

1 International Criminal Court

2 Appeals Chamber

3 Situation: Darfur, Sudan

4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman

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

6 Presiding Judge Piotr Hofmański

7 Appeals Judgment - Courtroom 1/Interactio

8 Friday, 5 February 2021

9 (The hearing starts in open session at 2.18 p.m.)

10 THE COURT USHER: [14:18:21] The International Criminal Court is now in
11 session.

12 PRESIDING JUDGE HOFMAŃSKI: [14:18:25] Good morning. Please excuse
13 the delay caused by the technical problems; I hope everything is okay now.
14 Would the court officer please call the case.

15 THE COURT OFFICER: [14:18:38] Thank you, your Honour.

16 The situation in Darfur, Sudan, in the case of the Prosecutor versus Ali
17 Muhammad Ali Abd-Al-Rahman (Ali Kushayb), case reference
18 ICC-02/05-01/20.

19 And we are in open session.

20 PRESIDING JUDGE HOFMAŃSKI: [14:18:56] Thank you very much, court
21 officer.

22 I am Judge Piotr Hofmański, presiding in this appeal arising from the case of
23 the Prosecutor against Ali Muhammad Ali Abd-Al-Rahman. My fellow
24 judges in this appeal are Judge Chile Eboe-Osuji, Judge Howard Morrison,
25 Judge Luz de Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa.

1 Due to the COVID-19 restrictions, this hearing is conducted on a virtual basis,
2 with myself and all parties and participants attending remotely via the
3 Interactio system.

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

6 Mr Laucci.

7 MR LAUCCI: [14:20:00](Interpretation) Yes, thank you very much,
8 Mr President. Representing the Defence this afternoon is legal assistant,
9 Ms Vanessa Gree; Mr Ahmad Issa, who is the case manager; Mr Mohamed
10 Manaa, legal assistant and also in charge of analysis of evidence; Carrin,
11 Marion, in charge of analysis of evidence; and myself, lead counsel,
12 Mr Cyril Laucci.

13 PRESIDING JUDGE HOFMAŃSKI: [14:20:15] (Overlapping speakers)
14 Thank you very much, Mr Laucci.
15 And for the Office of the Prosecutor.

16 MS REGUE BLASI: [14:20:36] Good afternoon, your Honours. On behalf of
17 the Prosecution, Ms Nivedha Thiru and Ms Meritxell Regue, both appeals
18 counsels.

19 PRESIDING JUDGE HOFMAŃSKI: [14:20:45] Thank you very much.
20 For the record, I note that Mr Abd-Al-Rahman participates via Interactio from
21 a remote location.

22 Today, the Appeals Chamber will deliver its judgment in the appeal of
23 Mr Abd-Al-Rahman against the decision of Pre-Trial Chamber II entitled,
24 "Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to
25 Rule 118(2) of the Rules of Procedure and Evidence".

1 This is a non-authoritative summary of the Appeals Chamber's written
2 judgment in the appeal. The latter will be notified after this hearing.

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

4 On 11 December 2020, after instructing the Prosecutor and Mr Abd-Al-Rahman
5 to file observations for the Pre-Trial Chamber's review of Mr Abd-Al-Rahman's
6 detention, the Pre-Trial Chamber ordered Mr Abd-Al-Rahman's continued
7 detention. It found that no changes of circumstances had occurred in the
8 factors underlying its first decision to maintain Mr Abd-Al-Rahman's detention
9 pending the confirmation hearing.

10 On 16 December 2020, Mr Abd-Al-Rahman appealed the decision to maintain
11 his detention. He raises three grounds of appeal against the impugned
12 decision.

13 Under his first ground of appeal, Mr Abd-Al-Rahman submits that the
14 Pre-Trial Chamber erred in rejecting his argument that the inadmissibility of
15 some of the evidence relied upon in the warrants of arrest constitutes a change
16 in circumstances justifying his release. In that regard, he argues that the
17 Pre-Trial Chamber erred in finding that the portion of the evidence he claimed
18 to be inadmissible represented only an insignificant part of the evidence
19 presented in the warrants of arrest and that he was required to direct his
20 submissions to the entirety of the evidence referred to in the warrants of arrest.

