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No. ICC-02/05-01/20

Date: 12 April 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:

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Mr Harry Tjonk

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Reparations Section**

Other

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)(b)(i), 58(1)(b)(ii), 60(3), and 60(4) of the Rome Statute (the ‘Statute’), rules 118 and 119 of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 51 of the Regulations of the Court (the ‘Regulations’), issues this Decision on the review of detention.

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute¹ and decided to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman 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 2004.²
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’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 2004.³
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court.
4. 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’).⁴

¹ *The Prosecutor v. Ahmad Muhammad Harun* (‘Ahmad Harun’) and *Ali Muhammad Ali Abd Al Rahman* (‘Ali Kushayb’), [Decision on the Prosecution Application under Article 58\(7\) of the Statute](#), ICC-02/05-01/07-1-Corr.

² [Warrant of Arrest for Ali Kushayb](#), ICC-02/05-01/07-3-Corr.

³ [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.

⁴ [Decision severing the case against Mr Ali Kushayb](#), ICC-02/05-01/07-87.

5. On 14 August, 2020, the Chamber rejected the Defence request for Mr Abd-Al-Rahman's interim release and ordered his continued detention (the 'Interim Release Decision').⁵
6. On 8 October 2020, the Appeals Chamber upheld the Interim Release Decision.⁶
7. On 11 December 2020, the Chamber rejected the Defence's request for interim release and ordered his continued detention (the 'Detention Review Decision').⁷
8. On 5 February 2021, the Appeals Chamber upheld the Detention Review Decision.⁸
9. On 16 March 2021, the Defence submitted a motion challenging the Court's jurisdiction (the 'Jurisdiction Challenge').⁹
10. On 18 March 2021, following an extension of time limit,¹⁰ the Office of the Prosecutor filed observations on the second review of Mr Abd-Al-Rahman's detention (the 'Prosecutor's Observations').¹¹
11. On 26 March 2021, the Defence submitted a request to declare the Prosecutor's witness statements inadmissible (the 'Admissibility Request').¹²

⁵ [Decision on the Defence Request for Interim Release](#), ICC-02/05-01/20-115.

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' (the '[Abd-Al-Rahman Interim Release Judgment](#)'), ICC-02/05-01/20-177.

⁷ [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).

⁸ 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' (the '[Abd-Al-Rahman Detention Review Judgment](#)'), ICC-02/05-01/20-279-Red.

⁹ Exception d'incompétence, 16 March 2021, ICC-02/05-01/20-302.

¹⁰ On 16 March 2021 at 18:57, the Prosecutor informed the Chamber by e-mail that the Office of the Prosecutor had failed to meet the 15 March 2021 time limit for submissions on the continued pre-trial detention of Mr Abd-Al-Rahman. By e-mail of 17 March 2021 at 16:06, the Chamber exceptionally granted the Prosecutor until 18 March 2021 to submit observations. The time limit for the Defence to submit its observations was correspondingly extended from 29 March 2021 to 1 April 2021.

¹¹ [Public Redacted Version of "Prosecution's observations on review of the pre-trial detention of Mr Ali Muhammad Ali Abd-Al-Rahman \("ALI KUSHAYB"\)", 18 March 2021, ICC-02/05-01/20-309-Conf](#), 22 March 2021, ICC-02/05-01/20-309-Red. Confidential version notified on 18 March 2021 (ICC-02/05-01/20-309-Conf).

¹² 1ère Requête aux fins d'exclusion de moyens de preuve, 26 March 2021, ICC-02/05-01/20-322.

