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

Date: 22 March 2021

PRE-TRIAL CHAMBER II

Before: 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

Public Redacted Version of “Prosecution’s observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman (“ALI KUSHAYB”)”, 18 March 2021, ICC-02/05-01/20-309-Conf

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

Mr James Stewart

Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of the Victims

Legal Representatives of the 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

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Prosecution submits that Mr Abd-Al-Rahman's continued pre-trial detention pursuant to article 60(2) of the Rome Statute remains necessary, as the conditions warranting his detention under article 58(1) continue to be met. The Prosecution again conveys its sincere apologies to the Chamber for its failure to meet the previously prescribed deadline for submitting observations on this matter.

2. The Prosecution observes that there has been no change in circumstances under article 60(3) that would justify modification of the previous determinations by Judge Rosario Salvatore Aitala, acting as Single Judge on behalf of Pre-Trial Chamber II ("Chamber"), in the first interim release decision ("First Interim Release Decision")¹ and second interim release decision ("Second Interim Release Decision"),² ordering that Mr Abd-Al-Rahman remain in detention.

3. Under article 58(1)(b)(ii), Mr Abd-Al-Rahman's continued detention remains necessary to prevent the obstruction or endangerment of the investigation and the court proceedings, as the Prosecution's ongoing disclosure of relevant witness materials and identities with minimal to no redactions significantly increases the risk that he will seek to influence or intimidate them.

4. In addition, under article 58(1)(b)(i), continued detention remains necessary to ensure Mr Abd-Al-Rahman's appearance at trial because the disclosure of new evidence provides greater incentive for him to abscond.

II. CLASSIFICATION

5. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files these observations as confidential because they contain confidential information relating to Prosecution investigations. Annexes 1 and 2 are classified as secret, *ex parte*, only available to the Prosecution, since they contain information relating to Prosecution witnesses who are not yet cleared for disclosure to the

¹ ICC-02/05-01/20-115 ("First Interim Release Decision"), pg. 11.

² ICC-02/05-01/20-230-Conf; ICC-02/05-01/20-230-Red ("Second Interim Release Decision"), pg. 10.

Defence. The Prosecution will file a public version of these observations as soon as practicable.

III. OBSERVATIONS

A. There have been no changed circumstances that would justify modification of the Chamber's order that Mr Abd-Al-Rahman remain in detention

6. When conducting its periodic review, pursuant to article 60(3) of the Statute, the Chamber reverts to the previous ruling on pre-trial detention to ascertain whether there has been a “change in circumstances” since the initial decision that would have a bearing on the conditions set out in article 58(1).³

7. In order to demonstrate that “changed circumstances” exist, there must be a “change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.”⁴ As such, the Prosecution need not re-establish circumstances that have already been established in previous submissions and should only bring any other relevant information to the attention of the Chamber.⁵

8. In both the First Interim Release Decision, and the Second Interim Release Decision, respectively, the Chamber maintained that the conditions set out under article 58(1)(b)(ii) for Mr Abd-Al-Rahman's pre-trial detention were fulfilled.⁶ While the conditions set out in article 58(1)(b) are alternative in nature, if one requirement is fulfilled, there is no need to address the remaining requirements.⁷ The Appeals Chamber has subsequently affirmed these decisions, finding that the Chamber did not err in its ordering Mr Abd-Al-Rahman's continued detention.⁸

9. Since the Second Interim Release Decision on 11 December 2020, the Prosecutor is not aware of any change in circumstances and/or facts or any new facts

³ ICC-01/05-01/08-1019 (OA 4), paras. 47, 52 (citing ICC-01/04-01/07-572 (OA 4), para. 14).

⁴ *Id.*, para. 51.

⁵ *Id.*, paras. 2 and 51.

⁶ First Interim Release Decision, paras. 29-30. Second Interim Release Decision, para. 32.

⁷ First Interim Release Decision, para. 25.

⁸ ICC-02/05-01/20-177 (“First Appeals Decision”), para. 23. *See also* ICC-02/05-01/20-279-Red, paras. 33, 37, and 42.

relevant to the Chamber's determination. As the Prosecution has previously noted, [REDACTED],⁹ and, thus, does not amount to sufficiently changed circumstances to justify a modification of the prior ruling under article 60(3).

B. The continued detention of Mr Abd-Al-Rahman remains necessary to prevent the obstruction or endangerment of the investigation and the court proceedings

10. Under article 58(1)(b)(ii), the continued detention of Mr Abd-Al-Rahman remains necessary to ensure that he does not obstruct or endanger the investigation and the court proceedings.

11. The Prosecution continues to disclose the material and identity of witnesses that have provided evidence in relation to Mr Abd-Al-Rahman in accordance with the deadlines set out by the Chamber.¹⁰ The Prosecution has disclosed material related to a total of 119 witnesses to the Defence, including 56 witnesses that have been cleared for disclosure without identity redactions since the submission of observations on the review of Mr Abd-Al-Rahman's detention on 20 November 2020.¹¹

12. The disclosure of witness materials with minimal or no redactions, [REDACTED], presents a heightened risk that Mr Abd-Al-Rahman could seek to influence the ongoing investigation and court proceedings, either directly or indirectly through supporters. While the Prosecution has made progress in relation to cooperation with the GoS, including a number of recent missions to Khartoum, [REDACTED].

13. The Prosecution has taken steps designed to protect potential witnesses and safeguard potential evidence [REDACTED].¹² [REDACTED].

⁹ [REDACTED].

¹⁰ ICC-02/05-01/20-238, pg. 15.

¹¹ ICC-02/05-01/20-209-Conf; ICC-02/05-01/20-209-Red ("First Observations on Review of Detention").

¹² [REDACTED].

14. Moreover, this potential risk of harm faced by witnesses cannot be adequately mitigated by imposing conditions on Mr Abd-Al-Rahman's release that would limit his ability to engage in direct intimidation. [REDACTED].¹³ [REDACTED].¹⁴

15. If released, Mr Abd-Al-Rahman would have potentially unrestricted access to his network of supporters, and he could disclose privileged information such as witness identities to these associates who could be better positioned to intimidate and retaliate against vulnerable witnesses on his behalf. As a result, Mr Abd-Al-Rahman's continued detention remains necessary, consistent with the Court's obligation to protect the safety, physical and psychological well-being of victims and witnesses under article 68(1) of the Statute.¹⁵

C. The continued detention of Mr Abd-Al-Rahman remains necessary to ensure his appearance at trial

16. Under article 58(1)(b)(i), the continued detention of Mr Abd-Al-Rahman remains necessary to ensure his appearance at trial. The Prosecution continues to obtain and disclose highly relevant evidence. The ongoing disclosure of relevant evidence, combined with the imminent prospect of facing formal charges at confirmation, could provide Mr Abd-Al-Rahman with further incentive to abscond.¹⁶

IV. RELIEF REQUESTED

17. For the aforementioned reasons, the Prosecution respectfully requests that the Chamber order the continued pre-trial detention of Mr Abd-Al-Rahman in accordance with articles 60 and 58(1) of the Statute.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ First Appeals Decision, para. 27.

¹⁶ ICC-02/05-01/20-95, paras. 18-19.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive style with a large initial 'J' and a period at the end.

James Stewart
Deputy Prosecutor

Dated this 22nd day of March 2021

At The Hague, The Netherlands