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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 with Public Annexes 1-3

Prosecution’s Response to “Requête en vertu de l’Article 60-2” (ICC-02/05-01/20-12)

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I. INTRODUCTION

1. The Single Judge Rosario Salvatore Aitala (“Single Judge”), acting for Pre-Trial Chamber II (“Chamber”), should reject the Defence request, “Requête en vertu de l’Article 60-2”, for the interim release of Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”) under article 60(2) of the Rome Statute (“Defence Request”).¹

2. Despite Mr Abd-Al-Rahman’s voluntary surrender, he has been a longstanding, wilful fugitive from justice. Over 13 years have elapsed since Pre-Trial Chamber I issued the first warrant of arrest for Mr Abd-Al-Rahman on 27 April 2007 (“First Arrest Warrant”).² Upon his surrender and transfer to the International Criminal Court (“ICC” or “Court”), Mr Abd-Al-Rahman was informed that he was also subject to a secret *ex parte* second warrant of arrest containing additional grave charges, that was issued by Pre-Trial Chamber II, in its previous composition, on 16 January 2018 (“Second Arrest Warrant”).³

3. Mr Abd-Al-Rahman’s detention remains necessary under article 60(2) of the Rome Statute (“Statute”), because the requirements under article 58(1)(a) and two of the conditions set out in article 58(1)(b) continue to be met. Mr Abd-Al-Rahman cannot be expected to appear before the Court unless he remains in detention under the meaning of article 58(1)(b)(i). Additionally, Mr Abd-Al-Rahman’s release from custody at this critical stage of the proceedings could risk obstructing or endangering the Prosecution’s ongoing investigation and court proceedings under the meaning of article 58(1)(b)(ii).

¹ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Requête en vertu de l’Article 60-2, 1 July 2020, ICC-02/05-01/20-12 (“Defence Request”).

² *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3-Corr (“First Arrest Warrant”).

³ *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, 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 (“Second Arrest Warrant”).

II. SUBMISSIONS

4. Under article 60(2) of the Statute, a person subject to a warrant of arrest shall continue to be detained if the Pre-Trial Chamber “is satisfied that the conditions set forth in article 58, paragraph 1, are met.”⁴ The applicable standard of review for the Pre-Trial Chamber in article 60(2) determinations will be *de novo* “in light of the material placed before it.”⁵ While the Pre-Trial Chamber’s review is “not conditioned by its previous decision to direct the issuance of a warrant of arrest,”⁶ the factors “underpinning the decision on a warrant of arrest may be the same as those for the decision under article 60(2).”⁷

5. As a preliminary matter, there must be reasonable grounds to believe that the accused has committed a crime within the jurisdiction of the Court under article 58(1)(a).⁸ With respect to article 58(1)(a), the Appeals Chamber has held that the Pre-Trial Chamber may refer to the warrant of arrest without affecting the *de novo* character of its determination.⁹ Regarding article 58(1)(b), the Appeals Chamber has affirmed that these three conditions are “in the alternative,” and as such, the

⁴ Article 60(2) of the Statute.

⁵ *Prosecutor v. Laurent Gbagbo*, 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’”, 26 October 2012, ICC-02/11-01/11-278-Red (“*Gbagbo Appeals Judgment*”), para. 23 (citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, 9 June 2008, ICC-01/04-01/07-572 (“*Ngudjolo Chui Appeals Judgment*”), para. 12).

⁶ *Ngudjolo Chui Appeals Judgment*, para. 10.

⁷ *Gbagbo Appeals Judgment*, para. 27.

⁸ The Prosecution notes that in *Prosecutor v. Dominic Ongwen*, the Single Judge limited his analysis of the interim release request to an examination of the grounds justifying detention under article 58(1)(b) of the Statute. According to his understanding of the text of article 60(2), “the consequences of extending an examination of the condition under article 58(1)(a) to a determination of the appropriateness of an interim release would be unreasonable and would seriously conflict with the Court’s overall procedural system.” See *Prosecutor v. Dominic Ongwen*, Decision on the “Defence Request for Interim Release of Dominic Ongwen”, 27 November 2015, ICC-01/04-01/15-349-Conf (“*Ongwen Decision*”), paras. 11-14.

