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

Date: **11 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")***

**Public**

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

**Source: Office of Public Counsel for Victims**

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 Julian Nicholls

**Counsel for the Defence**

Mr Cyril Laucci

**Legal Representatives of the Victims**

Ms Amal Clooney

Mr Nasser Mohamed Amin Abdalla

Ms Paolina Massidda

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

Ms Sarah Pellet

Ms Ludovica Vetrucchio

**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. The Legal Representative of a group of participating victims<sup>1</sup> submits that Mr Abd-Al-Rahman's continued detention pursuant to article 60(2) of the Rome Statute (the "Statute") remains necessary, as the conditions under article 58(1) persist. There is no change in circumstances that would require modification of the last decision on the review of detention issued by the Single Judge on 12 April 2021 and confirmed by the Appeals Chamber on 2 June 2021.

2. Under article 58(1)(b)(i) of the Statute, continued detention is necessary to ensure Mr Abd-Al-Rahman's appearance at trial because the recent disclosure of new evidence supporting the seriousness of the crimes charged provides a greater incentive for the Suspect to abscond. The risk of a detained person absconding increases as the proceedings against him or her advance. In this sense, the holding of the confirmation of the charges hearing and the likelihood that the charges against Mr Abd-Al-Rahman be confirmed constitutes in itself a "*changed circumstance*" pursuant to article 60(3) of the Statute that increases the probability that the suspect might decide to abscond, and which justifies his continued detention.

3. Under article 58(1)(b)(ii) of the Statute, Mr Abd-Al-Rahman continued detention is also necessary to prevent the obstruction or endangerment of the ongoing Court proceedings. In fact, the disclosure of witness identities significantly increase the risk that Mr Abd-Al-Rahman would seek to influence or intimidate them. The Chamber has an obligation to protect victims and witnesses and to consider their security situation before amending the conditions restricting the liberty of a suspect.

4. Lastly, there are no changed circumstances regarding Mr Abd-Al-Rahman's network of supporters which would warrant a modification of the risk assessment under article 58(1)(b)(i) and (ii) of the Statute. Continued detention remains thus

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<sup>1</sup> See the "Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests" (Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-398](#), 20 May 2021.

necessary and 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.

## II. PROCEDURAL HISTORY

5. On 27 April 2007, Pre-Trial Chamber I granted the Prosecution's application under article 58(7) of the Statute<sup>2</sup> and issued a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman ("Mr Abd-Al-Rahman" or the "Suspect") 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.<sup>3</sup>

6. On 16 January 2018, Pre-Trial Chamber II (the "Chamber"), in its previous composition, granted the Prosecution's application to amend the first warrant of arrest pursuant to article 58(6) of the Statute by issuing a second warrant of arrest against Mr Abd-Al-Rahman 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.<sup>4</sup>

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

8. On 1 July 2020, Mr Abd-Al-Rahman filed a request for interim release to the territory of the host State, pursuant to article 60(2) of the Statute.<sup>5</sup>

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<sup>2</sup> See the "Decision on the Prosecution Application under Article 58(7) of the Statute" (Pre-Trial Chamber I), [No. ICC-02/05-01/07-1-Corr](#), 27 April 2007.

<sup>3</sup> See the "Warrant of Arrest for Ali Kushayb" (Pre-Trial Chamber I), [No. ICC-02/05-01/07-3-Corr](#), 27 April 2007.

<sup>4</sup> See the "Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')" (Pre-Trial Chamber II), [No. ICC-02/05-01/07-74-CONF](#), 16 January 2018.

<sup>5</sup> See the "*Requête en vertu de l'Article 60-2*", [No. ICC-02/05-01/20-12](#), 1 July 2020.

