

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **31 August 2020**

**APPEALS CHAMBER**

**Before:** Judge Piotr Hofmański, Presiding  
Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR v.  
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

**Public**

**Prosecution Response to the “Mémoire d’appel de la décision ICC-02/05-01/20-115”**

**Source: Office of the Prosecutor**

**Document 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  
Ms Helen Brady

**Counsel for the Defence**

Mr Cyril Laucci

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. On 14 August 2020, the Single Judge Rosario Salvatore Aitala (“Single Judge”), acting for Pre-Trial Chamber II, rejected Mr Abd-Al-Rahman’s request to grant him interim release pending trial under article 60(2) of the Statute,<sup>1</sup> and ordered his continued detention.<sup>2</sup> The Single Judge found that the criteria in article 58(1)(a) and 58(1)(b)(ii) were met—namely, that there are reasonable grounds to believe that Mr Abd-Al-Rahman is responsible for war crimes and crimes against humanity within the jurisdiction of the Court,<sup>3</sup> and that his arrest and continued detention appears necessary to ensure that he does not obstruct or endanger the investigation or court proceedings.<sup>4</sup>

2. Mr Abd-Al-Rahman’s appeal against the Decision should be rejected as it fails to show any error of law or fact.<sup>5</sup> Instead, Mr Abd-Al-Rahman misconstrues the Decision, misunderstands the applicable law, and often merely expresses disagreement with the Single Judge’s conclusions in attempting to re-litigate the arguments previously advanced in his Request and Reply.<sup>6</sup>

## II. SUBMISSIONS

3. The Single Judge found that Mr Abd-Al-Rahman’s detention appears necessary under article 58(1)(b)(ii) to ensure that he does not obstruct or endanger the investigation or court proceedings. In doing so, he considered the following factors: (i) the Prosecution’s submission that it is not yet in a position to protect witnesses in Darfur/Sudan; (ii) the report of threats allegedly made by Mr Abd-Al-Rahman and his supporters to human rights activists in February 2020; (iii) Mr Abd-Al-Rahman’s alleged high-ranking position in Darfur; (iv) the connections he held in that role; and (v) the likelihood that he still had supporters who may have access to actual or potential witnesses.<sup>7</sup> The Single Judge’s decision is reasonable and correct.<sup>8</sup> The Appellant advances five grounds of appeal whereby he misconstrues the Decision and misunderstands the law. The Appeal should be dismissed.

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<sup>1</sup> ICC-02/05-01/20-12 (“[Request](#)”).

<sup>2</sup> ICC-02/05-01/20-115 (“[Decision](#)”).

<sup>3</sup> [Decision](#), para. 26.

<sup>4</sup> [Decision](#), para. 29.

<sup>5</sup> ICC-02/05-01/20-120-Corr (“[Appeal](#)”).

<sup>6</sup> ICC-02/05-01/20-100 (“[Reply](#)”).

<sup>7</sup> [Decision](#), paras. 28-29.

<sup>8</sup> ICC-01/04-02/06-271-Red (“[Ntaganda Interim Release AD](#)”), para. 29 (“In considering appeals in relation to decisions granting or denying interim release, the Appeals Chamber has previously held that it “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 showing to exist and vitiate the Impugned Decision”). *See*

**A. Ground 1: The Single Judge properly considered the Prosecution’s current inability to protect witnesses in Darfur/Sudan.**

4. The Single Judge properly found that “if interim release were to be granted, it would present an unacceptable risk that the suspect may exert pressure on witnesses, either directly or indirectly through his supporters”.<sup>9</sup> To reach this conclusion, the Single Judge correctly considered *all factual* circumstances<sup>10</sup> including that the Prosecution “is not yet in a position to protect witnesses in Darfur”.<sup>11</sup> The Appellant’s first ground of appeal that the Single Judge erred *in law* in considering that the current Prosecution’s inability to protect witnesses in that region<sup>12</sup> should be rejected.

5. The Single Judge did not *impute* the Prosecution’s inability to protect witnesses in Darfur/Sudan to Mr Abd-Al-Rahman.<sup>13</sup> This was only *one* of the factors that the Single Judge considered in assessing whether Mr Abd-Al-Rahman’s continued detention appeared necessary to prevent the risk of intimidation of actual and potential witnesses in that region.<sup>14</sup> There is no legal error in the Single Judge’s approach.

6. Moreover, the Single Judge’s reliance on this factor was correct. Article 58(1)(b)(ii) concerns the suspect’s capacity to obstruct or endanger the investigation or proceedings. It allows deprivation of liberty only if it *appears necessary*, in the sense that no other means appear to be available to adequately safeguard the investigation or proceedings. The Single Judge reasonably considered the Prosecution’s current inability to protect actual or potential witnesses in Darfur/Sudan in assessing the risk that the suspect may exert pressure on them and the investigation be endangered.<sup>15</sup> He concluded that the risk was “unacceptable” in these circumstances.<sup>16</sup> This conclusion is fully consistent with the logic of article 58(1)(b) and the

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*also* ICC-01/05-01/08-2151-Red (“[Bemba 5 March 2012 Interim Release AD](#)”), para. 16 (stating that for factual errors alleged in a decision on interim release, “the Appeals Chamber will “defer or accord a margin of appreciation both to the inferences the [Chamber] drew from the available evidence, and to the weight it accorded to the different factors militating for or against detention”. Therefore, the Appeals Chamber “will interfere only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”).

<sup>9</sup> [Decision](#), para. 29.

<sup>10</sup> [Decision](#), paras. 13, 14, 16, 28,

<sup>11</sup> [Decision](#), para. 28.

<sup>12</sup> [Appeal](#), paras. 10-16.

