance.

²⁴ [Appeal](#), para. 2.

²⁵ [Appeal](#), paras. 3-5.

²⁶ [Appeal](#), para. 6.

²⁷ [Appeal](#), para. 2.

²⁸ [Decision](#), para. 12.

²⁹ [Decision](#), para. 22.

³⁰ [Decision](#), para. 23.

³¹ [Decision](#), para. 22.

³² [Appeal](#), paras. 3-4.

³³ ICC-02/05-01/20-115 (“[First Detention AD](#)”), para. 10.

³⁴ [Decision](#), para. 2.

³⁵ [Decision](#), para. 13.

10. *Third*, the Defence fails to properly substantiate its submission³⁶ and to explain why Abd-Al-Rahman’s potential prosecution in Sudan would be a relevant consideration when assessing whether the confirmation of charges impacts the risk that he may abscond if released—or more in general whether his detention should continue. The Defence appears now to argue that, if released, Abd-Al-Rahman would not abscond, because if captured he could be surrendered to Sudan where, it is suggested, he faces the risk of arrest, detention and execution.³⁷ However, the Defence fails to explain why this circumstance would prevent Abd-Al-Rahman from absconding or otherwise obstructing or endangering the investigation or the proceedings.³⁸ Contrary to the Defence’s argument, the Chamber did not refuse “*de se prononcer sur cette question*”³⁹ but simply rejected the Defence’s unsubstantiated submission, and found it to be irrelevant.⁴⁰ The Defence fails to show why this conclusion was unreasonable.⁴¹

11. The Defence’s submissions under Ground 1 should be dismissed as they fail to show any error of law or fact.

ii. Ground 2: The Chamber made no legal errors

12. Under Ground 2, the Defence submits that the Chamber reversed the “*principe selon lequel la liberté constitue le principe et la détention l’exception*”, alleging that the Chamber’s finding that the confirmation of charges increased the risk that an accused may abscond would leave no alternative but continuing detention for the entire duration of the trial.⁴² The Defence’s submission is based on the wrong premise that both the Chamber, and the Court’s jurisprudence it relied upon, establish that the confirmation of charges, in and of itself, *justifies* the continuation of detention (“*la confirmation de nombreuses charges et la perspective d’une lourde peine justifient le maintien en détention*”).⁴³ To the contrary, the Chamber found that detention continues to be justified, based on the Pre-Trial Chamber’s prior well established

³⁶ [Appeal](#), para. 4-5.

³⁷ [Appeal](#), paras. 4-5, 19. Before the Chamber the Defence advanced what appears to be a the different argument, namely that the sanctions he allegedly faces in Sudan for having cooperated with the Court requires the Chamber to consider his voluntarily surrender a “*facteur déterminant en faveur de sa mise en liberté*.” ([Defence Observations](#), para. 8).

³⁸ See also below, para. 24.

³⁹ [Appeal](#), para. 5. The Defence misrepresents the Decision in that the Chamber did not refused “*de se prononcer sur cette question*”. Rather, it reasonably found the Defence’s submissions on this point were irrelevant to the issue at hand.

⁴⁰ [Decision](#), para. 27. See also [Defence Observations](#), para. 8.

⁴¹ See also below paras. 23-25 .

⁴² [Appeal](#), para.7.

⁴³ [Appeal](#), paras. 11, 12.

findings under article 58(1) absent any change in circumstance warranting release⁴⁴ and that the recent confirmation of charges against him was an additional “*factor* that militates in favour of continued detention”.⁴⁵ Based on this misunderstanding that turns the logic of article 60(3) reviews on its head, the Defence argues that the Chamber erred in law by finding that “*la confirmation des charges justifie le maintien en detention*”.⁴⁶ However, this is not what the Chamber did.

13. Contrary to the Defence’s understanding, there is no suggestion in the Decision (or in the cited jurisprudence) that the confirmation of charges *justifies* by default the continued detention of an accused, nor that Abd-Al-Rahman’s continued detention is justified by such confirmation.⁴⁷ The scope of the Chamber’s inquiry under article 60(3) is to determine whether any *new* circumstance requires to modify previous rulings on detention and not to re-establish whether Abd-Al-Rahman’s detention is justified and on which basis. In other words, the confirmation of charges is not “the basis” for Abd-Al-Rahman’s detention, as wrongly assumed by the Defence.

