



Original: English

No. ICC-02/05-01/20

Date: 11 December 2020

PRE-TRIAL CHAMBER II

Before:

Judge Kesia-Mbe Mindua, Presiding Judge

Judge Tomoko Akane

Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

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

Public

Public redacted version of 'Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence'

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
Mr Harry Tjonk

**Victims Participation and Reparations
Section Other**

PRE-TRIAL CHAMBER II of the International Criminal Court, in the case of *The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman* ('*Ali Kushayb*'), having regard to articles 58(1)(b)(i), 58(1)(b)(ii), 60(3), and 60(4) of the Rome Statute (the 'Statute'), rule 118(2) of the Rules of Procedure and Evidence (the 'Rules'), and regulation 51 of the Regulations of the Court (the 'Regulations'), issues this Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to Rule 118(2) of the Rules of Procedure and Evidence.

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor's application¹ under article 58(7) of the Statute and decided² to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman³ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas, in 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 Statute⁴ by issuing a second warrant of arrest against Mr Abd-Al-Rahman⁵ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas, in Darfur, Sudan, between on or about 5 to 7 March 2004.

¹ Pre-Trial Chamber I, Situation in Darfur, The Sudan, 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](#)).

² Pre-Trial Chamber I, *The Prosecutor v. Ahmad Muhammad Harun* ('*Ahmad Harun*') and *Ali Muhammad Al Abd Al Rahman* ('*Ali Kushayb*'), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, [ICC-02/05-01/07-1-Corr](#). ('Warrant of Arrest')

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

⁴ Pre-Trial Chamber II, Prosecution's application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for *Ahmad Muhammad Harun* ('*Ahmad Harun*') and *Ali Muhammad Al 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](#)).

⁵ Pre-Trial Chamber II, *The Prosecutor v. Ahmad Muhammad Harun* ('*Ahmad Harun*') and *Ali Muhammad Al Abd Al Rahman* ('*Ali Kushayb*'), Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 11 June 2020, ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, [ICC-02/05-01/07-74-Red](#)).

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').⁶
5. On 14 August, 2020, the Chamber rejected the Defence request for the interim release of the suspect⁷ and ordered the continued detention of Mr Abd-Al-Rahman (the 'Interim Release Decision').⁸ The Chamber found that the conditions of article 58(1)(a) and 58(1)(b)(ii) were fulfilled. The Chamber also determined that the 120 day period for review set out in rule 118(2) of the Rules commenced as of the date of its notification.
6. On 8 October 2020, the Appeals Chamber upheld the Interim Release Decision.⁹
7. On 16 November 2020, pursuant to article 60(3) of the Statute and rule 118(2) of the Rules, the Single Judge instructed the Prosecutor to submit observations in relation to the review of Mr Abd-Al-Rahman's detention by 20 November 2020 and gave the Defence until 27 November 2020 to file its observations.¹⁰
8. On 20 November 2020, the Office of the Prosecutor filed observations on the matter of the review of the suspect's detention (the 'Prosecutor's Observations').¹¹

⁶ Pre-Trial Chamber II, *The Prosecutor v. Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Al Abd Al Rahman* ('Ali Kushayb'), Decision severing the case against Mr Ali Kushayb, 12 June 2020, [ICC-02/05-01/07-87](#).

⁷ Pre-Trial Chamber II, *The Prosecutor v. Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Al Abd Al Rahman* ('Ali Kushayb'), Requête en vertu de l'Article 60-2, 1 July 2020, [ICC-02/05-01/20-12](#).

⁸ Pre-Trial Chamber II, *The Prosecutor v. Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Al Abd Al Rahman* ('Ali Kushayb'), Decision on the Defence Request for Interim Release, 14 August 2020, [ICC-02/05-01/20-115](#).

⁹ The Appeals Chamber, *The Prosecutor v. Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Al Abd Al Rahman* ('Ali Kushayb'), Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', 8 October 2020, [ICC-02/05-01/20-177](#).

¹⁰ Email from the Chamber, 16 November 2020, at 14:16.

¹¹ Pre-Trial Chamber II, *The Prosecutor v. Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Al Abd Al Rahman* ('Ali Kushayb'), Prosecution's observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 20 November 2020, ICC-02/05-

9. On 26 November 2020, the Defence submitted its observations on the matter of detention, including its reply to the Prosecutor’s Observations (the ‘Defence Observations’).¹²

II. SUBMISSIONS

A. The Prosecutor’s Observations

10. The Prosecutor submits that there is no change of circumstances that would merit revision of the order against interim release, as there have been no changes to some or all of the facts underlying the previous decision on detention, or a new fact to satisfy the Chamber that a modification of its prior ruling is necessary.¹³

11. The Prosecutor additionally submits that a number of incidents that have occurred since 14 August 2020¹⁴ require the continued detention of Mr Abd-Al-Rahman under article 58(1)(b)(ii) to ensure the integrity of the proceedings and safety of the witnesses.¹⁵

12. The Prosecutor further submits that the disclosure of 6,407 items of evidence to the Defence, including the identity of 44 witnesses,¹⁶ heightens an ongoing risk that Mr Abd-Al-Rahman might exert pressure on witnesses either directly or indirectly through his supporters.¹⁷

13. The Prosecutor also argues that although significant progress has been made in securing cooperation with the government of Sudan during the Prosecution’s mission from the 17-20 October 2020, the protection of witnesses that can be afforded under

01/20-209-Conf. A public redacted version is also available, see [ICC-02/05-01/20-209-Red](#), (the ‘Prosecutor’s Observations’).