<sup>13</sup> *Contra* [Appeal](#), para. 11.

<sup>14</sup> [Decision](#), paras. 27-30.

<sup>15</sup> [Decision](#), paras. 28, 29; *contra* [Appeal](#), paras. 11, 14.

<sup>16</sup> [Decision](#), paras. 28, 29.

determination that the Single Judge was called to make. The Appellant’s submission that “[l]’incapacité avouée du BdP à protéger ses témoins au Soudan plaide donc en faveur de la mise en liberté de Mr Ali Muhammad Ali Abd-Al-Rahman”<sup>17</sup> reverses the logic of the provision by suggesting that a suspect should be released *because* there are no other effective means available to protect the witnesses.

7. Further, far from uncritically *imputing* the Prosecution’s difficulties to Mr Abd-Al-Rahman,<sup>18</sup> the Single Judge considered the “fundamental principle that deprivation of liberty is the exception and not the rule”<sup>19</sup> and invited the Prosecutor “to take reasonable steps to put in place mechanisms to protect potential witnesses and/or safeguard potential evidence”.<sup>20</sup> By re-litigating his factual arguments and expressing his disagreement with the Decision,<sup>21</sup> the Appellant fails to point to any legal or factual error.

8. Finally, the Appellant’s submissions on the Prosecution’s ability to investigate in Sudan and prosecute this case<sup>22</sup> should be disregarded as speculative and immaterial. First, the Prosecution’s ability to carry out investigations in Sudan so as to prove the charges against Mr Abd-Al-Rahman is unrelated to the factors set out in article 58(1)(b). Moreover, at this stage, it is only necessary that the Pre-Trial Chamber is satisfied there are ‘reasonable grounds to believe’ that the suspect has committed crimes within the jurisdiction of the Court under article 58(1)(a)—a finding the Appellant has not challenged.<sup>23</sup> Second, arguments regarding the termination of the proceedings and compensation for unlawful detention under article 85(1)<sup>24</sup> should be raised when and if such requests are advanced by the Defence. The “suggestion” that the Single Judge and the Appeals Chamber should release Mr Abd-Al-Rahman to minimise the risk of future compensation<sup>25</sup> is misplaced and should be rejected.

9. In conclusion, the Appellant’s first ground of appeal should be dismissed.

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<sup>17</sup> [Appeal](#), para. 14.

<sup>18</sup> [Appeal](#), paras. 11, 13.

<sup>19</sup> [Decision](#), para. 23.

<sup>20</sup> [Decision](#), para. 31.

<sup>21</sup> [Appeal](#), para. 12, referring to [Reply](#), para. 10.

<sup>22</sup> [Appeal](#), paras. 12-14.

<sup>23</sup> [Decision](#), para. 26.

<sup>24</sup> [Appeal](#), para. 14.

<sup>25</sup> *Contra* [Appeal](#), para. 14.

## **B. Ground 2: The Single Judge did not err in taking into consideration the information in Annex 3 of the Prosecution Response**

10. As noted above, the Single Judge reasonably considered several factors in finding that article 58(1)(b)(ii) applied in this case.<sup>26</sup> In support of these considerations, the Single Judge cited information in the first and second Arrest Warrants issued against Mr Abd-Al-Rahman, and the report of the Darfur Network for Monitoring and Documentation contained in Annex 3 to the Prosecution's response to the Request ("Response")<sup>27</sup> which describes threats allegedly made by Mr Abd-Al-Rahman and his supporters to human rights activists in Darfur earlier this year ("Annex 3").<sup>28</sup> The Appellant's claim that the Single Judge erred legally and factually in relying upon Annex 3 is: based on incorrect representations about the Annex; misapprehends the consistent jurisprudence of this Court regarding the applicable evidentiary threshold; ignores the information considered by the Single Judge; and misconceives the question of the nickname or alias "Ali Kushayb". The Appellant simply disagrees with the Single Judge's factual assessment, but fails to identify any error. The Appellant's second ground of appeal should be rejected.

### *i. The Appellant mischaracterises relevant information in Annex 3*

11. The Appellant contends that Annex 3 does not establish the relationship between Mr Abd-Al-Rahman and "Ali Kushayb", and only refers to "Ali Kushayb".<sup>29</sup> However, the second paragraph of the report in Annex 3 states that the threats against the human rights defenders were made by:

**"Ali Mohammad Ali Abd-Al-Rahman, commonly known as Ali Kushayb, who was a senior Janjaweed commander supporting the Sudanese government in committing atrocities and human rights violations against the people of Darfur, and for which he is wanted by the ICC for crimes against humanity and other grave**

<sup>26</sup> [Decision](#), paras. 28-29.

<sup>27</sup> ICC-02/05-01/20-95 ("[Prosecution Response](#)").

<sup>28</sup> [Decision](#), paras. 28 (fn. 16), 29 (fns. 19, 20).

<sup>29</sup> [Appeal](#), paras. 18, 20(ii). The Prosecution notes that the Appellant introduced a substantive change to his Appeal without identifying it in the explanatory annex of his corrigendum: *compare* Appeal filed on 19 August 2020 (ICC-02/05-01/20-120), para. 20(ii) ("[...] alors que l'Annexe 3 vise des faits attribués à une personne désignée sous le patronyme « Ali Kushayb », sans mention de Mr Ali Muhammad Ali Abd-Al-Rahman.") with the corrigendum filed on 20 August 2020 (ICC-02/05-01/20-120-Corr), para. 20(ii) ("[...] alors que l'Annexe 3 vise des faits attribués à une personne désignée sous le patronyme « Ali Kushayb », sans établir ni démontrer de lien avec Mr Ali Muhammad Ali Abd-Al-Rahman."). (emphases added)

violations. Ali Kushayb is now the Head of Security in Raheed Al-Bardi in Nyala, South Darfur.”<sup>30</sup>

12. The Appellant’s assertion that Annex 3 contained no *prima facie* evidence of the link between Mr Abd-Al-Rahman and “Ali Kushayb”<sup>31</sup> readily fails in light of such clear reference to Mr Abd-Al-Rahman and his alleged alias or nickname “Ali Kushayb”, along with other identifying details, including that he is the person wanted for arrest before the ICC. On this basis alone, the Appellant’s second ground of appeal should be dismissed.

