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No. ICC-02/05-01/20

Date: 5 July 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

Decision on the review of detention

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), having regard to articles 58(1), and 60(3) of the Rome Statute (the ‘Statute’), rules 118(2) and (3) and 119 of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the review of detention.

I. PROCEDURAL HISTORY

1. On 27 April 2007 and 16 January 2018, warrants of arrest were issued against Mr Ali Muhammad Ali Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in Darfur, Sudan.¹
2. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court.
3. 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*’).²
4. On 14 August 2020, 11 December 2020 and 12 April 2021, the Chamber reviewed the detention and rejected the Defence requests for Mr Abd-Al-Rahman’s interim release (the ‘First Detention Review’,³ ‘Second Detention Review’⁴ and ‘Third Detention Review’,⁵ respectively). All these decisions were fully upheld by the Appeals Chamber.⁶

¹ *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](#), ICC-02/05-01/07-1-Corr; [Warrant of Arrest for Ali Kushayb](#), ICC-02/05-01/07-3-Corr; [Public redacted version of ‘Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman \(“Ali Kushayb”\)](#), 16 January 2018, [ICC-02/05-01/07-74-Secret-Exp](#), 11 June 2020, ICC-02/05-01/07-74-Red.

² [Decision severing the case against Mr Ali Kushayb](#), ICC-02/05-01/07-87.

³ [Decision on the Defence Request for Interim Release](#), ICC-02/05-01/20-115.

⁴ [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’](#), ICC-02/05-01/20-230-Red. A confidential version is also available (ICC-02/05-01/20-230-Conf).

⁵ [Decision on the review of detention](#), ICC-02/05-01/20-338.

⁶ [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; [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’](#), 5 February 2021, ICC-02/05-01/20-279-Red. A confidential version is also available (ICC-02/05-01/20-279-Conf); Judgment on the appeal of Mr Abd-Al-Rahman against

5. On 5 May 2021, the Chamber convened the annual hearing on detention pursuant to rule 118(3) of the Rules on 27 May 2021.⁷
6. On 24 May 2021, the Defence requested the Chamber to postpone the annual hearing on detention pursuant to rule 118(3) of the Rules on the ground that the Appeals Chamber had not yet ruled on the Defence's appeal against the Third Detention Review.⁸
7. On 26 May 2021, the Chamber rejected the Defence request to postpone the annual hearing on detention pursuant to rule 118(3) of the Rules (the 'Oral Decision').⁹
8. On 27 May 2021, the Chamber held the annual hearing on detention pursuant to rule 118(3) of the Rules (the 'Annual Hearing').¹⁰
9. On 2 June 2021, the Appeals Chamber upheld the Third Detention Review.¹¹
10. On 11 June 2021, the Prosecutor filed observations on the review of Mr Abd-Al-Rahman's detention (the 'Prosecutor's Observations').¹² On the same day, the Office of Public Counsel for Victims (OPCV) and the Legal Representatives of Victims (LRVs) filed their observations (the 'Victims Observations').¹³
11. On 16 June 2021, the Defence submitted its response on the matter of detention (the 'Defence Observations').¹⁴

Pre-Trial Chamber II's 'Decision on the review of detention', 2 June 2021, ICC-02/05-01/20-415 (the '[Third Review Judgment](#)').

⁷ [Order setting the schedule for the confirmation of charges hearing and convening annual hearing on detention](#), ICC-02/05-01/20-378.

⁸ *Demande d'ajournement de l'audience relative à la détention*, 24 May 2021 (notified on 25 May 2021), ICC-02/05-01/20-408 (the '[Adjournment Request](#)').

⁹ [Transcript of hearing](#), ICC-02/05-01/20-T-009-Red-ENG, p. 1, line 21 to p. 3, line 9.

¹⁰ [Transcript of hearing](#), ICC-02/05-01/20-T-010-ENG.

¹¹ Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention', 2 June 2021, ICC-02/05-01/20-415.

¹² Prosecution's observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("ALI KUSHAYB"), ICC-02/05-01/20-419-Conf.

¹³ Victims' observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("ALI KUSHAYB"), ICC-02/05-01/20-420 (the '[OPCV Observations](#)'); Observations on Behalf Of the Victims on the review of the Pre-Trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/20-421 (the '[LRV1 Observations](#)'); Victims' observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/20-422 (the '[LRV2 Observations](#)').

¹⁴ [Réponse aux Observations relatives à la Mise en Liberté](#), ICC-02/05-01/20-423.

II. SUBMISSIONS

A. The Prosecutor's Observations

12. In the Prosecutor's view, there have been no changed circumstances to justify Mr Abd-Al-Rahman's release. To the contrary, since the last review of detention, the Prosecutor has now disclosed the identity of a majority of the witnesses relied upon in support of the confirmation of charges. Moreover, the Prosecutor argues that the continued detention of Mr Abd-Al-Rahman remains necessary to ensure his continued appearance, given that the case has advanced significantly towards a possible trial.