12. On 1 April 2021, the Defence submitted its observations on the matter of detention, including its reply to the Prosecutor's Observations (the 'Defence Observations').¹³

13. On 9 April 2021, the Defence filed an urgent request to convene a hearing pursuant to rule 118(3) of the Rules to discuss the conditions for the immediate release of Mr Abd-Al-Rahman in light of the Prosecutor's failure to respond to the Admissibility Request (the 'Hearing Request').¹⁴

II. SUBMISSIONS

A. The Prosecutor's Observations

14. The Prosecutor submits that Mr Abd-Al-Rahman's continued detention 'remains necessary, as the conditions warranting his detention under article 58(1) continue to be met'.¹⁵ In the Prosecutor's view (i) '[t]here have been no changed circumstances that would justify modification of the Chamber's order that Mr Abd-Al-Rahman remain in detention';¹⁶ (ii) '[t]he continued detention of Mr Abd-Al-Rahman remains necessary to prevent the obstruction or endangerment of the investigation and the court proceedings';¹⁷ and (iii) '[t]he continued detention of Mr Abd-Al-Rahman remains necessary to ensure his appearance at trial'.¹⁸

B. The Defence Observations

15. The Defence begins its submissions by highlighting nine 'lessons' it claims to have drawn from previous decisions by this Chamber as well as the Appeals Chamber in this case.¹⁹ Based on these 'lessons',²⁰ the Defence provides a number of arguments in response to the Prosecutor's Observations and advances three grounds in support of

¹³ [Version Publique Expurgée des Observations relatives au second réexamen de la détention](#), ICC-02/05-01/20-329-Red. A confidential version is also available (ICC-02/05-01/20-329-Conf).

¹⁴ [Nouvelle Requête aux Fins de Convocation Urgente d'une Audience](#), 9 April 2021, ICC-02/05-01/20-336.

¹⁵ [Prosecutor's Observations](#), para. 1.

¹⁶ [Prosecutor's Observations](#), paras 6-9.

¹⁷ [Prosecutor's Observations](#), paras 10-15.

¹⁸ [Prosecutor's Observations](#), para. 16.

¹⁹ [Defence Observations](#), paras 3-7, referring to [Version Publique Expurgée de la Réponse aux Observations du Bureau du Procureur ICC-02/05-01/20-209-CONF](#), 26 November 2020 (notified on 27 November 2020), ICC-02/05-01/20-213-Red, paras 4-9.

²⁰ [Defence Observations](#), para. 9.

Mr Abd-Al-Rahman's release. In particular, the Defence argues that (i) there no longer are reasonable grounds to believe that Mr Abd-Al-Rahman is responsible for the crimes charged;²¹ (ii) Mr Abd-Al-Rahman has been detained for an unreasonable period due an inexcusable delay caused by the Prosecutor as well as the Chamber;²² and (iii) the prevalence of COVID-19 warrants Mr Abd-Al-Rahman's immediate release from the detention centre.²³

16. In its reply to the Prosecutor's Observations, the Defence argues that several major events have occurred since the Detention Review Decision which negate the necessity to maintain Mr Abd-Al-Rahman in detention.²⁴ In particular, the Defence avers that the Prosecutor has abused the Chamber's trust by failing to deliver on promises to put in place protective mechanisms for witnesses residing in Sudan.²⁵ In this regard, the Defence submits, *inter alia*, that the recent signing of the Memorandum of Understanding (the 'MOU') between the Office of the Prosecutor and the government of Sudan constitutes a relevant new circumstance to be taken into account in the present review.²⁶ The Defence also claims that several of its own motions, including its Jurisdiction Challenge and Admissibility Request, give rise to changed circumstances constituting cause for the release of Mr Abd-Al-Rahman.²⁷

III. ANALYSIS

A. Applicable law

17. The Chamber recalls that deprivation of liberty is the exception and not the rule.²⁸ As noted in the jurisprudence of this Court, a Chamber must periodically review²⁹ its

²¹ [Defence Observations](#), paras 17-25.

²² [Defence Observations](#), paras 26-31.

²³ [Defence Observations](#), paras 32-37.

²⁴ [Defence Observations](#), para. 12.

²⁵ [Defence Observations](#), paras 13-14.

²⁶ [Defence Observations](#), para. 15.

²⁷ [Defence Observations](#), para. 30, ns. 71-72.

²⁸ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on Application for Interim Release](#), 16 December 2008, ICC-01/05-01/08-321, para. 31.