⁹ *Gbagbo Appeals Judgment*, para. 27.

fulfilment of one of them is “sufficient to negate the need to address the remaining conditions.”¹⁰

6. According to the Appeals Chamber, in determining whether the continued detention of a suspect remains “necessary,” the Pre-Trial Chamber need only consider “the possibility, not the inevitability, of a future occurrence,” if that risk of absconding is based on concrete evidence.¹¹ The Pre-Trial Chamber may rely on evidence obtained from publicly available sources.¹² This determination “necessarily involves an element of prediction”¹³ on the basis of “all relevant factors taken together.”¹⁴ Thus, it is sufficient for the Chamber to establish that it is possible that a suspect will abscond.

7. The continued detention of Mr Abd-Al-Rahman remains necessary because the constituent conditions set out by article 58(1)(a), 58(1)(b)(i) and 58(1)(b)(ii) are met. The Pre-Trial Chambers in the First and Second Arrest Warrants for Mr Abd-Al-Rahman in 2007 and 2018, respectively, concluded that there are reasonable grounds to believe that he committed crimes within the jurisdiction of the Court under article 58(1)(a). Further, Mr Abd-Al-Rahman’s continued detention remains necessary to ensure his appearance at trial under article 58(1)(b)(i) and to ensure that he does not obstruct or endanger investigation or court proceedings under article 58(1)(b)(ii).

¹⁰ *Prosecutor v. Bosco Ntaganda*, Decision on the Defence’s Application for Interim Release, 18 November 2013, ICC-01/04-02/06-147 (“*Ntaganda* Decision”), para. 39 (citing *Prosecutor v. Thomas Lubanga Dyilo*, 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*”, 13 February 2007, ICC-01/04-01/06-824 (“*Lubanga* Appeals Judgment”), para. 139).

¹¹ *Ngudjolo Chui* Appeals Judgment, para. 21; *Gbagbo* Appeals Judgment, para. 56.

¹² *Ntaganda* Decision, para. 48 (citing *Prosecutor v. Laurent Gbagbo*, Decision on the “*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*”, 13 July 2012, ICC-02/11-01/11-180-Red (“*Gbagbo* Decision”), para. 54).

¹³ *Gbagbo* Decision, para. 48 (citing *Ngudjolo Chui* Appeals Judgment, para. 137).

¹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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*”, 16 December 2008, ICC-01/05-01/08-323 (“*Bemba* Appeals Judgment”), para. 55.

A. Mr Abd-Al-Rahman's continued detention is necessary to ensure his appearance at trial under article 58(1)(b)(i)

a. Prior to his surrender, Mr Abd-Al-Rahman had been a longstanding, wilful fugitive from justice

8. On 27 April 2007, Pre-Trial Chamber I granted the Prosecution's application under article 58(7) of the Statute and issued the First Arrest Warrant against Mr Abd-Al-Rahman.¹⁵ Interpol disseminated a Red Notice for the arrest of Mr Abd-Al-Rahman shortly thereafter.¹⁶ On 16 January 2018, Pre-Trial Chamber II, in its previous composition, further granted the Prosecution's application to amend the First Arrest Warrant under article 58(6) by issuing a secret *ex parte* Second Arrest Warrant against Mr Abd-Al-Rahman. The findings of the Chambers in the First Arrest Warrant and Second Arrest Warrant for Mr Abd-Al-Rahman regarding the commission of crimes within the jurisdiction of the Court remain valid¹⁷ under article 58(1)(a),¹⁸ a fact that is not in dispute.¹⁹

¹⁵ First Arrest Warrant.

¹⁶ The Office of the Prosecutor has mentioned the issuance of the Interpol Red Notices for Mr Abd-Al-Rahman and fellow suspect Mr Ahmad Muhammad Harun in its periodic reports to the United Nations Security Council. See e.g. Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 December 2007, para. 20; Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSC 1593 (2005), 5 June 2008, para. 4.