13. Further, the Appellant mischaracterises the report in Annex 3 as amounting to anonymous hearsay.<sup>32</sup> While the report contains hearsay information concerning two human rights defenders who were allegedly threatened by Mr Abd-Al-Rahman and his supporters, the report *names* the two human rights defenders and provides specific details of the date, time and location where the events took place.<sup>33</sup> Unlike reports where all information, including the identity of the victims is anonymised, the Annex 3 report provides information enabling further enquiry into the event, if Mr Abd-Al-Rahman wished to do so.

*ii. The Appellant misapprehends the applicable evidentiary threshold for the article 58(1)(b) analysis*

14. The Appellant’s argument that the Single Judge erred legally in relying on Annex 3 is based on a heightened evidentiary threshold that is incorrect and unwarranted for the purposes of assessing interim release applications against the criteria in article 58(1)(b).<sup>34</sup>

15. *First*, in claiming that the material should have been declared inadmissible as it amounted to (anonymous) hearsay and therefore lacked any probative value,<sup>35</sup> the Appellant disregards relevant jurisprudence of this Court. As the Single Judge correctly identified,<sup>36</sup> Chambers of this Court have consistently held that the test in article 58(1)(b) is a low one, requiring only an “appearance” of “necessity” to maintain detention of the suspect if one or

<sup>30</sup> ICC-02/05-01/20-95-Anx3 (“[Annex 3](#)”), p. 2 (emphases added).

<sup>31</sup> [Appeal](#), para. 20(ii).

<sup>32</sup> [Appeal](#), paras. 18, 23. *See also* [Reply](#), para. 9(ii).

<sup>33</sup> [Annex 3](#), pp. 2-3.

<sup>34</sup> [Appeal](#), para. 21.

<sup>35</sup> [Appeal](#), para. 21.

<sup>36</sup> [Decision](#), para. 28.

more of the grounds in article 58(1)(b) are satisfied.<sup>37</sup> This involves only the “possibility, not the inevitability, of a future occurrence”.<sup>38</sup> As stated in *Ntaganda*, the lower test is justified in this analysis, because the assessment of an interim release request is neither aimed at confirming charges, nor of making a finding of guilt against the suspect—both of which require a higher evidentiary threshold.<sup>39</sup> Therefore, evidence considered under article 58(1)(b) does not have to be of the same nature and strength as the evidence required to establish reasonable grounds to believe that the person has committed one or more crimes under the Court’s jurisdiction, under article 58(1)(a) of the Statute.<sup>40</sup>

16. In accordance with the lower evidentiary threshold, previous Chambers have consistently held that there is no bar to relying upon information contained in NGO reports, newspaper articles or other public sources that may amount to hearsay, for the purposes of assessing whether article 58(1)(b) is satisfied,<sup>41</sup> nor is there a requirement that such information be corroborated.<sup>42</sup> Rather, as stated by the Single Judge in an interim release decision in *Gbagbo* (which was confirmed on appeal), the Single Judge must analyse *all* the material placed before him or her in order to determine what weight must be given to it for the purposes of determining whether continued detention “appears necessary”.<sup>43</sup>

17. The Appellant fails to show how the Single Judge erred in relying on these principles to consider the information in Annex 3 when making his assessment under article 58(1)(b)(ii).

18. *Second*, the Appellant’s attempt to distinguish the jurisprudence from this case is unconvincing.<sup>44</sup> The Appellant misconstrues the principle expressed in *Gbagbo*, namely that it is permissible to rely on newspaper articles and other public sources, even if

<sup>37</sup> ICC-01/04-02/06-147 (“[Ntaganda Interim Release Decision](#)”), paras. 36, 47 (confirmed in [Ntaganda Interim Release AD](#), para. 35); ICC-01/04-01/07-572 (“[Ngudjolo Interim Release AD](#)”), paras. 20-21; ICC-01/05-01/08-323 (“[Bemba 16 December 2008 Interim Release AD](#)”), para. 55; ICC-02/11-01/11-180-Red (“[Gbagbo Interim Release Decision](#)”), para. 48.

<sup>38</sup> [Ngudjolo Interim Release AD](#), para. 21; [Bemba 16 December 2008 Interim Release AD](#), paras. 55, 67.

<sup>39</sup> [Ntaganda Interim Release Decision](#), para. 47.

<sup>40</sup> [Ntaganda Interim Release Decision](#), para. 47.

<sup>41</sup> [Ntaganda Interim Release Decision](#), paras. 47-49, ICC-01/04-01/07-344-Conf (“[Ngudjolo Interim Release Decision](#)”), p. 8, upheld by the Appeals Chamber in [Ngudjolo Interim Release AD](#), paras. 23-24; [Gbagbo Interim Release Decision](#), para. 54. See [Decision](#), para. 28.

<sup>42</sup> [Gbagbo Interim Release Decision](#), para. 54.

<sup>43</sup> [Gbagbo Interim Release Decision](#), para. 54; ICC-02/11-01/11-278-Red (“[Gbagbo Interim Release AD](#)”). See also [Ntaganda Interim Release Decision](#), paras. 47-48.