9. On 14 August 2020, the Chamber, Judge Aitala acting as Single Judge, issued the “Decision on the Defence Request for Interim Release”, rejecting the First Request (the “First Decision on Detention”).<sup>6</sup>

10. On 8 October 2020, the Appeals Chamber issued its judgment confirming the First Decision on Detention.<sup>7</sup>

11. On 11 December 2020, the Chamber ordered Mr Abd-Al-Rahman’s continued detention, finding no changes of circumstances in the factors underlying the First Decision on Detention (the “Second Decision on Detention”).<sup>8</sup>

12. On 5 February 2021, the Appeals Chamber issued its judgment confirming the Second Decision on Detention.<sup>9</sup>

13. On 12 April 2021, the Chamber issued its decision finding no change in circumstances requiring to modify its First Decision on Detention, rejecting the Hearing Request and remanding Mr Abd-Al-Rahman in detention (the “Third Decision on Detention”).<sup>10</sup>

14. On 20 May 2021, the Chamber issued the “Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests”,

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<sup>6</sup> See the “Decision on the Defence Request for Interim Release” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-115](#), 14 August 2020.

<sup>7</sup> See the “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’” (Appeals Chamber), [No. ICC-02/05-01/20-177 OA2](#), 8 October 2021. See also the “Separate concurring opinion of Judge Luz del Carmen Ibáñez Carranza to the 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’”, [No. ICC-02/05-01/20-177-Anx OA2](#), 8 October 2020.

<sup>8</sup> See the “Public Redacted Version of the Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118(2) of the Rules of Procedure and Evidence” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-230-Red](#), 11 December 2020, (original confidential filed on the same date).

<sup>9</sup> See the “Public Redacted Version of the Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s ‘Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence’” (Appeals Chamber), [No. ICC-02/05-01/20-279-Red OA6](#), 5 February 2021.

<sup>10</sup> See the “Decision on the review of detention” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-338](#), 12 April 2017.

authorising 151 victims to participate in the proceedings and appointing Counsel from the OPCV as one of the legal representatives in the case.<sup>11</sup>

15. Between 24 and 26 May 2021 the confirmation of charges hearing was held.

16. On 27 May 2021, the Chamber orally instructed the Prosecution and the Legal Representatives to file their written observations on the review of the pre-trial detention of Mr Abd-Al-Rahman by 11 June 2021.<sup>12</sup>

17. On 2 June 2021, the Appeals Chamber issued its judgment confirming the Third Decision on Detention.<sup>13</sup>

### III. OBSERVATIONS

18. The Legal Representative submits that Mr Abd-Al-Rahman's continued detention pursuant to article 60(2) of the Statute remains necessary, as the conditions under article 58(1) persist. There is no change in circumstances that would require a modification of the last decision on the review of detention issued by the Single Judge on 12 April 2021<sup>14</sup> and confirmed by the Appeals Chamber on 2 June 2021.<sup>15</sup>

19. The notion of "changed circumstances" within the meaning of article 60(3) of the Statute "*imports either 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*";<sup>16</sup> "[i]f there are changed circumstances, the Pre-Trial or Trial Chamber will need

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<sup>11</sup> See *supra* note 1.

<sup>12</sup> See the transcript of the hearing held on 27 May 2021, No. ICC-02/05-01/20-T-010-ENG RT, p. 3, line 24 to p. 5, line 3 (the official version of this transcript has not yet been notified).

<sup>13</sup> See the "Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention'" (Appeals Chamber), [No. ICC-02/05-01/20-415 OA7](#), 2 June 2021.

<sup>14</sup> See the Third Decision on Detention, *supra* note 10.

<sup>15</sup> See the "Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention'", *supra* note 13.

