



Original: English

No. ICC-02/05-01/20

Date: 17 July 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

Decision on Defence Request for Leave to Reply

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for Mr Abd-Al-Rahman
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court,¹ having regard to Regulation 24(5) of the Regulations of the Court (the ‘Regulations’), issues this Decision on Defence Request for Leave to Reply.

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Rome Statute (the ‘Statute’)² and decided³ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’)⁴ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas (Darfur, Sudan) between August 2003 and March 2004.

2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the first warrant of arrest pursuant to article 58(6) of the Statute⁵ by issuing a second warrant of arrest against Mr Abd-Al-Rahman⁶ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas (Darfur, Sudan) between on or about 5 to 7 March 2004.

3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court.

4. On 12 June 2020, the Chamber decided to sever the case against Mr Abd-Al-Rahman from the case of *The Prosecutor v. Ahmad Muhammad Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”).⁷

¹ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

² Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, ICC-02/05-56).

³ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

⁴ Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

⁵ Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”) by adding new crimes, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and ICC-02/05-01/20-6-Red2).

⁶ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red).

⁷ Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87.

5. On 1 July 2020, the Defence submitted a request for the interim release of Mr Abd-Al-Rahman, pursuant to article 60(2) of the Statute (the ‘Interim Release Request’).⁸

6. On 13 July 2020, the Prosecutor submitted a response to the Interim Release Request (the ‘Prosecutor’s Response’ or the ‘Response’).⁹

7. On 16 July 2020, the Defence submitted a request for leave to reply to the Prosecutor’s response, pursuant to Regulation 24(5) of the Regulations (the ‘Request for Leave to Reply’).¹⁰

8. In the Request for Leave to Reply, the Defence submits that the Prosecutor has raised novel arguments in its Response in relation to article 58(1)(b)(i) and (ii) of the Statute that could not have been reasonably anticipated at the time of the Request.

9. Specifically, the Defence refers to the Prosecutor’s arguments that detention is necessary to ensure the suspect’s appearance at trial, pursuant to article 58(1)(b)(i), on the basis that (a) the suspect attempted to evade justice for 13 years; (ii) there are alleged charges against the suspect in Sudan, and avoiding capture in Sudan may have been a factor motivating the suspect to surrender; (iii) at the time of his arrest, the suspect was unaware of the additional charges contained within the second warrant of arrest, and these charges may provide additional incentive to abscond; and (iv) the fact that, if released, the suspect would allegedly be able to travel throughout Europe without documentation.

10. In relation to the Prosecutor’s arguments pursuant to article 58(1)(b)(ii), the Defence refers to paragraphs 25-29 of the Prosecutor’s Response. In the aforementioned paragraphs, the Prosecutor submits that the suspect’s release could pose a risk of endangering or obstructing the Prosecutor’s ongoing investigation because of the possibility to threaten or intimate witnesses, either directly or indirectly. In particular, the Prosecutor refers to (i) the evidence of the suspect’s

⁸ Requête en vertu de l’Article 60-2, ICC-02/05-01/20-12.

⁹ Prosecution’s Response to « Requête en vertu de l’Article 60-2 » (ICC-02/05-01/20-12), ICC-02/05-01/20-95.

¹⁰ Requête en vertu de la norme 24-5 du Règlement de la Cour (autorisation de Réplique à ICC-02/05-01/20-95), ICC-02/05-01/20-96.

offences as contained in the first and second warrants of arrest; (ii) information received that until the time of his arrest, the suspect continued to serve as de facto commander in Darfur, where many witnesses reside; (iii) the fact that, as recently as February 2020, the suspect was reported to have threatened the lives of activists in South Darfur; (iv) if released, there would be virtually no possibility of controlling or monitoring the suspect's contact with his associates; and (v) the suspect's release could pose a particular risk to witnesses who reside in the EU.

11. The Single Judge recalls that pursuant to Regulation 24(5) of the Regulations, participants may only reply to a response with the leave of the Chamber, unless otherwise provided for in the Regulations.

12. In relation to the arguments in the Prosecutor's Response pertaining to article 58(1)(b)(i) of the Statute, the Single Judge finds that he has sufficient information to make a determination, and would not be assisted by a reply. Accordingly, the Request for Leave to Reply to these arguments is rejected.

13. The Single Judge notes that the novel arguments raised in the Prosecutor's Response pertaining to article 58(1)(b)(ii) of the Statute could not have been reasonably anticipated by the Defence, and that a reply by the Defence may be of assistance in rendering a determination on the Interim Release Request. As such, the Single Judge grants the Request for Leave to Reply in relation to the Prosecutor's arguments as set out in paragraphs 25-29 of her Response,¹¹ and directs the Defence to submit its reply by Wednesday, 22 July 2020.

¹¹ See Prosecution's Response to « Requête en vertu de l'Article 60-2 » (ICC-02/05-01/20-12), ICC-02/05-01/20-95, paras 25-29.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request for Leave to Reply, in part, as set out in paragraphs 13 of the present decision; and

DIRECTS the Defence to submit its reply by no later than Wednesday, 22 July 2020 at 16h00.

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

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a long horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Friday, 17 July 2020

At The Hague, The Netherlands