¹⁷ In relation to para. 12 of the Defence Request and the assertion that Annex 12 to the Prosecution's application under article 58(7), is "manifestly without factual basis and/or erroneous," the Prosecution refers to para. 261 of that application, which states that "Annex 12 sets out the details and status of the work of the [Sudanese] Judicial Investigations Commission, based on interviews between the JIC and the Prosecution", Prosecutor's Application under Article 58(7), 27 February 2007, ICC-02/05-56 ("First Application"), para. 261.

¹⁸ To date, the Defence has not filed an application to "impugn the foundation of the warrants of arrest" under article 58(1)(a). See also *Ntaganda* Decision, para. 38 (citing *Prosecutor v. Bosco Ntaganda*, Public redacted version – Defence application for interim release of Mr Bosco Ntaganda, 20 August 2013, ICC-01/04-02/06-87-Red-tENG, para. 2).

¹⁹ The Prosecution interprets the Defence Request as challenging the factual basis on which the initial arrest warrant was issued for Mr Abd-Al-Rahman in 2007 instead of a summons to appear, and not the factual basis on which the Pre-Trial Chamber determined that there were reasonable grounds to believe that he had committed a crime within the jurisdiction of the Court under article 58(1)(a). Regarding para. 1 of the Defence Request and the assertion that in the First Application, the Prosecution initially favoured a summons to appear for Mr Abd-Al-Rahman, the Prosecution refers to the decision on the First Application, where the Pre-Trial Chamber notes that in the First Application, the "Prosecution further states that any official response of the Government of the Sudan [...] showing that they would resist or fail to comply with the decision of the Pre-Trial Chamber, would modify this assessment and would justify the issuance of warrants of arrest", Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr ("Decision on the First

9. On 9 June 2020, Mr Abd-Al-Rahman was transferred to the custody of the ICC after surrendering himself to local authorities in the Central African Republic. On 15 June 2020, Mr Abd-Al-Rahman made his initial appearance before the Single Judge, acting on behalf of the Chamber.²⁰ Over 13 years passed between the issuance of the First Arrest Warrant for Mr Abd-Al-Rahman and his eventual surrender to the Court.

10. With respect to the Defence assertion that the circumstances that necessitated Mr Abd-Al-Rahman's arrest in April 2007 no longer apply,²¹ the Prosecution recalls that a more recent determination under article 58(1) has been made for Mr Abd-Al-Rahman. In approving the Prosecution's application to amend the First Arrest Warrant and issue the Second Arrest Warrant, the Chamber made a factual finding that the arrest of Mr Abd-Al-Rahman was necessary on the basis of evidence that was current as of January 2018.²² The Chamber noted at that time that the First Arrest Warrant had gone unexecuted for over ten years.²³

11. In *Prosecutor v. Bosco Ntaganda* ("Ntaganda"), the suspect had been at large for almost seven years following the issuance of a warrant of arrest.²⁴ Mr Abd-Al-Rahman's delay in surrendering himself to the Court is nearly double that length of time. Mr Abd-Al-Rahman's delay also exceeds that of the suspect in *Prosecutor v. Dominic Ongwen*, who eluded arrest for nine years.²⁵ It is clear that Mr Abd-Al-Rahman has actively chosen to and succeeded in avoiding apprehension by the Court for a substantial amount of time.

Application"), para. 114 (citing to paras. 277 and 278 of the First Application). The Pre-Trial Chamber then went on to note that based on an update provided by Prosecution, "the Sudanese Ministry of Foreign Affairs recently stated in a public document that Sudan will not cooperate with the Court [...]", Decision on the First Application, para. 123.

²⁰ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb"), Initial Appearance Hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG RT 15-06-2020 PT.

²¹ Defence Request, para. 12-13.

²² Second Arrest Warrant.

²³ Second Arrest Warrant, para. 25.

²⁴ *Ntaganda* Decision, para. 41.

²⁵ *Ongwen* Decision, para. 16.