²⁹ Rule 118(2) of the Rules ('in accordance with article 60, paragraph 3, at least every 120 days'). See e.g. Appeals Chamber, *The 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 (the '[Katanga and Ngudjolo Interim Release Judgment](#)'), 14 June 2008, ICC-01/04-01/07-572, para. 14.

ruling on the detention of a suspect, but may only modify its previous ruling if there has been a change in some or all of the facts underlying its previous decision.³⁰ Furthermore, the discovery of a new fact must be such that it is capable of satisfying the Chamber that an order for detention is no longer necessary.³¹

18. As to the object of the periodic review, the Appeals Chamber has held that '[t]he ruling that the Pre-Trial Chamber is required to review pursuant to article 60 (3) of the Statute is the determination that it has made in response to an application for interim release pending trial under article 60 (2)'.³² It further noted that

it is the initial ruling under article 60 (2) of the Statute that establishes the grounds justifying continued detention. However, given that this ruling may be subsequently modified under article 60 (3) if "changed circumstances so require" it is necessary to construe the "ruling on detention" as being the initial decision made under article 60 (2) of the Statute as well as any potential subsequent modifications made to that decision under article 60 (3) of the Statute.³³

19. In this regard, noting the wording of article 60(2) of the Statute,³⁴ the Appeals Chamber has held that 'under article 58(1)(b) of the Statute, detention may be ordered if it "appears necessary" to avoid the enumerated risks'.³⁵

20. The Chamber considers relevant to highlight the Appeals Chamber's finding on the necessity to take into consideration in a detention review 'the safety of witnesses',

³⁰ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence (the '[Bemba Detention Review Decision](#)'), 28 July 2010, ICC-01/05-01/08-843, para. 52; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence" (the '[Bemba Detention Review Judgment](#)'), 24 November 2010, ICC-01/05-01/08-1019, paras 1, 51.

³¹ [Bemba Detention Review Decision](#), para. 52.

³² [Bemba Detention Review Judgment](#), para. 45, quoting Appeals Chamber, *The 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" (the '[Lubanga Interim Release Judgment](#)'), 13 February 2007, ICC-01/04-01/06-824, para. 94.

³³ [Bemba Detention Review Judgment](#), para. 46.

³⁴ Article 60(2) of the Statute reads as follows: 'A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions'.

³⁵ [Abd-Al-Rahman Detention Review Judgment](#), para. 14. See Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision on the Defence's application for interim release](#), 18 November 2013, ICC-01/04-02/06-147, para. 47, quoting [Katanga and Ngudjolo Interim Release Judgment](#), para. 21.

‘regardless of whether they are currently reachable by the Prosecutor’ when assessing the circumstances under article 58(1)(b)(ii) of the Statute.³⁶ It is also pertinent to point out that the conditions set under article 58(1)(b) of the Statute are alternative in nature, *i.e.* there is the need to demonstrate that at least one of the requirements are fulfilled to determine the need for a continued detention.³⁷

21. The Chamber further recalls that the lapse of time in detention cannot, *per se*, be taken as a changed circumstance within the meaning of article 60(3) of the Statute, although it may be a relevant factor in the review of the assessment under this article.³⁸ In this regard, the Chamber must conduct its analysis on a detention review and interpret the related provisions in accordance with ‘internationally recognized human rights’.³⁹

22. Lastly, the Chamber is mindful of its duty to ensure that the detention of a suspect is not prolonged ‘for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor’, pursuant to article 60(4) of the Statute.⁴⁰

B. Previous findings

23. Bearing the aforementioned in mind, the Chamber recalls the main findings of previous decisions related to Mr Abd-Al-Rahman’s detention, which remain valid to the present decision.

1. Interim Release Decision

24. In the Interim Release Decision, the Chamber based its decision to maintain Mr Abd-Al-Rahman detained primarily on article 58(1)(b)(ii) of the Statute. In this

³⁶ [Abd-Al-Rahman Interim Release Judgment](#), para. 27.

³⁷ [Interim Release Decision](#), para. 25, referring to Appeals Chamber, *The 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. 89 and [Lubanga Interim Release Judgment](#), para. 139.