<sup>44</sup> [Appeal](#), para. 22.



uncorroborated, for the purpose of making an assessment under article 58(1)(b).<sup>45</sup> Contrary to the Appellant's claim, the decision does not limit this principle only to circumstances where there is a "plurality of press articles".<sup>46</sup> The Appellant's attempt to read in such a limitation is not supported by the plain text of the decision.

19. Likewise, the Appellant misunderstands *Ntaganda*. Even if article 69(4) applies, the evidence considered under article 58(1)(b) does not have to be of the same nature and strength as evidence required to establish reasonable grounds to believe that the person has committed a crime under article 58(1)(a).<sup>47</sup> Contrary to the Appellant's suggestion, the two are not incompatible.<sup>48</sup>

20. Moreover, the two decisions that the Appellant cites regarding the applicability of article 69(4) are inapposite:<sup>49</sup> the first decision concerns the applicability of article 69(4) for the purpose of confirming the charges against the suspect;<sup>50</sup> and the second decision generally observes that articles 69 to 72 lay down general principles applicable to different stages of the proceedings, including the investigation stage.<sup>51</sup> In sum, the Appellant simply advocates for a higher evidentiary threshold while ignoring the rationale underpinning the lower evidentiary threshold in article 58(1)(b), as set out in the jurisprudence,<sup>52</sup> and makes no convincing attempt to justify departing from it.

21. *Third*, the Appellant incorrectly states that the Single Judge did not consider the Defence submissions on the lack of probative value of Annex 3.<sup>53</sup> The Single Judge expressly acknowledged the Defence's submissions that Annex 3 consisted of anonymous hearsay,<sup>54</sup>

<sup>45</sup> [Decision](#), para. 28, citing [Gbagbo Interim Release Decision](#), para. 54 ("The Single Judge notes at the outset that the Defence opposes the reliance on newspaper articles or other public sources for the purpose of assessing the requirements. The Single Judge, however, considers that there does not exist in the applicable law any impediment to the use of such material, or any requirement that it be corroborated").

<sup>46</sup> [Appeal](#), para. 22.

<sup>47</sup> [Appeal](#), para. 22. See [Ntaganda Interim Release Decision](#), para. 47.

<sup>48</sup> [Appeal](#), para. 22.

<sup>49</sup> [Appeal](#), para. 23, citing ICC-01/04-01/07-717 ("[Katanga Confirmation of Charges Decision](#)"), paras. 77, 141; ICC-01/04-101-tEN-Corr ("[DRC Victim Participation Decision](#)"), paras. 42-43.

<sup>50</sup> [Katanga Confirmation of Charges Decision](#), para. 77 (stating that the Pre-Trial Chamber may exercise its discretion when determining the relevance or admissibility of any item of evidence"), 141 (stating that the probative value of hearsay information is to be analysed on a case-by-case basis).

<sup>51</sup> [DRC Victim Participation Decision](#), paras. 42-44.

<sup>52</sup> See *above* paras. 15-16.

<sup>53</sup> [Appeal](#), para. 21.

<sup>54</sup> [Decision](#), para. 15.

and addressed in his reasoning the law permitting the use of such material when determining an interim release request.<sup>55</sup>

***iii. The Appellant ignores the information considered by the Single Judge***

22. The Appellant repeatedly declares that Annex 3 has no *prima facie* value; that it was the sole basis of the Single Judge's decision under article 58(1)(b); and that there was no evidence to support a finding under article 58(1)(b)(ii). These arguments misunderstand the nature and purpose of an assessment under article 58(1)(b) and misread the Single Judge's reasoning in this regard.<sup>56</sup>

23. *First*, the Single Judge correctly found that the Annex showed that Mr Abd-Al-Rahman and his supporters had recently threatened human rights activists. Shortly after that incident he called for a community meeting and said that "he [was] the one with power and no one should question his power".<sup>57</sup> The Annex was relevant to the Single Judge's finding that, *inter alia*, the suspect had connections in his previous high ranking position in Darfur and likely still had supporters who may have access to actual or potential witnesses.<sup>58</sup>

24. Irrespective of any link between the human rights defenders referred to in the Annex and actual witnesses intended to be called in this case,<sup>59</sup> Annex 3 shows Mr Abd-Al-Rahman's previous behaviour towards those who accuse him of crimes, as well as the position of power that he held, and the network of supporters available to him to influence witnesses. The Appellant again disregards that a determination under article 58(1)(b) "necessarily involves an element of prediction"<sup>60</sup> on the basis of "all relevant factors taken together".<sup>61</sup> Thus it sufficed for the Single Judge to establish that it is possible that the suspect would interfere with witnesses.<sup>62</sup>

25. Moreover, the Single Judge was not required to determine on the basis of the materials before him that Mr Abd-Al-Rahman has already attempted to obstruct or endanger the

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<sup>55</sup> [Decision](#), para. 28.

<sup>56</sup> *Contra Appeal*, paras. 20(iii), 21, 23.

<sup>57</sup> [Annex 3](#), p. 2.

<sup>58</sup> [Decision](#), paras. 28, 29.

<sup>59</sup> *Contra Appeal*, para. 20(iii).

<sup>60</sup> [Gbagbo Interim Release Decision](#), para. 48.

<sup>61</sup> [Bemba 16 December 2008 Interim Release AD](#), para. 55.