<sup>16</sup> See the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa" (Appeals Chamber), [No. ICC-01/05-01/08-631-Red OA2](#), 8 December 2009, para. 60.

to consider their impact on the factors that formed the basis for the decision to keep the person in detention” otherwise, the “Chamber is not required to further review the ruling on release or detention”.<sup>17</sup>

20. The Legal Representative submits that, pursuant to article 58(1)(b)(i) of the Statute, continued detention of the Suspect remains necessary because the continuous disclosure of new evidence supporting the seriousness of the crimes the Prosecution is charging him with provides a greater incentive for Mr Abd-Al-Rahman to abscond. Furthermore, the holding of the confirmation of the charges hearing and the likelihood that the charges against Mr Abd-Al-Rahman be confirmed constitutes in itself a “changed circumstance” pursuant to article 60(3) of the Statute that increases the probability that the suspect might decide to abscond, and which justifies his continued detention.<sup>18</sup> Indeed, the practice of the Court already indicated that the probability that a suspect might decide to abscond increases as the proceedings advance.<sup>19</sup>

21. The criteria of article 58 of the Statute are all the more met if one considers the particularly serious nature of the charges brought against the Suspect in the present case. In this regard, the Legal Representative also recalls that the Appeals Chamber has established that the seriousness of the crimes for which the person is being

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<sup>17</sup> See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled ‘Decision on the defence’s 28 December 2011 ‘*Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba*’” (Appeals Chamber), [No. ICC-01/05-01/08-2151-Red OA10](#), 5 March 2012, paras. 1 and 31.

<sup>18</sup> See the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, (Appeals Chamber), [No. ICC-01/05-01/08-631-Red OA2](#), 8 December 2009, para. 70. See also the “Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo” (Pre-Trial Chamber I), [No. ICC-01/04-01/06-826](#), 14 February 2007, p. 6; and the “Second Review of the Decision on the Conditions of Detention of Germain Katanga” (Trial Chamber II), [No. ICC-01/04-01/07-794-tENG](#), 12 December 2008, paras. 9-10.

<sup>19</sup> See, *inter alia*, the “Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010” (Trial Chamber III), [No. ICC-01/05-01/08-1088](#), 17 December 2010, para. 40. See also the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (Appeals Chamber), [No. ICC-01/05-01/08-631-Red OA2](#), 2 December 2009, para. 70; and the “Decision on the ‘Defence Request for Interim Release’” (Pre-Trial Chamber I), [No. ICC-01/04-01/10-163](#), 19 May 2011, para. 42.

prosecuted is an important factor justifying his or her continued detention.<sup>20</sup> In particular, with regard to the seriousness and gravity of the crimes allegedly committed and attributed to a suspect, the Appeals Chamber has held that “[e]vading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail”,<sup>21</sup> and that “[i]f a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond”.<sup>22</sup>

22. Consequently, considering that the charges against Mr Abd-Al-Rahman might be confirmed in less than two months, he has a greater incentive to flee and abscond. Mr Abd-Al-Rahman is indeed now closer to a trial on grave charges that may result in multiple convictions leading to a serious sentence. The proceedings should not be put

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<sup>20</sup> See, *inter alia*, the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), [No. ICC-01/04-01/06-824 OA7](#), 13 February 2007, para. 136; the “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the ‘Defence Request for Interim Release’” (Appeals Chamber), [No. ICC-01/04-01/10-283 OA](#), 14 July 2011, para. 21; the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, *supra* note 19, para. 70; the “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release” (Appeals Chamber), [No. ICC-01/04-01/07-572 OA4](#), 9 June 2008, para. 21; and the “Public redacted version - Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’” (Appeals Chamber), [No. ICC-02/11-01/11-278-Red OA](#), 26 October 2012, para. 54.

<sup>21</sup> See the “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, *supra* note 20, para. 21. See also, the “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for Interim release’”, *supra* note 20, para. 55; and the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, *supra* note 19, para. 67.

<sup>22</sup> See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, *supra* note 20, para. 136. See also, the “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for Interim release’”, *supra* note 20, para. 55; and the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, *supra* note 19, para. 70.



at risk by affording him an opportunity to abscond or otherwise undermine his possible trial.