B. Victims Observations

13. The OPCV and the LRVs concur with the Prosecutor that there are no changed circumstances which justify Mr Abd-Al-Rahman's release. They also highlight the precarious security situation of the majority of the victims, who are claimed to be vulnerable to attempts at intimidation by the suspect's supporters. This is said to have a potentially chilling effect on the willingness of new witnesses to come forward. Some victims also expressed the fear that if Mr Abd-Al-Rahman were to be released, this could be interpreted by his supporters as an incentive to commit further crimes.

C. The Defence Observations

14. The Defence did not address the criteria of article 58(1) of the Statute for continued detention and did not allege there are changed circumstances. Instead, the Defence claims that the Chamber violated rule 118(3) *in fine* of the Rules by (i) limiting the purpose of the Annual Hearing to discussing the conditions of detention and the suspect's well-being, and (ii) failing to convene a new rule 118(3) hearing after the Appeals Chamber issued its ruling on the Third Review of Detention. In the Defence's view, parties should have been given the opportunity to make oral submissions on the continued lawfulness of the detention as well. The Defence argues that it has now been more than a year since there has been a hearing to review Mr Abd-Al-Rahman's detention and claims that his detention has therefore become unlawful as of 16 June 2021. Accordingly, the Defence requests the Chamber to order his immediate and unconditional release under article 60(2) and (3) of the Statute.¹⁵

¹⁵ [Defence Observations](#), p. 12.

III. ANALYSIS

15. Before analysing whether the conditions of article 58(1) of the Statute for continued detention remain fulfilled, the Chamber will first consider the arguments raised in the Defence Observations.

A. Defence Observations

16. The Chamber has considered the Defence arguments in relation to rule 118(3) of the Rules and finds them to be unmeritorious. In particular, the Chamber rejects the two main premises of the Defence's argument:

17. First, it is not the case that rule 118(3) hearings must be devoted to discussing the continued lawfulness of detention. The Chamber notes that its obligation to periodically review the continued lawfulness of the detention is independent of its obligation to hold at least one hearing with the detained person every year. Although Chambers have in the past often combined the two, there is no obligation to do so. Unless there is a need to hear witnesses, there is generally no reason why it would be necessary to hold a hearing to discuss whether or not the criteria of article 58(1) of the Statute are still met.¹⁶ Accordingly, the main purpose of holding a hearing in the presence of the detained person once a year is to evaluate his or her state and conditions of detention.¹⁷

18. Second, contrary to what the Defence claims,¹⁸ it is not impossible or inappropriate to conduct the periodic review of detention when an appeal against a previous decision on detention is still pending.¹⁹ Indeed, the fact that an appeal is still pending in no way prevents the Chamber from assessing whether there are changed circumstances that could warrant reviewing its prior ruling pursuant to article 60(3) of the Statute. If it occurs that a subsequent decision by the Appeals Chamber constitutes

¹⁶ See e.g. European Court of Human Rights, Grand Chamber, *A. and Others v. The United Kingdom*, [Application no. 3455/05](#), 19 February 2009, para. 204.

¹⁷ See e.g. [Transcript of hearing](#), *The Prosecutor v. Laurent Gbagbo*, 9 October 2013, p. 3, lines 2-3.

¹⁸ [Defence Observations](#), para. 20.

¹⁹ Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the "Requête de la défense en report de l'audience portant sur le quatrième réexamen des conditions de maintien en détention fixée par la Chambre Préliminaire au 9 octobre 2013 dans son ordonnance du 26 septembre 2013 \(ICC-02111-01/11-512\)](#), 3 October 2013, ICC-02/11-01/11-522, para. 11.

a changed circumstance, the parties can always seek a new ruling pursuant to rule 118(2) of the Rules.

19. The Chamber further notes that the Defence did not object during the hearing and did not seek leave to appeal the Oral Decision. It is worth pointing out, in this regard, that the Defence now claims that the Chamber should have followed the example of Pre-Trial Chamber I in the *Gbagbo* case,²⁰ which consisted of receiving oral submissions during the rule 118(3) hearing, but reserving the possibility of according the parties and participants an opportunity to make additional written submissions in case the Appeals Chamber were to rule before the deadline for periodic review laid down in rule 118(2) of the Rules. However, in its request to postpone the Annual Hearing, the Defence expressly stated that

*en conséquence de la délibération en cours [devant la Chambre d'Appel], [la Défense] n'est pas en mesure de participer à l'audience convoquée le 27 mai 2021 par l'Honorable Chambre Préliminaire II en vertu de la Règle 118-3 du RPP. Elle ne saurait en effet présenter la moindre soumission sur cette question alors qu'elle est en cours de délibéré et sans connaître les motivations ni les conclusions de l'arrêt que l'Honorable Chambre d'Appel rendra sur l'Appel OA7.*²¹

20. Hence, even if the Chamber had adopted the Pre-Trial Chamber I's approach, the Defence would clearly have refused to make substantive submissions. In the event, the Defence was able to make fully informed written submissions after the Appeals Chamber's Third Review Judgment was rendered. The Defence has not identified any prejudice it would have suffered as a result of the fact that the parties and participants made their submissions on the review of detention in writing instead of orally and the Chamber cannot discern any either. There was therefore no need to convene another hearing after the Appeals Chamber rendered its Third Review Judgment.