<sup>62</sup> [Ngudjolo Interim Release AD](#), para. 21; [Bemba 16 December 2008 Interim Release AD](#), paras. 55, 67.

investigation; it was sufficient that the Single Judge had grounds to believe that such interference could happen.<sup>63</sup> The information in Annex 3 was thus relevant to demonstrating that there was a *possibility* that the suspect might engage in witness interference in this case and that his release might result in conduct that would deter witnesses from coming forward in the investigation. Similar considerations have been found relevant in other cases.<sup>64</sup>

26. *Second*, throughout the second ground of appeal, the Appellant misrepresents the Single Judge's analysis as having relied solely on Annex 3 to maintain Mr Abd-Al-Rahman in detention.<sup>65</sup> This assertion ignores that, in addition to Annex 3, the Judge referred to and relied upon relevant information underpinning the first and second Arrest Warrants issued against Mr Abd-Al-Rahman.<sup>66</sup> The cited portions of the Arrest Warrants state: that Mr Abd-Al-Rahman is "also known as Ali Kushayb"; his approximate age, nationality, and parentage; his former senior position as a tribal and militia leader and a 'colonel of colonels' in the Wadi Salih area in Darfur; and his last-known whereabouts.<sup>67</sup> The Appellant's failure to acknowledge the totality of the information considered by the Single Judge undermines his attempt to exclusively challenge Annex 3.

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<sup>63</sup> C. Hall and C. Ryngaert, "Article 58: Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear", in O. Triffterer & K. Ambos (eds.), *The Rome Statute of the International Criminal Court A Commentary*, 3<sup>rd</sup> Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 1449, mn. 17 ("It is not necessary that the suspect has already attempted to obstruct or endanger the investigation; it is sufficient that the Pre-Trial Chamber has reasonable grounds to believe that such interference could happen"). While Hall and Ryngaert speak to a "reasonable grounds" standard, this language is not found in article 58(1)(b) of the Statute, as it is for article 58(1)(a). The standard to which a Pre-Trial Chamber must be satisfied of the possibility of interference under article 58(1)(b) is lower—namely, that the Chamber had grounds to believe that interference could happen. See M. Dubuisson and M.A. Tchekanda, "Article 58", in J. Fernandez, X. Pacreau and M. Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale : commentaire article par article*, 2<sup>nd</sup> Ed. (Paris: Éditions A. Pedone, 2019) ("Dubuisson and Tchekanda"), p. 1620 ("[L]a Chambre préliminaire n'a pas besoin de rechercher si le suspect a déjà commis de tels actes dans le passé, ou s'il a essayé de le faire. L'existence de précédents serait un élément à prendre en compte, mais cela n'est pas indispensable. Il suffit que la Chambre préliminaire ait des raisons de croire que de tels actes pourraient survenir"). See also p. 1168 (on the applicable standard of "appears necessary"); [Ntaganda Interim Release Decision](#), para. 47 ("[T]he evidence presented in relation to the necessity of continued detention for the purpose of article 58(1)(b) of the Statute does not have to be of the same nature and strength as the evidence required to establish reasonable grounds to believe that the person has committed on or more crimes [...] in accordance with article 58(1)(a) of the Statute").

<sup>64</sup> See e.g. [Bemba 16 December 2008 Interim Release AD](#), para. 67.

<sup>65</sup> [Appeal](#), paras. 23, 24.

<sup>66</sup> [Decision](#), para. 29 (fn. 19), citing ICC-02/05-01/07-3-Corr ("First Arrest Warrant"), p. 17; ICC-02/05-01/07-74-Red ("Second Arrest Warrant"), p. 3.

<sup>67</sup> [Decision](#), para. 29 (fn. 19), citing [First Arrest Warrant](#), p. 17; [Second Arrest Warrant](#), p. 3.

***iv. The Appellant misconstrues the relevance of the link between Mr Abd-Al-Rahman and the name “Ali Kushayb” to the article 58(1)(b) assessment***

27. The Appellant argues that the Single Judge erred in relying on the information in Annex 3, in which, he submits, the link between Mr Abd-Al-Rahman and the risk of interference with witnesses is not set out.<sup>68</sup> As shown above, this is an incorrect reading of Annex 3, which clearly states that Mr Abd-Al-Rahman is commonly known as “Ali Kushayb” and further describes his position.<sup>69</sup>

28. The Appellant contends that the link between himself and the name “Ali Kushayb” is an issue that the Single Judge should have taken into consideration in his article 58(1)(b)(ii) assessment. This is incorrect. The question of whether the Prosecution is capable of establishing that Mr Abd-Al-Rahman committed the crimes for which he is charged is one that goes to the merits of the case against him, and therefore one to be determined during the proceedings. For the purposes of an interim release request, the requisite standard to which the Single Judge must be satisfied is that set out in article 58(1)(a), namely, whether there are “reasonable grounds to believe” that the suspect committed a crime within the Court’s jurisdiction.

29. The Single Judge in this case concluded that there were indeed reasonable grounds to believe that Mr Abd-Al-Rahman committed war crimes and crimes against humanity in Darfur, relying upon the findings in the two Arrest Warrants issued against him.<sup>70</sup> The Appellant has not appealed this finding. It is necessarily implied in this finding that the Single Judge accepted the link between Mr Abd-Al-Rahman and the name “Ali Kushayb”<sup>71</sup>—a link which is expressly set out in the identifying information contained in the Arrest Warrants.<sup>72</sup>

30. Therefore, having found that article 58(1)(a) was satisfied, the Single Judge was not again required to consider the question of the link between Mr Abd-Al-Rahman and “Ali Kushayb” for his assessment under article 58(1)(b)(ii). The Appellant’s arguments, which

<sup>68</sup> [Appeal](#), para. 20(ii). *See above* fn. 30 regarding the Appellant’s substantive change to this allegation in the corrigendum of the Appeal.

<sup>69</sup> *See above* paras. 11-13.

<sup>70</sup> [Decision](#), para. 26; [First Arrest Warrant](#); [Second Arrest Warrant](#).

