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No.: ICC-02/05-01/20
Date: 25 November 2020

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 Confidential Annex 1 and
SECRET, *EX PARTE*, only available to the Prosecution Annexes 2 and 3**

**Public Redacted Version of “Prosecution’s observations on review of the pre-trial
detention of Mr Ali Muhammad Ali Abd-Al-Rahman (“ALI KUSHAYB”)”,
20 November 2020, ICC-02/05-01/20-209-Conf**

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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**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Prosecution submits that Mr Abd-Al-Rahman's continued detention pursuant to article 60(2) of the Rome Statute is necessary, as the conditions warranting his detention under article 58(1) persist. There is no change in circumstances that would require modification of the decision by the Single Judge on behalf of Pre-Trial Chamber II ("Chamber"), to reject the Defence's request for Mr Abd-Al-Rahman's interim release ("Interim Release Request")¹ and order his continued detention ("Interim Release Decision").²

2. To the contrary, under the current circumstances, there are further justifications for the continued detention of Mr Abd-Al-Rahman under article 58(1)(b)(i) and (ii).

3. As regards article 58(1)(b)(ii), which formed the basis of the Interim Release Decision, the Prosecution is now disclosing the material and identity of witnesses who have provided evidence in relation to Mr Abd-Al-Rahman. This increases the need to ensure that Mr Abd-Al-Rahman does not obstruct or endanger the investigation or court proceedings. Furthermore, the Prosecution has also recently learned that some Prosecution witnesses have received threats in relation to the unfolding proceedings against Mr Abd-Al-Rahman.

4. In relation to article 58(1)(b)(i), additional information has become available in relation to the circumstances of Mr Abd-Al-Rahman's surrender to the ICC. This information provides further support to the Prosecution's previous submissions that Mr Abd-Al-Rahman's continued detention remains necessary to ensure his appearance at trial.³

II. CLASSIFICATION

5. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files these observations as confidential because they contain confidential

¹ ICC-02/05-01/07-87.

² ICC-02/05-01/2—115 ("Interim Release Decision").

³ ICC-02/05-01/20-95, para. 17.

information relating to Prosecution investigations. Annex 1 is classified as confidential, consistent with the classification of these observations. Annexes 2 and 3 are classified as secret, *ex parte*, only available to the Prosecution, since they contain information relating to Prosecution witnesses who are not yet cleared for disclosure to the Defence. The Prosecution will file a public redacted version of these observations as soon as practicable.

III. OBSERVATIONS

A. The circumstances justifying Mr Abd-Al-Rahman's continued detention remain unchanged

6. In the Interim Release Decision, the Single Judge found that the requirement of article 58(1)(b)(ii) was fulfilled.⁴ There are no changed circumstances or new facts that would justify a modification of this prior ruling.

7. The Appeals Chamber has confirmed that a Chamber carrying out a periodic review of a ruling on detention under article 60(3) must satisfy itself that the conditions under article 58(1), as required by article 60(2), continue to be met.⁵ In conducting this review, the Chamber should revert to the ruling on detention to determine whether there has been any change in the circumstances and/or any new facts that would have a bearing on the conditions of article 58(1) of the Statute.⁶

8. Changed circumstances have been found to exist where there is 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."⁷ Thus, in periodic reviews, the Prosecution does not have to re-establish circumstances that have already been established in previous submissions, but need only bring any new development to the attention of the Chamber.⁸

⁴ Interim Release Decision, paras. 29 and 30.

⁵ ICC-01/05-01/08-1019 (OA 4), para. 47, citing ICC-01/04-01/07-572 (OA 4), para. 14.

⁶ *Id.*, para. 52.

⁷ *Id.*, para. 51.

⁸⁸ *Id.*, paras. 2 and 51.

9. The Single Judge found that given “the alleged high ranking position previously held by the suspect in Darfur, the connections that he held in this role, and the likelihood that he still has supporters that may have access to actual or potential witnesses [...], if interim release were to be granted, it would present an unacceptable risk that the suspect may exert pressure on witnesses, either directly or indirectly through his supporters.”⁹ The Single Judge’s conclusions were recently confirmed by the Appeals Chamber.¹⁰

10. The Prosecution is not aware of any change of circumstances that would require the Single Judge to modify his prior decision in relation to article 58(1)(b)(ii).¹¹ In addition, while the Single Judge did not address the requirements under article 58(1)(b)(i), due to the fact that the criteria under 58(1)(b) of the Statute are alternative in nature,¹² there is also no change in circumstances in relation to article 58(1)(b)(i).¹³

B. Recent developments confirm the need to maintain the continued detention of Mr Abd-Al-Rahman

11. Recent developments confirm – if not heighten - the ongoing risk that if interim release were to be granted, the suspect may exert pressure on witnesses either directly or indirectly through his supporters. There is also additional information in relation to the circumstances of Mr Abd-Al-Rahman’s surrender, suggesting that if released, he may not appear for trial.

a. The disclosure of witness identities increases the risk that the suspect or his supporters might obstruct or endanger the investigation or court proceedings

12. The Prosecution has disclosed approximately 6,407 items of evidence to the suspect and his Defence team, including the material relating to the identity of 44 witnesses. The disclosure of this material, without redactions to the identity of the

⁹ Interim Release Decision, para. 29.

¹⁰ ICC-02/05-01/20-177, para. 23.

¹¹ Interim Release Decision, paras. 28-29.

¹² Interim Release Decision, paras. 25, 30. See also the Appeal Chamber’s recent judgement which upholds the Single Judge’s reasoning on that particular point, ICC-02/05-01/20-177, paras. 42, 44.