14. Further, the Defence argues that it was “speculative” for the Chamber to consider the sentence likely to be imposed, and contrary to the presumption of innocence because the accused may be acquitted.⁴⁸ The Defence again misrepresents the Chamber’s reasoning⁴⁹ as well as the relevant jurisprudence.⁵⁰ The Chamber reasonably considered that the *likelihood* of a lengthy sentence “if convicted” increases the risk *now* that an accused may abscond. It is therefore the current assessment of the possibility of a lengthy overall sentence, and not the sentence that may eventually be imposed (if any), that creates a strong incentive *today* for the Accused to abscond. Whether the accused will eventually be acquitted is beside the point.

⁴⁴ [Decision](#), para. 32.

⁴⁵ [Decision](#), para. 22 (emphasis added).

⁴⁶ [Appeal](#), para. 13.

⁴⁷ *Contra* [Appeal](#), paras. 7, 11-13.

⁴⁸ [Appeal](#), paras. 9-11, 13.

⁴⁹ [Decision](#), para. 23.

⁵⁰ See for instance *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](#), para. 70; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence request for interim release, 29 May 2020, [ICC-01/12-01/18-786-Red](#), para. 58; *The Prosecutor v. Laurent Gbagbo*, Sixth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, 11 July 2014, [ICC-02/11-01/11-668](#), para. 41; *The Prosecutor v. Germain Katanga*, Second Review of the Decision on the Conditions of Detention of Germain Katanga, 12 December 2008, [ICC-01/04-01/07-794-tENG](#), para. 10.

15. In sum, the Defence submissions are premised on misrepresentations of the Chamber's reasoning and the jurisprudence of the Court as well as the law under article 60(3). Ground 2 should be dismissed as it fails to show any error of law or fact in the Decision.

B. Ground 3: The Chamber reasonably assessed the Investigator's Report, the Video and the Accused's alleged breach of Sudanese law

16. Under its third ground of appeal, the Defence expresses its disagreement with three of the Chamber's findings of fact. Two of them relate to the reliability of Annex 3 (an article reporting Abd-Al-Rahman's threat to human rights activists, which was relied upon by the Pre-Trial Chamber in its Interim Release Decision)⁵¹ and one relates to the Accused's alleged breach of Sudanese law.⁵² However, the Defence fails to show any error of law or fact.

i. The Chamber reasonably found that the Investigator's Report and the Video do not undermine Annex 3

17. At the outset, the Prosecution notes that the Defence again misrepresents the Pre-trial Chamber's Interim Release Decision, by suggesting that Annex 3 is the "*seul élément de preuve*" supporting that Chamber's finding that Abd-Al-Rahman's detention was justified to ensure that he did not obstruct or endanger the investigation or the proceedings.⁵³ As the Appeals Chamber noted in a previous appeal on release in this same case, "Abd-Al-Rahman's submission that Annex 3 was the sole basis underlying [the Interim Release Decision] appears to be based on a misreading" of the Interim Release Decision.⁵⁴ Rather, the Pre-Trial Chamber relied "on various factors holistically, including, in addition to the information in Annex 3, the information in the two warrants of arrest on Abd-Al-Rahman's position and connections, as well as the Prosecutor's inability to protect witnesses in Darfur".⁵⁵ Therefore, as the Appeals Chamber then concluded, "any limitations concerning the evidentiary value that Annex 3 might have if it were to be considered in isolation are irrelevant".⁵⁶ For this reason alone, the Defence's argument should be dismissed.

⁵¹ [Appeal](#), paras. 14-18, 20.

⁵² [Appeal](#), paras. 14-16, 19-20.

⁵³ [Appeal](#), para. 17.

⁵⁴ ICC-02/05-01/20-177 ("[First Detention AD](#)"), para. 35.

⁵⁵ [First Detention AD](#), para. 35.

⁵⁶ [First Detention AD](#), para. 35.