12. During the unprecedented 13 years that elapsed between the issuance of the First Arrest Warrant and his eventual surrender, Mr Abd-Al-Rahman had ample opportunity to submit himself to the jurisdiction of the Court but he remained at large. He has repeatedly shown both the willingness and the capability to evade justice when it is within his interest to do so. Mr Abd-Al-Rahman's persistent reluctance to surrender for such a prolonged period is a far better indication of his actual intent to appear before the Court than his past few weeks of cooperation.

b. The late decision of Mr Abd-Al-Rahman to surrender after 13 years is not the determining factor to establish his risk of flight

13. In *Ntaganda*, this Chamber, in its previous composition, first addressed the impact of a suspect's voluntary surrender on article 60(2) determinations and decided that "little weight, if any" should be given to his surrender taking into consideration its specific circumstances.²⁶ The Chamber in *Ntaganda* found that the fact of a suspect's surrender is not sufficient in and of itself to justify release from detention because it "does not mean *per se* that he might not abscond, if the possibility arises."²⁷ This rationale is equally applicable in regard to Mr Abd-Al-Rahman.

14. Instead, the Chamber determined that it "should take into consideration, *inter alia*, the circumstances of Mr. Ntaganda's voluntary surrender including its timeliness and the manner in which it took place."²⁸ In reaching this conclusion, the Chamber looked to jurisprudence from the International Criminal Tribunal for the former Yugoslavia ("ICTY"). In these ICTY cases, the Chambers considered whether the surrenders were truly voluntary and, upon doing so, consistently held that the circumstances surrounding a suspect's surrender are important to assessing its

²⁶ *Ntaganda* Decision, para. 52.

²⁷ *Ntaganda* Decision, para. 41.

²⁸ *Ntaganda* Decision, para. 42.

overall weight as a factor in determining whether to authorise interim release.²⁹ These Chambers afforded less weight to a voluntary surrender when the individual only did so after a lengthy period of time.³⁰

15. The Prosecution does not have direct knowledge of the precise motive behind the suspect's voluntary surrender. The Defence contends that Mr Abd-Al-Rahman has come to seek justice before the Court.³¹ It is equally possible that Mr Abd-Al-Rahman made a rational, calculated decision to surrender to the Court's jurisdiction only after he exhausted all other available options. He may also have made his decision in conjunction with many other external considerations arising from the rapidly changing political and military landscape in Sudan. No matter how voluntary, the circumstances surrounding the timeliness and manner of Mr Abd-Al-Rahman's surrender strongly suggest that he remains a flight risk.

16. The Prosecution observes that Mr Abd-Al-Rahman's surrender after 13 years follows the April 2019 overthrow of long-term President Omar Al-Bashir, who is also a suspect wanted by the Court for his alleged participation in crimes committed against the civilian population of Darfur.³² In his response to the Prosecutor's Thirtieth Report to the United Nations Security Council on 18 December 2019, the Representative of Sudan to the United Nations declared that Messrs Omar Al Bashir, Abdel Raheem Hussein, and Ahmad Harun, were currently detained and facing

²⁹ *Ntaganda* Decision, paras. 41-42.

³⁰ See, e.g. *Prosecutor v. Zoran Kupreškić et al.*, "Decision on motion for provisional release filed by Zoran Kupreskic, Mirjan Kupreskic, Drago Josipovic and Dragan Papic (joined by Marinko Katava)", 5 December 1997, IT-95-16-T, para. 12; *Prosecutor v. Dragoljub Kunarac & Radomir Kovač*, "Decision on request for provisional release of Dragoljub Kunarac", 11 November 1999, IT-96-23-T, para. 4; *Prosecutor v. Vinko Pandurević & Milorad Trbić*, "Decision on Vinkoandurevic's application for provisional release", 18 July 2005, IT-05-86-PT, paras. 16-18; *Prosecutor v. Milan Martić*, Decision on Motion for Provisional Release", 10 October 2002, IT-95-11-T; *Prosecutor v. Martić*, "Decision on Second Motion for Provisional Release", 12 September 2005, IT-95-11-T, paras. 32-33.

³¹ Defence Request, paras. 13.

