

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 10 June 2021

**PRE-TRIAL CHAMBER II**

**Before:** Judge Rosario Salvatore Aitala, Presiding Judge  
Judge Antoine Kesia-Mbe Mindua  
Judge Tomoko Akane

**SITUATION IN DARFUR, SUDAN**

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

**Confidential**

**Prosecution's observations on review of the pre-trial detention of Mr Ali  
Muhammad Ali Abd-Al-Rahman ("ALI KUSHAYB")**

**Source:** Office of the Prosecutor

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

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**Detention Section**

**Victims Participation and Reparations  
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## I. INTRODUCTION

1. The Prosecution hereby submits its observations on the periodic review of Mr Abd-Al-Rahman's detention under rule 118(2) of the Rules of Procedure and Evidence ("Rules").<sup>1</sup>

2. Mr Abd-Al-Rahman's continued pre-trial detention pursuant to article 60(2) of the Rome Statute ("Statute") remains necessary, as the conditions warranting his detention under article 58(1) are still met.

3. There is no change in circumstances that would require the Chamber to reverse its previous determination ordering Mr Abd-Al-Rahman's continued detention pursuant to article 60(3) of the Statute. To the contrary, as the prospect of a trial draws closer, Mr Abd-Al-Rahman's detention is further justified under article 58(1)(b)(i) and (ii).

4. Mr Abd-Al-Rahman's detention remains necessary to prevent the obstruction or endangerment of the ongoing investigation and the court proceedings under article 58(1)(b)(ii). In particular, the need for the protection of witnesses has increased because the identities of most of the witnesses relied upon at the confirmation hearing are now known to Mr Abd-Al-Rahman, along with the link between their evidence and the charges.

5. In addition, detention of Mr Abd-Al-Rahman is still necessary to ensure his appearance at trial under article 58(1)(b)(i) because his incentive to abscond has only increased following the confirmation hearing, now that the case has progressed significantly towards a possible trial.

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<sup>1</sup> See, for context, ICC-02/05-01/20-T-010-FRA, page 4, lines 8-12.

## II. CLASSIFICATION

6. 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. 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**

7. Article 60(3) of the Statute requires the Pre-Trial Chamber to periodically review its previous ruling on the release or detention of a person in order to ascertain whether the circumstances have changed and if so, whether they warrant the termination of detention.<sup>2</sup>

8. As stated by the Chamber in its most recent decision on Mr Abd-Al-Rahman's interim release of 12 April 2021 ("Third Interim Release Decision"), for the Chamber to modify its previous determination, "the discovery of a new fact must be such that it is capable of satisfying the Chamber that an order for detention is no longer necessary."<sup>3</sup> There is no such new fact.

9. In all three decisions on interim release since Mr Abd-Al-Rahman's surrender, the Chamber found that the conditions for Mr Abd-Al-Rahman's pre-trial detention as set out under article 58(1)(b)(ii) were fulfilled.<sup>4</sup> The Appeals Chamber has recently upheld the Third Interim Release Decision, rejecting all of Mr Abd-Al-Rahman's grounds of appeal.<sup>5</sup>

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<sup>2</sup> ICC-01/05-01/08-1019 (OA 4), para. 47, 52 (citing ICC-01/04-01/07-572 (OA 4), para. 14 and ICC-01/05-01/08-631-Red (OA 2), para. 60).

<sup>3</sup> ICC-02/05-01/20-338 ("Third Interim Release Decision"), para. 17 (citing ICC-01/05-01/08-1019, para. 52).

<sup>4</sup> ICC-02/05-01/20-115, para. 29; ICC-02/05-01/20-230-Red, para. 28.

<sup>5</sup> ICC-02/05-01/20-415 (OA 7).

10. The Prosecutor is not aware of any change in circumstances or any new facts relevant to the Chamber's determination. On the contrary, all the recent developments in this case, set out below, confirm the need for the continued detention of Mr Abd-Al-Rahman.

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

11. 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.

12. In the Third Interim Release Decision, the Chamber found that "there still exists a significant likelihood that if Mr Abd-Al-Rahman were to be released, he might pose a threat – directly or indirectly – to the victims and witnesses in this case."<sup>6</sup> Not only do those risks to victims and witnesses persist, but recent developments since the Chamber's last review of Mr Abd-Al-Rahman's detention further militate in favour of detention.

13. Since the Prosecution's last submissions on interim release on 18 March 2021,<sup>7</sup> Mr Abd-Al-Rahman has received the identity of an additional 23 Prosecution witnesses. As a result, Mr Abd-Al-Rahman now knows the identity of 94 out of the total 111 witnesses relied upon by the Prosecution at the confirmation hearing.

14. A majority of those witnesses either reside in Chad or Sudan or, if residing elsewhere, still have family in Chad or Sudan. Moreover, at the confirmation hearing, the Prosecution presented the evidence of many of its witnesses and detailed the probative value of their evidence in relation to the charges against Mr Abd-Al-Rahman.

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<sup>6</sup> Third Interim Release Decision, para. 37.

<sup>7</sup> ICC-02/05-01/20-309-Conf.

15. The disclosure of these witness materials with no identity redactions 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. As the Prosecution has previously noted, the recent signing of the Memorandum of Understanding (“MoU”) with the Government of Sudan on 14 February 2021 does not change the overall risk assessment faced by witnesses currently residing in Sudan.<sup>8</sup>

16. Indeed, the volatile security situation in Sudan and remoteness of witness locations continue to pose substantial challenges for risk mitigation notwithstanding the signing of the MoU. If anything, the need to protect victims and witnesses is greater now that the suspect has access to the material and identities of all but 17 of the witnesses that the Prosecution relied upon for confirmation.

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

17. Under article 58(1)(b)(i), the continued detention of Mr Abd-Al-Rahman remains necessary to ensure his appearance at trial. The Prosecution is not aware of new factors indicating that Mr Abd-Al-Rahman is less likely to abscond if released. On the contrary, all recent developments since the Third Interim Release Decision confirm the need for his continued detention.

18. The case has advanced significantly towards a possible trial as the confirmation hearing was completed on 26 May 2021. As previously held by the Appeals Chamber, “the gravity of the charges and the resulting expectation of a lengthy prison sentence are relevant factors.”<sup>9</sup> In addition, the Appeals Chamber has held that “[e]vading justice in fear of the consequences that may befall the person

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<sup>8</sup> ICC-02/05-01/20-287-Conf-Red, para. 39; ICC-02/05-01/20-294-Conf, para. 4.

<sup>9</sup> ICC-02/11-01/11-278-Red (OA), para. 54 (citing *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-283 (OA), para. 27).

becomes a distinct possibility; a possibility rising in proportion to the consequences that the conviction may entail.”<sup>10</sup>

19. On 29 March 2021, the Prosecution filed its document containing the charges, followed by its pre-confirmation brief and its list of evidence on 16 April 2021. The confirmation of charges hearing took place from 24 to 26 May 2021 and the Pre-Trial Chamber will make a determination on the confirmation of charges within the next 60 days in accordance with regulation 53 of the Regulations of the Court. As the prospect of a trial grows closer, so does Mr Abd-Al-Rahman’s incentive to abscond.

#### IV. RELIEF REQUESTED

20. 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.



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**Fatou Bensouda, Prosecutor**

Dated this 10<sup>th</sup> day of June 2021

At The Hague, The Netherlands

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<sup>10</sup> ICC-01/04-01/07-572 (OA 4), para. 21.