18. In any event, the Chamber reasonably found that neither the Investigator's Report⁵⁷ nor the Video allegedly depicting the event reported in Annex 3⁵⁸ undermine the reliability of that Annex,⁵⁹ as found by the Pre-Trial Chamber in its Interim Release Decision.⁶⁰

19. *First*, the Chamber reasonably found⁶¹ that the information contained in the recently disclosed Investigator's Report⁶² does not refute the allegation that the Accused threatened human rights activists in January 2020.⁶³ The Defence repeats its submission that the Investigator's Report shows that Abd-Al-Rahman was "on the run" from late 2019 and that this circumstance "*était difficilement réconciliable*" with him threatening human rights activists in January 2020.⁶⁴ However, the Investigator's Report does not state that Abd-Al-Rahman was "on the run", nor does it contain any other information that may undermine Annex 3.⁶⁵ In addition, the Defence fails to substantiate its submission and explain why being "on the run" could be "hardly reconciled" with threatening human rights activists. Further, that the Sudanese authorities had issued an arrest warrant against Abd-Al-Rahman as of December 2019, and that since then he might have been "on the run" as he wanted to avoid capture in Sudan and confinement in a prison in Khartoum, was discussed before the Pre-Trial Chamber⁶⁶ and does therefore not constitute a new circumstance. The Chamber sufficiently reasoned its decision on the basis that "it was unable to accept that the contents of [the Investigator's Report] are capable of providing such corroboration"⁶⁷ to the Defence's argument.

20. *Second*, the Chamber reasonably concluded that the Video—showing Abd-Al-Rahman talking to a crowd—, far from undermining the reliability and credibility of Annex 3,⁶⁸ "is capable of lending support to the Prosecution's submission that the accused, if granted conditional release, presented a potential or actual risk to witnesses because of his previous position of power and the likelihood that he still has supporters who may have access to actual

⁵⁷ [Investigator's Report](#).

⁵⁸ DAR-OTP-0215-2697 ("Video"); DAR-OTP-0215-7148 ("Video English Transcripts").

⁵⁹ [Decision](#), paras. 24-26.

⁶⁰ [Interim Release Decision](#), para. 29 referring to [Annex 3](#) to [Prosecution's Response to Request for Interim Release](#).

⁶¹ [Decision](#), para. 24.

⁶² [Defence Observations](#), para. 7; [ICC-02/05-01/20-T-015-ENG](#), 6 :12-23, 9:5-8.

⁶³ [Interim Release Decision](#), paras. 29 referring to [Annex 3](#) to [Prosecution's Response to Request for Interim Release](#).

⁶⁴ [Appeal](#), para. 17; [ICC-02/05-01/20-T-015-ENG](#), 9:5-8.

⁶⁵ [Appeal](#), para. 17; [ICC-02/05-01/20-T-015-ENG](#), 6 :12-23, 9:5-8.

⁶⁶ [Prosecution's Response to Request for Interim Release](#), para. 17.

⁶⁷ [Decision](#), para. 24.

⁶⁸ *Contra* [Appeal](#), para. 18; [ICC-02/05-01/20-500](#).

or potential witnesses”.⁶⁹ The Defence argues that the Chamber erred in fact because the Video would be incompatible with the description of the events included in Annex 3.⁷⁰

21. The Defence’s submission is based on the flawed premise that the Video captures the entirety of Abd-Al-Rahman’s address to the community meeting in Raheed Al-Bardi on 23 January 2020. However, while it is the Prosecution’s position that the Video was most likely taken at that event, there is nothing to suggest that it covered it in its entirety. For this reason, the fact that the Video and the article in Annex 3 are not entirely aligned does not in any way undermine the credibility and reliability of those aspects of Annex 3 that report parts of Abd-Al-Rahman’s speech which were not recorded in the Video—including that “killing is not a problem because he had previously killed more than these two Human Rights Defenders”.⁷¹

22. Further, the Defence’s argument that the Chamber provided no reasoning for its conclusion⁷² misrepresents the Decision. The Chamber explained that the Video, taken in conjunction with Annex 3, further supports prior findings about Abd-Al-Rahman’s previous position of power and likelihood that he still has supporters who may have access to actual or potential witnesses.⁷³ The Defence disregards the Chamber’s analysis and merely asserts that no reasonable Chamber could have reached this conclusion. However, it does not show any error in the Chamber’s decision.