<sup>71</sup> *Contra* [Appeal](#), para. 20(ii).

<sup>72</sup> [First Arrest Warrant](#), p. 17; [Second Arrest Warrant](#), p. 3.

repeat those made in the Reply,<sup>73</sup> amount to mere disagreement with the Single Judge and are insufficient to establish a clear error.<sup>74</sup>

***iv. The Appellant argues immaterial errors without demonstrating any impact of such purported errors on the Decision***

31. The Appellant alleges two immaterial legal and factual errors in the second ground of appeal without demonstrating what, if any, impact such errors had on the Decision. These arguments should be dismissed on that basis alone.

32. *First*, the Appellant claims that the Single Judge erred factually in referring to threats to human rights defenders taking place in February 2020, when the events are reported in Annex 3 as having taken place in January 2020.<sup>75</sup> The report in Annex 3 is dated February 2020 and may have been the date that the Single Judge had in mind when referring to the threats. Nevertheless, even if considered a discrepancy, it is an immaterial one which had no impact on the Decision.

33. *Second*, the Appellant claims that the Single Judge erred legally by violating his earlier decision that Mr Abd-Al-Rahman should no longer be named under the name “Ali Kushayb” in official documents and submissions to the Court”.<sup>76</sup> The Appellant clearly misunderstands the import of the Single Judge’s decision on the case name. The decision only required that the suspect be addressed by the name “Abd-Al-Rahman” and not “Ali Kushayb” in court proceedings, official court documents and filings, and public information material emanating from the Court.<sup>77</sup> The decision does not in any way prevent the parties or the Court from citing references to “Ali Kushayb” in the evidence or to alleging that Mr Abd-Al-Rahman was also known as “Ali Kushayb”.

34. In conclusion, because of the foregoing the Appellant’s second ground of appeal should be dismissed.

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<sup>73</sup> Reply, para. 9(i).

<sup>74</sup> [Gbagbo Interim Release AD](#), para. 52.<sup>75</sup> [Appeal](#), para. 2

<sup>75</sup> [Appeal](#), para. 2

<sup>76</sup> See [Appeal](#), para. 20(ii) (page 10).

<sup>77</sup> ICC-02/05-01/20-8 (“[Case Name Decision](#)”), p. 8.

### C. Ground 3: The Single Judge properly assessed the risk of pressure on actual and potential witnesses

35. The Single Judge properly concluded that the suspect may exert pressure on actual or potential witnesses. He considered and dismissed the Defence's submissions seeking to distinguish between witnesses in Darfur/Sudan<sup>78</sup> and those in the European Union.<sup>79</sup> The Appellant's repetition of these arguments<sup>80</sup> does not show any error of law or fact.

36. In relation to the witnesses in Darfur/Sudan, the Single Judge recalled the Defence's arguments, including that the Prosecutor cannot argue that the provisional release would impact on the safety of witnesses in Darfur/Sudan given the lack of agreements between the Court and the Sudanese Authorities.<sup>81</sup> The Single Judge also recalled the Defence's arguments regarding witnesses in the European Union, including that—according to the Defence—the Prosecutor cannot rely on its own breach of secrecy regarding the location of witnesses to argue against the release of the suspect.<sup>82</sup>

37. In light of the Prosecution's submissions,<sup>83</sup> the Single Judge rejected the Defence's arguments and found that interim release would present an unacceptable risk that the suspect may exert pressure on *actual* or *potential* witnesses, irrespective of their location.<sup>84</sup> The Appellant has failed to articulate how the lack of distinction between witnesses residing in Darfur/Sudan and the European Union amounts to a legal or factual error, given the finding that the release would expose both to an unacceptable risk.

38. Contrary to the Appellant's submission, the Single Judge sufficiently motivated his Decision.<sup>85</sup> To be sufficiently reasoned a decision does not “necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must

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<sup>78</sup> [Decision](#), paras. 16, 18-19, 29.

<sup>79</sup> [Decision](#), paras. 17, 18-19, 29.

<sup>80</sup> See [Reply](#), paras. 10-12.

<sup>81</sup> See [Decision](#), para. 16; [Appeal](#), para. 26.

<sup>82</sup> See [Decision](#), para. 17; [Appeal](#), para. 26.

<sup>83</sup> [Decision](#), paras. 13-14, 28-29.

<sup>84</sup> [Decision](#), para. 29 (“In light of the alleged high ranking position previously held by the suspect in Darfur, the connections that he held in this role, and the likelihood that he still has supporters who may have access to *actual* or *potential* witnesses, the Single Judge finds that if interim release were to be granted, it would present an unacceptable risk that the suspect may exert pressure on witnesses, either directly or indirectly through his supporters.”. See also para. 28.

<sup>85</sup> [Appeal](#), para. 26.

identify which facts it found to be relevant in coming to its conclusion.”<sup>86</sup> The Single Judge recited the Defence’s arguments<sup>87</sup> and identified the facts relevant to his conclusion.<sup>88</sup> In these circumstances “it is to be presumed that the [Chamber] evaluated all the evidence before it [since] there is no indication that [it] completely disregarded any particular piece of evidence”.<sup>89</sup>

39. As discussed above,<sup>90</sup> the Single Judge reasonably considered that the Prosecution’s current difficulties to operate in Darfur/Sudan, together with other factors, leads to an unacceptable risk that the suspect may exert pressure on witnesses residing in that region.<sup>91</sup> Further, as the Prosecution submitted<sup>92</sup> and the Single Judge rightly found,<sup>93</sup> not only *actual* witnesses but also *potential* witnesses may be pressured and/or deterred in coming forward if the suspect is released. The Appellant’s arguments that the Prosecution “*ne pouvait donc techniquement avoir de témoins au Soudan*”<sup>94</sup> and that no witness identity has been disclosed yet<sup>95</sup> are therefore immaterial.