¹² Réponse aux observations du Bureau du Procureur, 26 November 2020, ICC-02/05-01/20-213-Conf. A public redacted version is also available, see [ICC-02/05-01/20-213-Red](#) (the ‘Defence Observations’).

¹³ Prosecutor’s Observations, para. 7, referring to The Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence”, 24 November 2010, [ICC-01/05-01/08-1019](#), para 51.

¹⁴ Prosecutor’s Observations, para. 14.

¹⁵ Prosecutor’s Observations, para. 16.

¹⁶ Prosecutor’s Observations, para. 12.

¹⁷ Prosecutor’s Observations, para. 11.

these cooperative measures are insufficient and it is imperative that “when determining whether the conditions for continued detention under article 58(1)(b)(ii) of the Statute [are] met, the safety of witnesses must be considered regardless of whether they are currently reachable by the Prosecutor”.¹⁸

14. The Prosecution additionally submits that Mr Abd-Al-Rahman should remain in detention because it will ensure his appearance at trial. This is based on statements made by the Attorney General for Sudan that Mr Abd-Al-Rahman “was surrounded” by a police force but that he never moved alone.¹⁹ Based on this statement, the Prosecutor claims that Mr Abd-Al-Rahman only surrendered to ICC custody to avoid detention in Sudan.²⁰

B. The Defence Observations

15. The Defence argues that there have been two new changes of circumstances which merit the release of the suspect to the territory of the Netherlands as host state.²¹

16. The first alleged change is that the Defence recently discovered that there was no existing special agreement between Sudan and the Court pursuant to article 4(2) of the Statute. The Defence claims that the absence of such an agreement deprived the Prosecution of its ability to legally conduct investigations on Sudanese territory, since Sudan is not a State Party to the Statute.²² The Defence argues that a number of items of evidence that were relied upon in support of the warrants of arrests against Mr Abd-Al-Rahman are inadmissible pursuant to article 69(7) of the Statute because they were obtained by means of a violation of the Statute.

17. The Defence further argues that the Prosecutor has failed to comply with the ICC Information Protection Policy by failing to mark certain exhibits as confidential.²³

¹⁸ The Appeals Chamber, *The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Al Abd Al Rahman ('Ali Kushayb')*, Judgement on the Appeal of Mr Ali Muhammad Ali Abd Al Rahman against the decision of Pre Trial Chamber II of 14 August 2020 entitled ‘Decision on Defence Request for Interim Release,’ 8 October 2020, [ICC-02/05-01/20-177](#), para. 27.

¹⁹ Prosecutor’s Observations, paras 22,23.

²⁰ Prosecutor’s Observations, paras 22, 23.

²¹ Defence Observations, para. 16.

²² Defence Observations, para.22,

²³ Defence Observations, para.35.

According to the Defence, the failure to have these markings make those items inadmissible.²⁴

18. The Defence argues that the exclusion of the exhibits affected by the absence of a special agreement and those inadmissible because of non-compliance with information security rules means that the evidentiary basis for the warrants of arrest no longer exists. As a result of that, the criteria in article 58(1) are no longer fulfilled and this requires the immediate release of the Defendant.²⁵

19. Additionally, the Defence asks the Chamber to take into consideration the suspect's age and health condition.²⁶

III. Analysis

20. At the outset, the Chamber notes that deprivation of liberty is the exception and not the rule.²⁷

21. As noted in the jurisprudence of this Court, the Chamber must periodically review its ruling on the detention of the suspect, but may only modify its previous ruling if there has been a change in some or all of the facts underlying its previous decision.²⁸ Furthermore, the discovery of a new fact must be such that it is capable of satisfying the Chamber that an order for detention is now no longer necessary.²⁹

22. Bearing this in mind, the Chamber will first recall the main findings of the Interim Release Decision.

23. In relation to the requirement of article 58(1)(a) that there must be reasonable grounds to believe that the person has committed a crime within the jurisdiction of the

²⁴ Defence Observations, para. 35.

²⁵ Defence Observations, para. 37, with reference to section 7 of Presidential Directive ICC/PRES/D/G/2007/001 – Information Protection Policy.