³⁸ Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision on the review of Dominic Ongwen’s detention pursuant to article 60\(3\) of the Statute](#), 23 March 2016, ICC-02/04-01/15-421, para. 7, referring to Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et. al*, [Judgment on the appeals against Pre-Trial Chamber II’s decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification](#), 29 May 2015, ICC-01/05-01/13-969, paras 44-45.

³⁹ Article 21(3) of the Statute. See [Katanga and Nqudjolo Interim Release Judgment](#), para. 15.

⁴⁰ See *e.g.* [Lubanga Interim Release Judgment](#), para. 4.

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'.⁴¹ 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'.⁴²

2. *Detention Review Decision*

25. In the Detention Review Decision, the Chamber found that the Defence had not presented any new fact warranting Mr Abd-Al-Rahman's release.⁴³ It specifically highlighted that 'the Prosecutor ha[d] submitted two instances whereby threats were being made to witnesses subsequent to the disclosure of evidence to the Defence'.⁴⁴ 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'.⁴⁵ Whilst deploring that the Court was not yet in a position to sufficiently mitigate risks to all witnesses, the Chamber held that 'this reality must be taken into account for the purposes of assessing the continued need to detain Mr Abd-Al-Rahman', and remanded Mr Abd-Al-Rahman's in custody.⁴⁶

C. **Review of conditions for detention**

26. The Chamber will now assess whether there are any changed circumstances that would warrant the release of Mr Abd-Al-Rahman, with or without conditions. The Chamber will first examine the Defence's arguments under article 58(1)(a) of the Statute to the effect that there are no longer reasonable grounds to believe that Mr Abd-Al-Rahman committed crimes within the jurisdiction of the Court. Then it will determine whether there is still a need to detain Mr Abd-Al-Rahman in order to ensure that he does not obstruct or endanger the investigation or court proceedings. After this, the Chamber will evaluate the Defence's claim that Mr Abd-Al-Rahman has been

⁴¹ [Interim Release Decision](#), para. 29. See [Detention Review Decision](#), para. 24.

⁴² [Interim Release Decision](#), 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 [Detention Review Decision](#), para. 24.

⁴³ [Detention Review Decision](#), para. 28.

⁴⁴ [Detention Review Decision](#), paras 29-30.

⁴⁵ [Detention Review Decision](#), para. 31.

⁴⁶ [Detention Review Decision](#), paras 31-32.

detained for an unreasonable period due to inexcusable delay by the Prosecutor and/or the Chamber. Finally, the Chamber will assess the Defence's claim that Mr Abd-Al-Rahman must be released to prevent him from being contaminated with COVID-19.

1. Article 58(1)(a)

27. The Defence claims that there are no longer reasonable grounds to believe that Mr Abd-Al-Rahman committed crimes within the jurisdiction of the Court. This claim is essentially based on two arguments:

28. First, the Defence maintains that the image which the Prosecutor has projected of Mr Abd-Al-Rahman as a powerful and influential figure does not correspond to reality. The main argument put forward by the Defence in support of this claim is that Mr Abd-Al-Rahman is, in fact, a man of extremely limited means who can barely support his family's needs. This reality is incongruent, according to the Defence, with the claim that Mr Abd-Al-Rahman was once the 'Colonel of Colonels' and that he would still be able to rely on a network of persons who are willing and able to threaten or harm potential witnesses against him. The Defence further advances the argument that, if Mr Abd-Al-Rahman had really been in a position of power and influence in the past, he would undoubtedly have enriched himself, which is contradicted by the fact that he is virtually destitute now. The Chamber is unpersuaded by the Defence's arguments in this regard. Even if it were established that Mr Abd-Al-Rahman really had no assets today, this would by no means imply that he could never have been a leadership figure in a local militia before. Neither would it imply that he could not still have supporters and sympathisers today. The fact that the Prosecutor has not proved its claims about Mr Abd-Al-Rahman yet does not mean that the Chamber therefore has to ignore the available information for the purpose of its review of Mr Abd-Al-Rahman's detention simply because the Defence contradicts it.