³² *Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09; *Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-95.

domestic criminal charges.³³ All of these named individuals are members of the former regime who are also subject to ICC arrest warrants for crimes committed in Darfur,³⁴ and yet Mr Abd-Al-Rahman remained the sole suspect still at large.³⁵

17. According to Sudanese Attorney General Taj al-Ser Ali al-Hibr Ali, the new transitional government issued an arrest warrant for Mr Abd-Al-Rahman on 2 December 2019, for charges related to various serious crimes.³⁶ It is not unlikely that one motivating factor in Mr Abd-Al-Rahman's surrender to the Court was his desire to avoid capture in Sudan and confinement in a prison in Khartoum. In February 2020, a spokesman for the government announced that the ruling Sovereign Council had reached an agreement with rebel leaders that included "the appearance of those who face arrest warrants before the International Criminal Court."³⁷ This is an additional factor that may well have prompted Mr Abd-Al-Rahman's surrender to the ICC.

c. The Second Arrest Warrant, containing charges of the murder of at least 100 persons, was unknown to Mr Abd-al-Rahman at the time of his arrest and provides additional incentive to abscond if granted interim release

18. The Prosecution notes that, at the time of his surrender, Mr Abd-Al-Rahman was not yet aware of the additional grave charges against him, regarding the attack on the village of Deleig and surrounding villages in March 2004, as set out in the Second Arrest Warrant. These charges include the murder of at least 100 people as a

³³ United Nations Security Council, Reports of the Secretary-General on the Sudan and South Sudan, 18 December 2020, <https://undocs.org/en/S/PV.8691>, p. 15.

³⁴ See *Prosecutor v. Abdel Raheem Muhammad Hussein*, Warrant of Arrest for Abdel Raheem Muhammad Hussein, 1 March 2012, ICC-02/05-01/12-2; *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Warrant of Arrest for Ahmad Harun, 27 April 2007, ICC-02/05-01/07-2.

³⁵ The Prosecution notes that the fifth suspect in the ICC Darfur investigation, Mr Abdallah Banda Abakaer Nourain, faces charges related to different crimes, but also remains at large.

³⁶ Sudan Tribune, "Legal measures against Kushayb pushed him to surrender to ICC: Sudan's prosecution," 11 June 2020, DAR-OTP-0215-2766 ("Annex 1").

³⁷ See e.g. Reuters, "Sudan agrees ex-president Bashir should appear before ICC over Darfur," 11 February 2020, DAR-OTP-0215-2763 ("Annex 2").

crime against humanity and a war crime, as well as other inhumane acts as a crime against humanity.³⁸

19. The Appeals Chamber has held that the gravity of the crimes and potential length of the sentence that a suspect faces are “distinct factors which enhance the probability of the person absconding.”³⁹ Until his arrest, Mr Abd-Al-Rahman was not fully aware of the gravity and scope of the crimes he is alleged to have committed, which impact the potential sentence that he could face. The knowledge of the serious charges contained in the Second Arrest Warrant provides an even greater incentive to abscond. The totality of the evidence demonstrates that Mr Abd-Al-Rahman’s continued detention remains necessary to ensure his appearance at trial.

d. Mr Abd-Al-Rahman will have sufficient opportunity to abscond if he is released

20. The Defence submits that Mr Abd-Al-Rahman does not possess the requisite financial resources to enable his escape from the conditions imposed by any future Court-mandated interim release.⁴⁰ However, Mr Abd-Al-Rahman remains a flight risk, notwithstanding the alleged state of his personal finances. As noted previously, the Pre-Trial Chamber need only consider “the possibility, not the inevitability, of a future occurrence,” if the risk of absconding is based on concrete evidence.⁴¹ This determination “necessarily involves an element of prediction”⁴² on the basis of “all relevant factors taken together.”⁴³

21. For the Chamber’s finding of necessity under the meaning of article 58(b)(1), the fact that Mr Abd-Al-Rahman is now purportedly indigent cannot alone be

³⁸ Second Arrest Warrant, p. 13.

³⁹ *Ntaganda* Decision, para. 50 (citing *Ngudjolo Chui* Appeals Judgment, paras. 21, 24). See also *Ongwen* Decision, para. 18.

⁴⁰ Defence Request, para. 15.

⁴¹ *Ngudjolo Chui* Appeals Judgment, para. 21. See also *Gbagbo* Appeals Judgment, para. 56.