²⁶ Defence Observations, para. 38.

²⁷ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, 16 December 2008, [ICC-01/05-01/08-321](#), para. 31.

²⁸ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence, 28 July 2010, [ICC-01/05-01/08-843](#), para 52.

²⁹ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence, 28 July 2010, [ICC-01/05-01/08-843](#), para. 52.

Court, the Single Judge noted that the Defence had not contested this point and recalled the findings in the two warrants of arrest issued against Mr Abd-Al-Rahman.³⁰

24. In relation to the requirement of article 58(1)(b)(ii) that the detention of the suspect must appear necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings, the Single Judge considered that the Court was not yet in a position to protect witnesses in Darfur and noted reports of threats allegedly made by the suspect and his supporters to human rights activists in February 2020.³¹ The Single Judge also took into consideration Mr Abd-Al-Rahman's high ranking position, his personal connections, and the likelihood that he still has supporters who may have access to actual or potential witnesses.³²

25. In relation to article 58(1)(a), the Defence puts forward two arguments. First, the Defence argues that the supposed absence of a special agreement between Sudan and the Court means that all the evidence that was collected by the Prosecutor in Sudan is inadmissible. Second, the Defence argues that the alleged failure by the Prosecutor to comply with the administrative rules on information security means that the affected exhibits are inadmissible. The Defence further claims that the inadmissibility of this evidence means that the warrants of arrest lack a proper evidentiary basis.

26. The Chamber is not persuaded that the arguments put forward by the Defence, even if accepted in their entirety, would rise to the level that they could lead to the annulment of the warrants of arrest. Indeed, the Chamber observes that the bulk of the evidence relied on in support of the warrants of arrest was obtained outside of Sudan and is thus not affected by the Defence's arguments concerning article 4(2) of the Statute. Similarly, the amount of evidence that is claimed to be inadmissible on the basis of the alleged violation of the Court's Information Protection Policy is relatively insignificant compared to the entirety of the evidence in support of the warrants of arrest. Consequently, the Chamber does not need to rule on the merits of the Defence's arguments. The Chamber further recalls that the subject matter of this decision pertains to the review of the suspect's detention, and that

³⁰ Interim Release Decision, para. 26.

³¹ Interim Release Decision, para. 28.

³² Interim Release Decision, para. 29.

under Article 61(6)(b) of the Statute the Defence may challenge the admissibility of evidence at the confirmation hearing.

27. Conclusively on this point, the Chamber finds that no changes have occurred in the factors underlying the Interim Release Decision under article 58(1)(a) of the Statute.

28. With respect to the conditions under article 58(1)(b)(ii), the Defence has not advanced any new facts or change of circumstances. The Chamber considers that the grounds for the Interim Release Decision as outlined above are still present. This conclusion is reinforced by the information provided by the Prosecutor, which shows that witness security is still far from guaranteed and that persons apparently related to Mr Abd-Al-Rahman have access to certain witnesses.

29. [REDACTED]

30. [REDACTED]

31. The Chamber has taken note of the limited progress the Prosecutor and VWU have been able to make in relation to putting in place protective measures for witnesses. However, it is not correct, as is argued by the Defence, that the Prosecutor is somehow in breach of the Interim Release Decision. In the Interim Release Decision, the Chamber instructed the Prosecutor to “take reasonable steps to put in place mechanisms to protect potential witnesses and/or safeguard potential evidence, and to collect more detailed information and evidence about Mr Abd-Al-Rahman’s remaining position of influence in the region.”³³ There is no indication that the Prosecutor did not take all feasible steps under the circumstances to comply with this instruction. While it is regrettable that the Court is not yet in a position to sufficiently mitigate risks to all witnesses, this reality must be taken into account for the purposes of assessing the continued need to detain Mr Abd-Al-Rahman.

32. Based on these considerations, the Chamber finds that the requirement of article 58(1)(b)(ii) of the Statute is still fulfilled, and that the continued detention of Mr Abd-Al-Rahman remains justified at this phase of the proceedings in order to ensure that the suspect does not obstruct or endanger the investigation or the Court’s proceedings.

³³ Interim Release Decision, para. 31.

33. The Chamber further finds that the risks of witness interference are such that they cannot be minimised with the imposition of conditions upon interim release.

34. Finally, the Chamber considers that Mr Abd-Al-Rahman's condition, which is reported to have improved, does not warrant that he be released on humanitarian grounds.

FOR THESE REASONS, THE CHAMBER HEREBY


REJECTS the Defence Request for interim release; and

ORDERS that Mr Abd-Al-Rahman remain in detention.

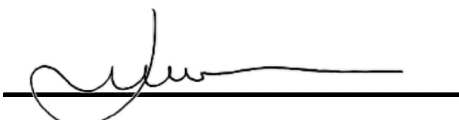
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Friday, 11 December 2020

At The Hague, The Netherlands