29. Second, the Defence asks the Chamber to find that there are no longer reasonable grounds to believe that Mr Abd-Al-Rahman has committed crimes within the jurisdiction of the Court on the basis of the fact that the Defence has requested the Chamber to declare all witness statements disclosed by the Prosecutor so far inadmissible. The Defence is correct that, if the Chamber were to grant the Admissibility Request, this would severely undermine the evidentiary basis of the Prosecutor's allegations. However, as noted above, the mere fact that the Defence made

this request does not oblige the Chamber to act as if it were already granted. The Chamber will rule on the Defence's request in due course and draw all necessary consequences from its ruling at that time.

2. Article 58(1)(b)(ii)

30. The Chamber notes that the Prosecutor claims not to be aware of any change in circumstances and/or new facts relevant to the Chamber's determination.⁴⁷ In particular, the Prosecutor asserts that the signing of the MOU with the Government of Sudan on 14 February 2021, whilst being a new fact, does not constitute a changed circumstance because it did not affect 'the overall risk assessment faced by witnesses currently residing in Sudan'.⁴⁸ Notwithstanding the improved cooperation, the Prosecutor submits that 'the volatile security situation in Sudan and remoteness of witness locations continue to pose substantial challenges for risk mitigation'.⁴⁹ In addition, the Prosecutor argues that the disclosure of the statements and identity of witnesses who provide evidence against Mr Abd-Al-Rahman presents a heightened risk that Mr Abd-Al-Rahman could seek to influence the ongoing investigation and court proceedings, particularly for witnesses residing in Chad and Sudan.⁵⁰ The Chamber further notes that the Prosecutor has received additional information that persons sympathetic to Mr Abd-Al-Rahman are still in a position to harm witnesses.⁵¹

31. The Chamber has taken note of the above and agrees that there are no substantially changed circumstances that would warrant the release of Mr Abd-Al-Rahman. The Chamber is not persuaded by the Defence's argument that the slow progress in the implementation of protective mechanisms inside Sudan and elsewhere constitutes a changed circumstance within the meaning of article 60(3) of the Statute.⁵² On the contrary, the fact that the Prosecutor and VWU still have not been able to put in place adequate measures to protect all witness residing in different locations throughout Sudan is, unfortunately, very much a continuation of the prevailing situation during the

⁴⁷ [Prosecutor's Observations](#), para. 9.

⁴⁸ [Prosecutor's Observations](#), para. 9.

⁴⁹ [Prosecutor's Observations](#), para. 13.

⁵⁰ [Prosecutor's Observations](#), paras 11-12.

⁵¹ [Prosecutor's Observations](#), para. 14 and Annex 2.

⁵² [Defence Observations](#), para. 15.

previous detention review. The Chamber firmly rejects the Defence's portrayal of the slow progress in this regard as an abuse of trust on the part of the Prosecutor.⁵³ There is no indication whatsoever that the Prosecutor and the VWU have not been sufficiently diligent in the implementation of protective mechanisms or that they deliberately misled the Chamber about the expected speed thereof.

32. The Chamber also does not accept the Defence's argument that its own motions constitute changed circumstances warranting the release of Mr Abd-Al-Rahman.⁵⁴ Irrespective of the merits of these motions, their mere submission is incapable of changing the factual or legal situation of Mr Abd-Al-Rahman, let alone the security threats faced by the witnesses. Contrary to what the Defence suggests, the Chamber will not anticipate its rulings on these motions for the purpose of this decision. Moreover, the Chamber does not subscribe to the Defence's claim that the Prosecutor's failure to submit a response to the Defence's Admissibility Request implies that the Prosecutor does not object to it, much less that the Chamber would *ipso facto* have to accede to the Defence's request.

3. Article 60(4)

33. The Defence also claims that Mr Abd-Al-Rahman ought to be released on account of inexcusable delays ascribed to the Prosecutor and the Chamber itself.⁵⁵

34. In relation to the Prosecutor, the Defence alleges that the second postponement of the confirmation hearing was entirely due to the Prosecutor's abuse of the Chamber's trust by claiming that the additional extension would suffice to put in place protective mechanisms for its witnesses in Sudan and elsewhere.⁵⁶ The Defence is right that the need to put in place such protective mechanisms was a major element in the Chamber's decision to grant the second postponement. However, the Defence is wrong to suggest that the Chamber did so in the expectation that all witness protection issues would be resolved in this period. The Chamber simply considered it appropriate to give the Prosecutor a final opportunity to attempt to put in place sufficient protective measures to allow the confirmation hearing to take place without unduly endangering witnesses

⁵³ [Defence Observations](#), paras 13-14, 29.