23. In fact, Mr Abd-Al-Rahman's continued detention also remains necessary under article 58(1)(b)(ii) to prevent the obstruction or endangerment of the ongoing investigations and of the Court proceedings. Indeed, the Prosecution's disclosure of witness identities and lifting of relevant redactions significantly increase the risk that Mr Abd-Al-Rahman would seek to influence or intimidate them. In this regard, under article 68 of the Statute, the Court has a general obligation to protect victims and witnesses and to take into account the information before it on their security before eventually amending any conditions restricting the liberty of the Suspect.<sup>23</sup> In turn, pursuant to article 57(3)(c) of the Statute, one of the functions of the Pre-Trial Chamber is, where necessary, to provide for the protection and privacy of victims and witnesses. Rule 86 of the Rules of Procedure and Evidence establishes that a Pre-Trial Chamber, in making any direction or order shall take into account the needs of all victims and witnesses in accordance with article 68 of the Statute.<sup>24</sup>

24. Moreover, there are no changed circumstances regarding Mr Abd-Al-Rahman's network of supporters which would warrant a change in the risk assessment under article 58(1)(b)(i) and (ii) of the Statute. If released, the Suspect will be able to access his network of supporters and disclose information in his possessions to intimidate and retaliate against vulnerable witnesses. In addition, the Appeals Chamber recently confirmed the Third Decision on Detention, finding that the alleged indigence of Mr Abd-Al-Rahman is irrelevant in order to establish whether he benefits or not from a network of supporters.<sup>25</sup> Accordingly, his continued detention remains necessary

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<sup>23</sup> See the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber II, Single Judge), [No. ICC-01/09-01/11-249](#), 5 August 2011, para. 118. See also the "Public Redacted Version of the Decision on matters of confidentiality and the Request for extension of the page limit" (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-342](#), 19 June 2007, p. 5.

<sup>24</sup> See the "Decision authorising the filing of observations on applications for participation in the proceedings" (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-329-tEN](#), 23 May 2007, p. 3.

<sup>25</sup> See the "Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention'", *supra* note 13, paras. 59-61.

and 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.

25. Considering this information for the purpose of its determination in its last Decision on review of detention, the Chamber acted in line with its obligation under article 68 of the Statute to ensure the protection and well-being of both victims and witnesses. In the present case, and in respect to similar arguments raised by the Defence, the Appeals Chamber has already found that *"when determining whether the condition for continued detention under article 58(1)(b)(ii) of the Statute is met, the safety of witnesses must be considered regardless of whether they are currently reachable by the Prosecutor"*.<sup>26</sup> In this regard, the Legal Representative recalls the precarious security situation of the majority of the victims in their place of residence and in particular in the IDP and refugees camps, where the infiltration of individuals linked to the Suspect's network of supporters is a reality.<sup>27</sup>

26. Lastly, in relation to the concerns expressed by the Victims, all indicated that Mr Abd-Al-Rahman has to be maintained in detention to ensure that he will appear before the Court if committed to trial and to avoid any interference with them and witnesses. Moreover, Victims recalled that the security situation in Darfur remains volatile and most of them continue to fear for their safety and the one of their families. Victims residing outside Sudan also reiterated these concerns in relation to their relatives still living in Darfur.

27. In light of the above, the Legal Representative echoes the views and concerns of the Victims and requests the Chamber to order the continued detention of Mr Abd-Al-Rahman in accordance with articles 60 and 58(1) of the Statute.

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<sup>26</sup> See "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'" *supra* note 7, para. 27.

<sup>27</sup> See the Legal Representative's opening statements, transcript of the hearing held on 25 May 2021, No. ICC-02/05-01/20-T-008-CONF-ENG RT, p. 58, lines 10-22 (the official version of this transcript has not yet been notified).

Respectfully submitted,

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined.

**Paolina Massidda**  
**Principal Counsel**

Dated this 11<sup>th</sup> day of June 2021

At The Hague, The Netherlands