ii. The Chamber reasonably concluded that the information that the Accused was in breach of Sudanese law is irrelevant to the review of his detention

23. *Third*, the Chamber reasonably concluded that the information that the Accused was in breach of Sudanese law when he surrendered himself to the Court was irrelevant to the review of his detention.⁷⁴ The Defence argues that the Chamber erred by merely referring to the Defence’s “submissions” that cooperation with the Court constituted a criminal offence under Sudanese law at the time, while this had been confirmed by several Registry reports.⁷⁵

⁶⁹ [Decision](#), paras. 25-26. In the Video, Abd-Al-Rahman is depicted stating: “I’d have stabbed and killed any individual who mocked Rehed al-Birdi or denigrated the teacher.”; “If the people who’re speaking out now - and before- don’t stop, I’ll grab that individual, tie him up and then, by Allah, I’ll take him over there to Hamdok himself” (See Video English Transcripts, p.2 lines 45-46, 48-50).

⁷⁰ [Appeal](#), para. 18.

⁷¹ [Annex 3](#), p.1.

⁷² [Appeal](#), para. 19.

⁷³ [Decision](#), para. 26 referring to [Interim Release Decision](#), para. 29 and [First Detention AD](#), para. 35.

⁷⁴ [Decision](#), para. 27.

⁷⁵ [Appeal](#), para. 19, fn. 44.

However, the Chamber did not question the veracity of this fact, but simply held that it was irrelevant to assessing whether a change in circumstances warranted the release of the accused pursuant to article 60(3).⁷⁶

24. In addition, the Defence argues that the Chamber erred in fact and in law by failing to provide a reasoned decision. According to the Defence, the Chamber did not engage with the merits of its arguments that by surrendering himself to the Court, Abd-Al-Rahman was in breach of Sudanese law applicable at the time, which exposed him to the risk of capital punishment if he absconded and was returned to Sudan after being captured.⁷⁷ This argument is based on a number of hypothetical premises,⁷⁸ and therefore cannot show any error in the Chamber's reasoning. Further, and as noted above, the Chamber reasonably held that there was no logical link between the Defence's argument and the issue at hand, namely whether there was a change in circumstances that affected the risks under article 58(1)(b) that warranted Abd-Al-Rahman's release.⁷⁹ The Defence disagrees with the Chamber's conclusion and merely asserts that no reasonable trier of fact could have failed to see the relevance of its arguments. This is plainly insufficient to show any error in the Chamber's decision.

25. The Appeals Chamber of the ICTY and ICTR has repeatedly held that it will summarily dismiss arguments where an appellant claims that a chamber "should have reached a particular conclusion without advancing any evidence in support [or otherwise makes] undeveloped arguments and alleged errors [...]".⁸⁰ It has also held that it will summarily dismiss arguments "where [an] appellant merely asserts that the Trial Chamber failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Trial Chamber did."⁸¹ The Appeals Chamber of the Court should consider following this practice and summarily rejecting the Defence's unsubstantiated argument.

⁷⁶ [Decision](#), para. 27.

⁷⁷ [Appeal](#), para. 19.

⁷⁸ [Appeal](#), para. 19. Abd-Al-Rahman's argument assumes that he would be provisionally released to a third state, other than Sudan, from which he would then be transferred to Sudan, if he was captured after absconding. However, no third State has offered to receive Abd-Al-Rahman. In addition, if *arguendo* Abd-Al-Rahman were to abscond and then be apprehended in a third State, he would be transferred to the Court, and not to Sudan, as he would have been provisionally released to the third State by the Court.

⁷⁹ [Decision](#), para. 27.

⁸⁰ [Krajišnik AJ](#), paras. 26-27. See also [Galić AJ](#), para. 297; [Martić AJ](#), paras. 19-20; [Strugar AJ](#), paras. 21-22; [Halilović AJ](#), para. 13; [Blagojević and Jokić AJ](#), para. 11; [Brđanin AJ](#), para. 15; [Gacumbitsi AJ](#), para. 10.

⁸¹ [Krajišnik AJ](#), para. 19. See also [Brđanin AJ](#), para. 24; ; [Galić AJ](#), paras. 257-258.