⁴² *Gbagbo* Decision, para. 48 (citing *Ngudjolo Chui* Appeals Judgment, para. 137).

⁴³ *Bemba* Appeals Judgment, para. 55.

dispositive. Indeed, the Defence refers to Mr Abd-Al-Rahman's difficult and dangerous two-month journey undertaken to travel to Birao, Central African Republic, allegedly at his own expense.⁴⁴ Presumably, Mr Abd-Al-Rahman could undertake a much easier and shorter journey, at no danger and virtually zero expense, to cross the open borders of the Netherlands.

22. In his capacity as "the colonel of colonels" (*aqid al-ogada*) for the whole of Wadi the Salih area in Darfur,⁴⁵ Mr Abd-Al-Rahman has maintained a network of support from powerful individuals throughout his 13 years as a fugitive from the Court. It is reasonable to assume that, through the actions of these individuals, and crucially, their financial and logistical assistance, he has thus far managed to evade arrest. Previous Chambers of this Court have found "past and present political and professional position, international contacts and ties, financial situation and resources, and availability of the necessary network and financial resources" to be relevant factors to determining the risk of flight.⁴⁶ The Prosecution has no reason to believe that Mr Abd-Al-Rahman's network would no longer be willing and able to facilitate his escape from Court control. It is entirely possible that supporters in Sudan and elsewhere could provide funds to Mr Abd-Al-Rahman beyond the scope of Court observation, utilising, for example, the *hawala* money transfer system.

23. Although the COVID-19 pandemic has resulted in heightened restrictions for tourist travel, the European Union ("EU") has never fully frozen internal free movement and furthermore, travel restrictions from the Netherlands are now being

⁴⁴ Defence Request, para. 13. The Prosecution notes that the Defence has not provided any material in support of this assertion.

⁴⁵ First Arrest Warrant, p. 17; Second Arrest Warrant, p. 3.

⁴⁶ *Gbagbo* Decision, para. 57 (citing *Prosecutor v. Jean-Pierre Bemba Gombo*, 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', 2 December 2009, ICC-01/05-01/08-631-Red, para. 72; *Lubanga* Appeals Judgment, para. 137; *Ngudjolo Chui* Appeals Judgment, para. 22).

relaxed.⁴⁷ The open nature of country borders within the Schengen Area of the EU, by design,⁴⁸ would make it exceptionally difficult to restrict the movement of Mr Abd-Al-Rahman once he has been released. According to the Defence Request, Mr Abd-Al-Rahman currently possesses no contacts, no residence, and no source of financial support within the Netherlands.⁴⁹ Now that the Court has facilitated his way into the Schengen Area, without these amenities at his disposal, he has very little incentive to remain.

24. Furthermore, Mr Abd-Al-Rahman has already demonstrated that he is adept at clandestinely traversing international borders in the past. As was the case in *Ntaganda*, Mr Abd-Al-Rahman is “used to the practice of crossing borders to different countries,” which demonstrates that he has the capability to attempt the same practice in the EU.⁵⁰ Practically speaking, Mr Abd-Al-Rahman’s lack of travel documentation⁵¹ does not pose an actual impediment to his escape from justice. Undocumented border crossing is possible with relative ease within the bounds of the Schengen Area.

B. The continued detention of Mr Abd-Al-Rahman is necessary to ensure that he does not obstruct or endanger the investigation or court proceedings under article 58(1)(b)(ii)

a. Mr Abd-Al-Rahman would have the ability to exert influence and intimidate witnesses through unmonitored communications with his associates if released

⁴⁷ See e.g. Government of Netherlands, “Tourists from the Netherlands can now holiday in 16 European countries,” 15 June 2020, <https://www.government.nl/latest/news/2020/06/15/tourists-from-the-netherlands-can-now-holiday-in-16-european-countries>.

⁴⁸ The Schengen Agreement of 1985 on Schengen Cooperation, was incorporated into the EU legal framework by the 1997 Treaty of Amsterdam. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 10 November 1997, OJ C 340, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997D/TXT>.