21 In respect of Mr Abd-Al-Rahman's first ground of appeal, the
22 Appeals Chamber emphasises that any assessment of whether the conditions
23 justifying detention under Article 58(1) of the Statute are met would necessarily
24 concern a qualitative -- and not just quantitative -- review of the evidence.

25 Nevertheless, for the purposes of this appeal, the Appeals Chamber confines its

1 determination to the arguments raised by the appellant. In this regard, the
2 Appeals Chamber concurs with the Prosecutor that Mr Abd-Al-Rahman's
3 computations are based on an arbitrarily narrow reading of the first warrant of
4 arrest.

5 In light of the fact that the Prosecutor relied on 278 items of evidence, the
6 Appeals Chamber finds that the Pre-Trial Chamber's conclusion was
7 reasonable; that the amount of contested evidence is insignificant.

8 Therefore, the Appeals Chamber rejects Mr Abd-Al-Rahman's first ground of
9 appeal.

10 Under his second ground of appeal, Mr Abd-Al-Rahman argues that the
11 Pre-Trial Chamber erred in concluding that the Prosecutor was not in breach of
12 the first interim release decision regarding the measures taken for the
13 protection of potential witnesses.

14 He claims that the Pre-Trial Chamber contradicted its own conclusion in its
15 decision on the second postponement of the confirmation hearing, where it
16 found that the Prosecutor had violated its instructions regarding the protection
17 of her witnesses.

18 The Appeals Chamber finds no merit in the second ground of appeal.

19 The Appeals Chamber recalls that in the Abd-Al-Rahman OA2 judgment, it
20 determined that the Prosecutor's inability to protect the witnesses in Darfur
21 cannot be assessed in isolation, as the Pre-Trial Chamber's determination as to
22 whether detention is necessary to avoid any obstruction of the investigation or
23 court proceedings is also based on other considerations. In particular, the
24 Appeals Chamber found that, under the circumstances, it was irrelevant that
25 the Prosecutor may or may not be in a position to implement protective

1 measures for witnesses. Consequently, Mr Abd-Al-Rahman's arguments
2 asserting that the lack of an agreement between the Court and Sudan render it
3 impossible for the Prosecutor to protect witnesses merely re-litigates a matter
4 already addressed by the Appeals Chamber.

5 Regarding the Pre-Trial Chamber's decision to postpone the confirmation
6 hearing, the Appeals Chamber finds that Mr Abd-Al-Rahman mischaracterises
7 the Pre-Trial Chamber's finding. In that decision, the Pre-Trial Chamber did
8 not find that the Prosecutor had violated its instructions in relation to the
9 setting up of mechanisms for the protection of her witnesses; rather, it found
10 that the Prosecutor had violated its instruction on applying for an extension of
11 time.

12 The Appeals Chamber therefore rejects Mr Abd-Al-Rahman's second ground of
13 appeal.

14 Finally, under his third ground of appeal, Mr Abd-Al-Rahman argues that the
15 Pre-Trial Chamber erred in failing to consider the particular circumstances of
16 his detention. For the reasons explained more fully in the confidential version
17 of today's judgment, the Appeals Chamber rejects this ground of appeal.

18 For these reasons -- and, for the reasons stated more fully in the written
19 judgment -- the Appeals Chamber rejects the appeal and confirms the
20 impugned decision. Judge Eboe-Osuji appends a separate opinion to the
21 judgment, which will also be available later today.

22 This brings us to the end of the summary of the Appeals Chamber's judgment.
23 I would like to thank the court reporters, the interpreters and the Registry staff
24 for their valuable assistance today in holding the hearing.

25 The hearing is now adjourned.

- 1 (The hearing ends in open session at 2.28 p.m.)