C. Ground 4: The Chamber properly found that Abd-Al-Rahman's right to family visits does not outweigh the factors necessitating continued detention

26. The Chamber correctly held that Abd-Al-Rahman's right to family visits does not outweigh the identified factors necessitating continued detention under article 58(1)(b),⁸² and reasonably noted that the Defence has not made a request to the Registry for the organisation of video-calls between Abd-Al-Rahman and his family.⁸³ The Defence's submissions under Ground 4 fail to show any error of law or fact.

27. The Defence argues that the Chamber erred in two respects. First, that the Chamber violated Abd-Al-Rahman's right to family visits, and that this alone rendered his continued detention illegal.⁸⁴ Second, that the Chamber erred by noting that the Defence had not requested the Registry to set up video-calls between Abd-Al-Rahman and his family. According to the Defence, the absence of video-calls was irrelevant to determining the legality of continued detention, because Abd-Al-Rahman has a right to receive face-to-face family visits.⁸⁵ These arguments, which will be addressed jointly in the following paragraphs, should be rejected.

28. The Chamber did not violate Abd-Al-Rahman's right to family visits. The Defence's argument regarding Abd-Al-Rahman's right to family visits did not relate to any of the circumstances that formed the basis for detaining him. Therefore, it did not amount to a changed circumstance under article 60(3) that would warrant Abd-Al-Rahman's release.⁸⁶ The Chamber nevertheless acknowledged Abd-Al-Rahman's right to family visits and noted that the Court has a positive obligation to render such right effective.⁸⁷ It then balanced the identified risks under articles 58(1)(b) against Abd-Al-Rahman's right to family visits and concluded that the latter did not outweigh other factors necessitating Abd-Al-Rahman's continued detention.⁸⁸ The Chamber's balancing exercise was reasonable and correct. In fact, the Defence does not challenge it.

29. In addition, in this case Abd-Al-Rahman has failed to first pursue the separate administrative process to ensure that his right to family visits is given effect. Instead, it

⁸² [Decision](#), para. 30.

⁸³ [Decision](#), para. 30.

⁸⁴ [Appeal](#), paras. 22, 24.

⁸⁵ [Appeal](#), para. 23.

⁸⁶ [Decision](#), paras. 22-29; [Al Hassan Detention AJ](#) (ICC-01/12-01/18-1311-Red), para. 30.

⁸⁷ [Decision](#), para. 30, *citing to* [ICC-RoR221-02/16-3-Red](#), para. 42; *see also* [ICC-RoR217-02/08-8](#), para. 38.

⁸⁸ [Decision](#), para. 30.

conflates administrative and judicial procedures and prematurely raised the issue before the Chamber as part of its submissions on the review of detention. The Chamber therefore correctly held that in these circumstances Abd-Al-Rahman's right to family visits did not outweigh the identified factors necessitating continued detention.

30. Under the Court's regulatory framework, the Defence has a remedy to ensure that his right to family visits under regulation 100(1) of the Regulations of the Court is given effect.⁸⁹ The Defence is entitled to formally apply to the Registry to make arrangements for a family visit pursuant to regulation 179(1) of the Regulations of the Registry. If the Defence is of the view that the Registrar's administrative decision is incorrect, it can seek a review of that decision from the Presidency pursuant to regulation 221 of the Regulations of the Registry.⁹⁰ This process concerns the management of the detention centre which, according to regulation 90(1) of the Regulations of the Court, is the responsibility of the Registrar, and is subject to an administrative review by the Presidency.⁹¹

31. The lawfulness of detention, on the other hand, is ensured through a judicial decision by the Chamber under article 58(1) and that decision is subject to a periodic judicial review pursuant to article 60(3).

32. In this case, the Defence started the administrative procedure to enforce his right to family visits and engaged in a consultation with the Registrar.⁹² During that process, the Registry informed the Defence, that due to a lack of resources in the Trust Fund for Family Visits, the Court could not arrange for in-person meetings between Abd-Al-Rahman and his family.⁹³ It then started a consultation process with a view to establishing contact between Abd-

⁸⁹ Regulation 100(3) provides that "[t]he relevant conditions for visits as well as restrictions and supervision that may be necessary in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre shall be set out in the Regulations of the Registry."