⁴⁹ Defence Request, para. 15.

⁵⁰ *Ntaganda* Decision, para. 53.

⁵¹ Defence Request, para. 15.

25. The release of Mr Abd-Al-Rahman could pose a risk of endangerment or obstruction of the Prosecution's ongoing investigation under article 58(1)(b)(ii) of the Statute because of the possible opportunity to intimidate or threaten witnesses "either directly or indirectly, through his loyalist or his family members."⁵² With the hearing for the confirmation of charges currently scheduled for 7 December 2020, the Prosecution has a limited timeframe in which to continue its investigation, process evidence for disclosure, re-contact vital witnesses, and make all other necessary preparations for trial. Mr Abd-Al-Rahman's interim release risks interference with the Prosecution's investigation at this critical stage.

26. The Chamber in *Ntaganda* looked to the suspect's "documented history of violence" and the "seriousness of the counts or charges he is facing" as some of several factors to weigh in determining that continued detention is necessary to prevent the "influencing, threatening or intimidating witnesses and victims and/or their family members" under article 58(1)(b)(ii).⁵³ As the Chamber itself has affirmed by granting the Prosecution's article 58 applications and issuing both the First Arrest Warrant and Second Arrest Warrant, the evidence of Mr Abd-Al-Rahman's alleged offences against the civilian population of Darfur, perpetrated both directly and indirectly, is well-documented. The 53 serious charges that Mr Abd-Al-Rahman faces include his alleged direct participation in denying food and access to hygiene facilities to detainees in Deleig, walking on their backs, and beating them with a baton or axe-like object before sending them off to be summarily executed.⁵⁴

27. There is publicly available information indicating that, until his surrender, Mr Abd-Al-Rahman continued to serve as *de facto* commander for some militia forces in the Darfur, Sudan region, where many witnesses reside. As recently as February 2020, Mr Abd-Al-Rahman was reported to have threatened the lives of human rights

⁵² *Ntaganda* Decision, para. 59.

⁵³ *Ntaganda* Decision, para. 59.

⁵⁴ Second Arrest Warrant, paras. 13-18.

activists in South Darfur. Mr Abd-Al-Rahman was allegedly accompanied by other armed members of the Central Reserve Police who were operating under his command.⁵⁵

28. Mr Abd-Al-Rahman's unrestricted access to telephones, the internet, and even bank transfers extends the reach of the influence that he may exert from afar to indirectly intimidate, coerce and silence witnesses. If Mr Abd-Al-Rahman is released, there will be virtually no ability to control or monitor his interaction with his associates which could lead to irreparable harm to witnesses in Sudan and otherwise. The Prosecution notes that it does not currently have the ability to adequately mitigate the risk of harm to its witnesses residing in Sudan to an acceptable level. Rather than encouraging greater victim participation in the Prosecution's investigation, Mr Abd-Al-Rahman's release will make it less likely for witnesses to come forward out of fear of retaliation from these agents.

29. The release of Mr Abd-Al-Rahman could risk bringing real and substantial harm to the legitimate interests of victims and witnesses. In particular, the Prosecution calls attention to the risks faced by witnesses who currently reside in the EU. Previously, witnesses for the Prosecution who reside in the EU have been subjected to intimidation, bribery and interference due to their suspected cooperation with the Court. If Mr Abd-Al-Rahman is released from detention, the Prosecution will not be able to monitor the potential illicit disclosure of witness identities to his associates who could either act on his behalf or of their own accord to influence these vulnerable individuals.

⁵⁵ The Central Reserve Police are also known as the Central Reserve Forces. Darfur Network for Monitoring & Documentation, "Sudan: Ali Kushayb, wanted by the International Criminal Court, threatened to kill two human rights defenders (HRDs) in Darfur, western Sudan," 28 February 2020, DAR-OTP-0215-2761 ("Annex 3").

III. RELIEF SOUGHT

30. For the above reasons, the Prosecution respectfully requests that the Single Judge reject the Defence Request for the interim release of Mr Abd-Al-Rahman.



Fatou Bensouda, Prosecutor

Dated this 13th day of July 2020
At The Hague, The Netherlands