⁵⁴ [Defence Observations](#), para. 30, ns. 71-72.

⁵⁵ [Defence Observations](#), paras 26-31.

⁵⁶ [Defence Observations](#), para. 26.

and their relatives. There was no expectation of a specific result in this regard. As already noted, there is no indication that the Prosecutor and the VWU did not use the additional time diligently. It is therefore incorrect to portray the second postponement as unreasonably long.

35. The Defence also claims that Mr Abd-Al-Rahman has been detained for an unreasonably long period due to the fact that the Chamber has not ruled on a number of motions that have been pending for a while.⁵⁷ According to the Defence, these matters are central to its preparation as well as to Mr Abd-Al-Rahman's continued detention. The Chamber notes that it is not for the Defence to dictate in which order the Chamber considers particular requests, much less when it should issue its corresponding rulings. The Defence's claim that the fact that some of its motions may have been pending for a while has caused Mr Abd-Al-Rahman to be detained for an unreasonable period of time is entirely gratuitous and lacks any substantiation.

4. COVID-19

36. Finally, the Defence requests the Chamber to release Mr Abd-Al-Rahman on the ground that he might be contaminated with COVID-19 at the ICC Detention Centre.⁵⁸ The Chamber notes that it belongs to the Registry to monitor the individual situation of all detainees and to inform the Chamber if certain measures, including their (conditional) release, are required on medical grounds. The Chamber has been regularly updated by the Registry but has not been given any indication that Mr Abd-Al-Rahman's current situation is particularly concerning.

⁵⁷ In particular, the Defence refers to the following filings: [Demande d'autorisation d'appel de la Décision](#), 3 December 2020, ICC-02/05-01/20-217; [Prosecution's submissions on the evidence demonstrating that Ali Abd-Al-Rahman is also known as Ali Kushayb pursuant to ICC-02/05-01/20-196](#), 7 December 2020, ICC-02/05-01/20-224; [Version Publique Expurgée de la Requête en vertu des Articles 4-2 et 68-1 du Statut](#), 14 December 2020, ICC-02/05-01/20-231-Red; [Réponse aux Observations ICC-02/05-01/20-224](#), 17 December 2020, ICC-02/05-01/20-235; [Version publique expurgée de l'Offre de Réplique aux Observations ICC 02/05 01/20 256 et ICC 02/05 01/20 258 Conf](#), 18 January 2021, ICC-02/05-01/20-261-Red; [Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour](#), 26 January 2021, ICC-02/05-01/20-269; and [Version publique expurgée de la Requête en vertu de l'Article 43-1 du Statut et de la Règle 13 du Règlement de Procédure et de Preuve](#), 29 January 2021, ICC-02/05-01/20-272-Red. See [Defence Observations](#), para. 30, ns. 71-72.

⁵⁸ [Defence Observations](#), paras 32-37.

D. Overall conclusion

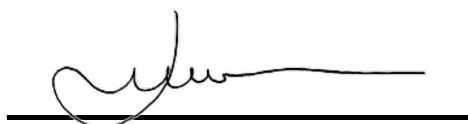
37. Based on the above considerations, the Chamber finds that there are still reasonable grounds to believe that Mr Abd-Al-Rahman has committed crimes within the Court's jurisdiction. The Chamber further finds that there are no changed circumstances requiring the Chamber to modify its prior ruling. Indeed, there still exists a significant likelihood that if Mr Abd-Al-Rahman were to be released he might pose a threat – directly or indirectly – to victims and witnesses in this case. The Chamber further finds that this risk cannot be sufficiently minimised with the imposition of conditions.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Hearing Request; 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, 12 April 2021

At The Hague, The Netherlands