21. Accordingly, the Defence Observations are rejected.

B. Review of detention

22. The Chamber recalls the Court's jurisprudence regarding review of detention, as set out in its previous decisions.²²

²⁰ [Defence Observations](#), para. 21.

²¹ [Adjournment Request](#), para. 4.

²² See e.g. [Third Detention Review](#), paras 17-22.

1. The Chamber's previous rulings on detention

23. The Chamber recalls the main findings of its previous decisions related to Mr Abd-Al-Rahman's detention, which remain valid to the present decision.

24. In the First Detention Review, the Chamber based its decision to remand Mr Abd-Al-Rahman in detention primarily on article 58(1)(b)(ii) of the Statute. In this regard, the Single Judge noted Mr Abd-Al-Rahman's previous 'alleged high ranking position', his personal connections, and 'the likelihood that he still has supporters who may have access to actual or potential witnesses'.²³ The Single Judge also considered that the Court was 'not yet in a position to protect witnesses in Darfur' and noted a report of 'threats allegedly made by the suspect and his supporters to human rights activists in February 2020'.²⁴

25. In the Second Detention Review, the Chamber noted that 'the Prosecutor ha[d] submitted two instances whereby threats were being made to witnesses subsequent to the disclosure of evidence to the Defence'.²⁵ The Chamber also noted 'the limited progress the Prosecutor and VWU ha[d] been able to make in relation to putting in place protective measures for witnesses'.²⁶

26. In the Third Detention Review, the Chamber found that adequate protective measures for all witnesses had still not been implemented in Sudan.²⁷ Moreover, the Chamber considered that there still existed a significant likelihood that, if Mr Abd-Al-Rahman were to be released, he could pose a threat to victims and witnesses in this case, which could not be minimised with the imposition of conditions.²⁸

²³ [First Detention Review](#), para. 29. See [Second Detention Review](#), para. 24.

²⁴ [First Detention Review](#), para. 28, referring to [Annex 3 to the Prosecution's Response to "Requête en vertu de l'Article 60-2" \(ICC-02/05-01/20-12\)](#), 13 July 2020, ICC-02/05-01/20-95-Anx3. See [Second Detention Review](#), para. 24.

²⁵ [Second Detention Review](#), paras 29-30.

²⁶ [Second Detention Review](#), para. 31.

²⁷ [Third Detention Review](#), paras 31, 37. See paras 30, 32. See also [Third Review Judgment](#), paras 55-62.

²⁸ [Third Detention Review](#), para. 37. See also [Third Review Judgment](#), paras 55-62.

2. *Assessment of the current circumstances*

27. The Chamber will now assess whether there are any significant changes in the circumstances as described in its previous rulings that would warrant the release of Mr Abd-Al-Rahman, with or without conditions.

28. As noted above, the Defence has not argued that there are any changed circumstances relevant to the review of detention. The Chamber agrees with the Prosecutor and the victims legal representatives that there are no substantially changed circumstances which could warrant the release of Mr Abd-Al-Rahman. To the contrary, the fact that the suspect is now in possession of the identities of many of the key witnesses in this case presents a heightened risk that Mr Abd-Al-Rahman could seek to influence the ongoing investigation or the court proceedings, either directly or indirectly through his supporters.²⁹ Moreover, the victims expressed concerns regarding his possible release in light of the continued volatile situation in Darfur. The Chamber notes, in this regard, that the Prosecutor has not reported any substantial improvement in terms of the Court's ability to offer protection to victims and witnesses currently residing in Sudan. As a result, Mr Abd-Al-Rahman's continued detention remains necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings. The Chamber further finds that this risk cannot be sufficiently minimised with the imposition of conditions.

²⁹ See Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, [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"](#), 26 October 2012, ICC-02/11-01/11-278-Red, para. 65.


FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence Observations;

ORDERS the Prosecutor to file a public version of the Prosecutor's Observations; and

REMANDS Mr Abd-Al-Rahman in detention.

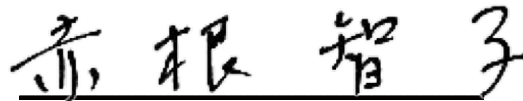
Done in both English and French, the English version being authoritative.



Judge Rosario Salvatore Aitala



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Monday, 5 July 2021

At The Hague, The Netherlands