

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-02/05-01/20
Date: 14 October 2021

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

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

Public

Victims’ Observations on the detention of the Accused

Source: Office of Public Counsel for Victims
Legal Representatives of the Victims

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

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I. INTRODUCTION

1. Counsel submit 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 Pre-Trial Chamber II on 5 July 2021.¹

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 decision on confirmation of charges and disclosure of new evidence supporting the seriousness of the alleged crimes provide a greater incentive for the Accused to abscond. In fact, the risk of absconding increases as the proceedings advance. In this sense, the confirmation of the charges against Mr Abd-Al-Rahman constitutes in itself a "*changed circumstance*" pursuant to article 60(3) of the Statute, enhances the likelihood that the Accused decides to abscond, and justifies his continued detention.

3. Under article 58(1)(b)(ii) of the Statute, Mr Abd-Al-Rahman detention is also necessary to prevent the obstruction or endangerment of the ongoing trial preparation. In fact, the setting of the date of commencement of the trial and the disclosure of witness identities significantly increase the risk that Mr Abd-Al-Rahman could 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 an accused.

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

¹ See the "Decision on the review of detention" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-430](#), 5 July 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 BACKGROUND

5. On 5 July 2021, Pre-Trial Chamber II issued the "Decision on the review of detention", remanding Mr Abd-Al-Rahman in detention.²

6. On 9 July 2021, Pre-Trial Chamber II issued the Decision confirming the charges against Mr Abd-Al-Rahman and committing him for trial.³

7. On 21 July 2021, the Presidency assigned the case to Trial Chamber I (the "Chamber").⁴

8. On 15 September 2021, the Chamber issued the "Order setting out deadlines for observations on detention of the accused" and instructed the Prosecution, the Legal Representatives of Victims and the Registry to submit observations on the matter by 15 October 2021.⁵ In addition, the Chamber instructed the Legal Representatives, together with Counsel from the Office of Public Counsel for Victims (the "OPCV"), to submit one filing as a single team.⁶

9. On 13 October 2021, Counsel from the OPCV consulted with Ms von Wistinghausen and Mr Abdalla, who expressed their agreement with the substance of the present submissions and their wish to co-sign the filing on behalf of the victims they represent.

² *Idem*.

³ See the "Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-433](#), 9 July 2021 (the "Decision confirming the charges").

⁴ See the "Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*" (Presidency), [No. ICC-02/05-01/20-440](#), 21 July 2021.

⁵ See the "Order setting out deadlines for observations on detention of the accused" (Trial Chamber I), [No. ICC-02/05-01/20-471](#), 15 September 2021.

⁶ *Idem*, para. 2, fn 2.

III. OBSERVATIONS

10. At the outset, Counsel submit 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 modification of the last decision on the review of detention.⁷

11. 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*";⁸ "[i]f there are changed circumstances, the Pre-Trial or Trial Chamber will need 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".⁹

12. Counsel posit that, pursuant to article 58(1)(b)(i) of the Statute, continued detention remains necessary because the recent decision on confirmation of charges against the Accused - together with the ongoing disclosure of new evidence supporting the seriousness of the alleged crimes - provide a greater incentive for Mr Abd-Al-Rahman to abscond. In fact, the confirmation of the serious charges against the Accused constitutes in itself a "*changed circumstance*" pursuant to article 60(3) of the Statute, enhances the risk that he might decide to abscond and justifies his continued detention.¹⁰ According to the Court established jurisprudence, the risk that

⁷ See the "Decision on the review of detention", *supra* note 1.

⁸ See in the *Bemba* case, 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.

⁹ See in the *Bemba* case, 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.

¹⁰ See in the *Bemba* case, 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 8, para. 70. See also in the

a suspect or an accused might decide to abscond increases as the proceedings advance¹¹ and especially when learning about the charges faced and the possible sentence that may result if found guilty.¹²

13. The criteria of article 58 of the Statute are all the more met if one considers the particularly serious nature of the charges confirmed against the Accused in the present case. In this regard, Counsel also recall that the Appeals Chamber has previously found that the seriousness of the crimes for which the person is being prosecuted is an important factor justifying the continued detention.¹³ In particular, 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

Lubanga case, 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 in the *Katanga et al.* case, 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.

¹¹ See, *inter alia*, in the *Bemba* case, 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 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 8, para. 70; and in the *Mbarushimana* case, the “Decision on the ‘Defence Request for Interim Release’” (Pre-Trial Chamber I), [No. ICC-01/04-01/10-163](#), 19 May 2011, para. 41.

¹² See in the *Bemba* case, 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 8, paras. 68 and 89.

¹³ See, *inter alia*, in the *Lubanga* case, 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; in the *Mbarushimana* case, 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; in the *Bemba* case, 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 8, para. 70; in the *Katanga et al.* case, 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 in the *Gbagbo* case, 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.

conviction may entail”,¹⁴ 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”.¹⁵

14. Consequently, considering the seriousness of the charges confirmed against Mr Abd-Al-Rahman, he has today an even greater incentive to flee and abscond. Mr Abd-Al-Rahman is indeed now closer to a trial involving grave charges and that may result in multiple convictions leading to a serious sentence. The preparation of the upcoming proceedings should not be put at risk by affording him an opportunity to abscond or otherwise undermine the trial.

15. 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 overall proceedings against him. The Prosecution’s disclosure of witness identities and lifting of relevant redactions significantly increase the risk that Mr Abd-Al-Rahman could seek to influence or intimidate those witnesses. In this regard, the Court has a general obligation under article 68 of the Statute to protect victims and witnesses and to take into account the information on their security before amending any conditions restricting the liberty of an accused.¹⁶

¹⁴ See in the *Katanga et al.* case, 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 13, para. 21. See also, in the *Bemba* case, 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 8, para. 67.

¹⁵ See in the *Lubanga* case, 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 13, para. 136. See also, in the *Bemba* case, 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 8, para. 70.

¹⁶ See in the *Ruto et al.* case, 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 in the *Situation in the Democratic Republic of the Congo*, 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.

16. 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 Accused will still be able to access his network of supporters and disclose information in his possession which might be used to intimidate and retaliate against vulnerable witnesses. In addition, the Appeals Chamber recently found 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.¹⁷ Accordingly, his continued detention remains 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.

17. In the present case, 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*".¹⁸ In this regard, Counsel recall the precarious security situation of the majority of the victims in their place of residence and in particular in the IDP and refugees camps,¹⁹ where the infiltration of individuals linked to the Accused's network of supporters continue to be a reality.

18. 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 to face trial and to avoid any interference with them and witnesses. Moreover, Victims recalled that the security situation in Darfur remains volatile and that they continue to fear for their safety and the one of their families. Victims residing outside Sudan also voiced the same concerns in relation to their relatives still living in Darfur.

¹⁷ 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, paras. 59-61.

¹⁸ 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'" (Appeals Chamber), [No. ICC-02/05-01/20-177 OA2](#), 8 October 2021, para. 27.

¹⁹ See the Legal Representative's opening statements, transcript of the hearing held on 25 May 2021, [No. ICC-02/05-01/20-T-008-Red-ENG WT](#), p. 45, line 24 to p. 46, line 10.

IV. CONCLUSION

19. For the foregoing reasons, Counsel request the Chamber to find that Mr. Abd-Al-Rahman shall remain in detention.



Paolina Massidda



Natalie von Wistinghausen



Nasser M. Amin Abdalla

Dated this 14th day of October 2021

At The Hague, The Netherlands