¹³ ICC-02/05-01/20-95, paras. 8-24.

witnesses and minimal redactions to persons referenced therein, only exacerbates the risk to its investigation and upcoming proceedings.¹⁴

13. Further, access to this evidence, much of it incriminating, may constitute a further incentive for the suspect to abscond if released.¹⁵

b. Pressure on witnesses and other persons in the region

14. Witnesses recently contacted by the Prosecution reported incidents relating to individuals they assert are linked to Mr Abd-Al-Rahman's case. [REDACTED].¹⁶

15. [REDACTED].¹⁷

16. These recent events highlight the ability of persons to attempt to influence victims and witnesses for the potential benefit of Mr Abd-Al-Rahman, as well as the particular vulnerability of certain witnesses and the extremely sensitive background against which these proceedings are unfolding. Were the suspect to be released, such risks would only be exacerbated. His continued detention remains therefore necessary under article 58(1)(b)(ii) in order to ensure the integrity of the proceedings and the safety of victims and witnesses.

c. [REDACTED]

17. The Prosecution has made progress in relation to cooperation with the Government of Sudan, including in particular, the Prosecution's mission to Khartoum between 17 and 20 October 2020. [REDACTED].

18. The Prosecution has taken steps designed to protect potential witnesses and safeguard potential evidence.¹⁸ In particular, during the Prosecution's mission to Khartoum, the delegation discussed how the Government of Sudan would facilitate the Office's operations in Sudan. For this purpose, the Prosecution is now in the

¹⁴ Interim Release Decision, paras. 28-29.

¹⁵ ICC-02/05-01/20-95, paras. 18-19.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ Interim Release Decision, para. 31.

process of negotiating a joint memorandum of understanding and making strenuous efforts to deploy an operational team on the ground in Sudan.

19. The Prosecution has also been taking steps to assess, from a protection perspective, the situation of victims and witnesses in Sudan and Chad. However, numerous challenges relating to the COVID-19 pandemic have affected mission deployments, their duration and witness availability.

20. The Prosecution's planned investigative activities in Sudan and Chad do not warrant a change in the Interim Release Decision. [REDACTED]. As noted by the Appeals Chamber in its recent decision endorsing the reasoning of the Single Judge, "when determining whether the conditions 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 Prosecution."¹⁹

d. Additional information on the circumstances of Mr Abd-Al-Rahman's surrender suggest his continued detention remains necessary to ensure his appearance at trial

21. In its response to the Interim Release Request, the Prosecution stated that it is not unlikely that one motivating factor in Mr Abd-Al-Rahman's surrender to the ICC was his desire to avoid capture in Sudan.²⁰ In this regard the Prosecution referred to comments made by Sudanese Attorney General Taj al-Ser Ali al-Hibr Ali.²¹

22. On 16 November 2020, Mr Taj al-Ser Ali al-Hibr Ali made further comments that reinforce his previous statement. In particular, he stated that a police force "surrounded [...] Kushayb" but "he was able to enter Central Africa with his group – [he] never moves alone."²²

¹⁹ ICC-02/05-01/20-177, para. 27.

²⁰ ICC-02/05-01/20-95, para. 17.

²¹ ICC-02/05-01/20-95, para. 17.

²² Sudan News Today, "The Attorney General reveals [that which is] hidden and clarifies the conditions of Al-Bashir's surrender to The Hague.", 16 November 2020, DAR-OTP-0215-5276 ("Annex 1"). The Prosecution will provide an English translation from the OTP Language Services Unit as soon as practicable. The Prosecution provides the following draft translation of the relevant part relating to Mr Abd-Al-Rahman: "I have information that before the defendant Kushayb surrendered to the International Criminal Court, you were about

23. This additional information in relation to the circumstances of Mr Abd-Al-Rahman's surrender provides further support to the Prosecution's previous submissions that his continued detention remains necessary to ensure his appearance at trial.

e. The length of time spent by the accused in pre-trial detention does not amount to a change in circumstances

24. The length of time spent by Mr Abd-Al-Rahman in detention since the Interim Release Decision, does not constitute a change in circumstances that would justify Mr-Abd-Al-Rahman's interim release. As stated by the Appeals Chamber:

the lapse of time in detention cannot be considered on its own to be a changed circumstance within the meaning of article 60(3) of the Statute. This is so because the review of an individual's detention under article 60(3) of the Statute is based on whether the conditions of article 58(1)(a) and (b) of the Statute, which were found to be met in the initial article 60(2) assessment, have changed such that detention is no longer justified.²³

IV. RELIEF REQUESTED

25. For the reasons above, the Prosecution requests that the Single Judge maintain the continued detention of Mr Abd-Al-Rahman as the conditions warranting his detention have not changed since his initial application for interim release. To the contrary, the new developments that have unfolded in the case only confirm the Single Judge's previous determination that Mr Abd-Al-Rahman's detention remains necessary.

to arrest him. Is this true? What happened? He was in (unease) at that time, and a police force surrounded him. The police chief told me: "I am very sorry." After the blockade we imposed on Kushayb, he was able to enter Central Africa with his group - never moves alone. Does this mean that Kushayb preferred the trial of The Hague over Khartoum? Maybe he thought at that time, if he goes to Central Africa he won't be caught and he'll find a safe haven. Did Kushayb have information that you wanted to arrest him? Exactly, not just information, he was absolutely sure.

²³ ICC-01/05-01/13-969 (OA 5, OA 6, OA 7, OA 8, OA 9), para. 44.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart
Deputy Prosecutor

Dated this 25th day of November 2020

At The Hague, The Netherlands