40. There has been no “security” or “confidentiality” breach by the Prosecution: stating that witnesses currently reside in the European Union<sup>96</sup> is not a breach of confidential information undermining the security of any witness. The Appellant’s submissions to the contrary are wrong. In any event, the Appellant fails to explain how the existence of a security or confidentiality breach would *per se* affect the risk assessment under article 58(1)(b)(ii) or justify the release of the suspect.

<sup>86</sup> See [Gbagbo Interim Release AD](#), paras. 46-47 citing ICC-01/04-01/06-774 (“[Lubanga First Redactions Requests AD](#)”), para. 20.

<sup>87</sup> [Decision](#), paras. 15-22.

<sup>88</sup> [Decision](#), paras. 27-30.

<sup>89</sup> ICC-01/05-01/13-2275-Red (“[Bemba et al. AJ](#)”), para. 105, citing *Prosecutor v. Halilović*, Case No. IT-01-48-A, [Judgement](#), 16 October 2007, paras. 121, 188. See *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, [Judgement](#), 20 February 2001, para. 498; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, [Judgement](#), 28 February 2005, para. 23; *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, [Judgement](#), 20 October 2010, para. 195; *Prosecutor v. Simba*, Case No. ICTR-01-76, [Judgement](#), 27 November 2007, para. 152; Case 002/01 (*KHIEU Samphân and NUON Chea*), 002/19-09-2007-ECCC/SC, [Appeal Judgement](#), 23 November 2016, para. 304.

<sup>90</sup> See above paras. 4-8.

<sup>91</sup> [Decision](#), para. 28.

<sup>92</sup> [Prosecution Response](#), para. 28.

<sup>93</sup> [Decision](#), para. 29.

<sup>94</sup> [Appeal](#), para. 26.

<sup>95</sup> [Appeal](#), para. 26.

<sup>96</sup> [Prosecution Response](#), para. 29.

41. In conclusion, because of the foregoing the Appellant's third ground of appeal should be dismissed.

**D. Ground 4: The Single Judge correctly articulated and applied the principle that pre-trial detention is the exception, and not the rule**

42. The Appellant's fourth ground of appeal alleges that the Single Judge reversed the standard applicable to pre-trial detention before the Court (namely, that pre-trial detention is the exception, not the rule).<sup>97</sup> The Appellant's arguments in this ground of appeal largely repeat and rely upon the arguments previously made in this Appeal and/or in the Reply, and should be rejected for the reasons already outlined above.

43. *First*, the Appellant claims that this case is unique before this Court as it is the first case in which doubt exists as to whether the suspect (Mr Abd-Al-Rahman) is the person who is alleged by the Prosecution to have committed crimes (described in the Arrest Warrants and supporting documents as Mr Abd-Al-Rahman and as "Ali Kushayb").<sup>98</sup> The Appellant merely repeats his arguments in Ground 2 that there exists doubt as to the link between the two names, and argues in Ground 4 that this doubt should be resolved in the suspect's favour to allow his release.<sup>99</sup> But as set out above,<sup>100</sup> the question of the link between Mr Abd-Al-Rahman and "Ali Kushayb" was considered and resolved by the Single Judge in his determination under article 58(1)(a). The Single Judge correctly found—and the Appellant does not challenge this on appeal—that there are reasonable grounds to believe that Mr Abd-Al-Rahman committed crimes within the jurisdiction of this Court and that article 58(1)(a) was satisfied.<sup>101</sup> Against this standard, the unsubstantiated—and repetitive<sup>102</sup>—arguments that Mr Abd-Al-Rahman raises as to the allegations against him are not simply to be resolved in his favour so that he is released. Such an untenable interpretation subverts the test in article 58(1) and goes against its logical and plain textual reading.

44. *Second*, the Appellant again states that he is willing to comply with stringent security conditions to allay any concerns that may exist under article 58(1)(b)(ii).<sup>103</sup> Yet the Appellant fails to acknowledge that the Single Judge took this into account, but found that the imposition of conditions on release would not sufficiently mitigate the risk to the integrity of

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<sup>97</sup> [Appeal](#), paras. 27-32.



the investigations and the proceedings and the safety of witnesses.<sup>104</sup> The Appellant fails to show how the Single Judge erred in this assessment.

45. *Third*, the Appellant claims that the Decision rested on three considerations which should not have supported the decision to maintain him in detention: (i) the Prosecutor's inability to investigate in Darfur should not prejudice his ability to be released; (ii) Annex 3 should have been ruled inadmissible; and (iii) there is low relevance of the high-ranking position that Mr Abd-Al-Rahman is alleged to have.<sup>105</sup> These considerations have already been addressed above and may be rejected for the same reasons. Specifically: (i) the Single Judge correctly considered *all factual* circumstances including the Prosecutor's ability to protect witnesses in Darfur in his article 58(1)(b)(ii) assessment;<sup>106</sup> (ii) the Single Judge did not err in applying a lower evidentiary threshold in his article 58(1)(b)(ii) assessment, and in relying on Annex 3;<sup>107</sup> and (iii) the suspect's alleged high ranking position was a relevant factor to the Single Judge's assessment under article 58(1)(b)(ii).<sup>108</sup>

46. The Single Judge correctly stated the principle that "in considering the right to interim release, one must bear in mind the fundamental principle that deprivation of liberty is the exception and not the rule".<sup>109</sup> The Single Judge did not err in his application of that principle when making his assessment under article 58(1)(b)(ii). In attempting to show otherwise, the Appellant simply strings together his previous arguments without demonstrating any clear error, let alone any error that had an impact on the Decision.