⁹⁰ [ICC-RoR221-02/16-3-Red](#), para. 21.

⁹¹ In a situation similar to the present one where an accused's right to in-person family visits could not be arranged due to the shortage of funds in the TFFV, the Presidency emphasised the need to "actively seek donations for the TFFV from States Parties, other States, non-governmental organizations, civil society, individuals and other entities" ([ICC-RoR221-02/16-3-Red](#), para. 42). However, consistent with regulation 100(3) of the Regulations of the Court, this is a duty of the Registry, and not a judicial matter. Accordingly, the administrative process aimed at giving effect to the accused's right to family visits is clearly separated from the judicial review of detention and the former cannot affect the latter.

⁹² [Defence Observations](#) (ICC-02/05-01/20-495), para. 9. *See also* ICC-02/05-01/20-495-Conf-Anx2 and ICC-02/05-01/20-495-Conf-Anx3.

⁹³ [ICC-02/05-01/20-T-015-ENG](#), 17:19-24; *see also* ICC-02/05-01/20-495-Conf-Anx2, p. 2. During the hearing the Defence stated that to date, Abd-Al-Rahman did not receive any in-person visit at the detention centre in The Hague ([ICC-02/05-01/20-T-015-ENG](#), 17:25-18:2).

Al-Rahman and his family members through video-conferencing,⁹⁴ which according to the Court's jurisprudence can be an appropriate tool to give effect to Abd-Al-Rahman's right to family visits.⁹⁵

33. However, the Defence did not pursue the option of requesting video-conferencing with his family because it was of the view that this solution was not practicable for Abd-Al-Rahman's family members and because it opined—without any basis—that the information about the Court's capacity to organise video-conferencing through the telephone network was simply incorrect.⁹⁶ Instead, the Defence sought to obtain a judicial decision on release under article 60(3), arguing that Abd-Al-Rahman's right to family visits has not been given full effect.

34. During the detention hearing the Presiding Judge noted the Defence's position and cautioned the Defence, stating as follows: “[T]he reality is [that] you haven't asked” [...] [I]t's a bit difficult to argue that something is not available if you haven't given anybody the opportunity to see if it is available.”⁹⁷ Because the Defence failed to exhaust the administrative process before bringing the matter up with the Chamber, the Chamber correctly did not give the Defence's argument undue weight.

35. In sum, the Chamber was reasonable in finding that Abd-Al-Rahman's right to family visits did not outweigh other factors necessitating Abd-Al-Rahman's continued detention.⁹⁸ Abd-Al-Rahman's fourth ground of appeal should be rejected.

⁹⁴ [ICC-02/05-01/20-T-015-ENG](#), 18:7-11; *see also* ICC-02/05-01/20-495-Conf-Anx3.

⁹⁵ As held by the Single Judge of Trial Chamber V, “frequent and extensive video-conferencing [may] render the accused's right to family visits effective” under certain circumstances ([ICC-01/14-01/18-869-Red](#), para. 11; [ICC-01/14-01/18-869-Red](#), para. 13). The Appeals Chamber similarly held that enhanced communication between an accused in detention and his family through video-conferencing may be an appropriate tool to address “exceptional humanitarian circumstances” that require an accused to be in contact with his family, especially when weighing these circumstances against risks under article 58(1)(b) ([Al Hassan Detention AJ](#) paras. 103-106). These recent decisions deviate from a Presidency 2009 decision in the *Katanga* case, finding that video-conferencing cannot be a “substitute for the right to receive face-to-face visits” (*See Appeal*, para. 24, fn. 51, referring to [ICC-RoR217-02/08-8](#), para. 36). In so doing, these recent decision implicitly acknowledge that since 2009, video conferencing technology has significantly improved. The *Katanga* decision therefore does not undermine the Chamber's findings in this case.

⁹⁶ [ICC-02/05-01/20-T-015-ENG](#), 18:11-19:2.

⁹⁷ [ICC-02/05-01/20-T-015-ENG](#), 19:4-5; 19:14-15.

⁹⁸ [Decision](#), para. 30.

CONCLUSION AND RELIEF SOUGHT

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



Karim A. A. Khan QC, Prosecutor

Dated this 23rd day of November 2021
At The Hague, The Netherlands