47. In conclusion, the Appellant's fourth ground of appeal should be dismissed.

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<sup>98</sup> [Appeal](#), para. 29.

<sup>99</sup> [Appeal](#), paras. 20(ii), 29.

<sup>100</sup> *See above* paras. 27-30.

<sup>101</sup> *See above* paras. 27-30.

<sup>102</sup> *See Reply*, paras. 9(i), 16..

<sup>103</sup> [Appeal](#), para. 30. *See also Request*, para. 16; [Reply](#), para. 16.

<sup>104</sup> [Decision](#), paras. 22, 29.

<sup>105</sup> [Appeal](#), para. 31.

<sup>106</sup> *See above* paras. 4-9.

<sup>107</sup> *See above* paras. 14-21.

<sup>108</sup> *See above* paras. 2222-25.

<sup>109</sup> [Decision](#), para. 23.

**E. Ground 5: The Single Judge was not required to seek observations from the Host State under regulation 51 of the Regulations of the Court**

48. The Single Judge correctly found that “while interim or conditional release cannot be granted unless State observations have first been requested, regulation 51 of the Regulations of the Court cannot be understood as requiring that observations must be required even when the Chamber does not intend to grant interim release”.<sup>110</sup> The Appellant fails to show any error of law let alone any impact of the alleged error on the Decision.

49. The Appellant argues that under regulation 51 the Single Judge should have sought observations from the Host State to which Mr Abd-Al-Rahman sought to be released, irrespective of his decision to deny the Request.<sup>111</sup> However, the Appellant misunderstands a decision in *Bemba*<sup>112</sup> which is inapposite in this case, since it deals with Chambers’ duties when *granting* conditional release.

50. In *Bemba* the Appeals Chamber found “that *in order to grant conditional release* the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary.”<sup>113</sup> The Appeals Chamber noted that rule 119(3) of the Rules of Procedure and Evidence, dealing with steps to be taken when *granting* conditional release, “obliges the Court to seek, *inter alia* the views of the relevant States *before imposing or amending any conditions* restricting liberty”<sup>114</sup> and that “a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release.”<sup>115</sup> The last sentence, referring in general to “a decision on conditional release” (“*une décision en la matière*”, in the French translation cited by the Appellant)<sup>116</sup>, must be read in context as referring to decisions to *grant*, and not to decisions to *deny*, conditional release. This is confirmed by the Appeals Chamber’s conclusion that “the Pre-Trial Chamber erred in

<sup>110</sup> [Decision](#), para. 32.

<sup>111</sup> [Appeal](#), paras. 33-36.

<sup>112</sup> [Appeal](#), para. 35 relying upon [ICC-01/05-01/08-631-Red-tFRA](#).

<sup>113</sup> [ICC-01/05-01/08-631-Red](#) (“[Bemba 2 December 2009 Interim Release AD](#)”), para. 106 (emphasis added).

<sup>114</sup> [Bemba 2 December 2009 Interim Release AD](#), para. 106 (emphasis added).

<sup>115</sup> [Bemba 2 December 2009 Interim Release AD](#), para. 106.

<sup>116</sup> [Appeal](#), para. 35. The French version cited by the Appellant reads “[L]a Chambre d’appel considère que pour **accorder la mise en liberté** sous condition, il faut qu’un État soit disposé à accueillir la personne concernée et à mettre en œuvre les conditions associées. La règle 119-3 du Règlement de procédure et de preuve oblige la Cour à demander notamment leurs observations aux États concernés avant **d’imposer ou de modifier des conditions restrictives** de liberté. Il s’ensuit qu’il faut d’abord identifier un État disposé à **accueillir la personne concernée** et capable de le faire avant de rendre une décision en la matière.” [ICC-01/05-01/08-631-Red-tFRA](#), para. 106 (emphasis added).

*granting conditional release* without [...] identifying the State to which Mr Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court”<sup>117</sup>

51. Further, the approach taken by the Single Judge is supported by the jurisprudence of the Court. In the *Ongwen* case, the Single Judge did not seek observations from the Host State when determining an application for interim release, on the basis that the identified risks existed independently of the question of which State might accept the suspect, and that regulation 51 cannot be understood to require that observations must be requested even in the absence of any reasonable prospect that an application for interim release (with or without conditions) may be granted.<sup>118</sup> Other cases suggest that steps under regulation 51 should be taken *only* if the Pre-Trial Chamber is considering conditional release.<sup>119</sup>

52. In any event, even if the Single Judge erred in this regard, the error had no impact on the Decision to order the continued detention of Mr Abd-Al-Rahman under article 58(1)(b)(ii).

53. In conclusion, the Appellant’s fifth ground of appeal should be dismissed.

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<sup>117</sup> [Bemba 2 December 2009 Interim Release AD](#), para. 109 (emphasis added). *See* also para. 107 (noting that “any decision of the Court granting conditional release would be ineffective” without State cooperation).

<sup>118</sup> ICC-02/04-01/15-349 (“[Ongwen Interim Release Decision](#)”), para. 25.

<sup>119</sup> ICC-01/05-01/08-1937-Red2 (“[Bemba 23 November 2011 Provisional Release AD](#)”), para. 35; [Gbagbo Interim Release Decision](#), para. 52.

### III. CONCLUSION

54. For the reasons above, the Prosecution respectfully requests the Appeals Chamber to reject Mr Abd-Al-Rahman's Appeal and confirm the Interim Release Decision.



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**Fatou Bensouda, Prosecutor**

Dated this 31<sup>st</sup> day of August 2020

At The Hague, The Netherlands