

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/20

Date: 11 June 2021

PRE-TRIAL CHAMBER II

Before:

**Judge Rosario Salvatore Aitala, Presiding Judge
Judge Tomoko Akane
Judge Antoine Kesia-Mbe Mindua**

SITUATION IN DARFUR, SUDAN

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

Public Document

**Victims' observations on review of the pre-trial detention of Mr Ali Muhammad
Ali Abd-Al-Rahman ("Ali Kushayb")**

Source: Legal Representative 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. The Legal Representative of the Victims makes this filing pursuant to the Presiding Judge's instructions on 27 May 2021 that '[p]arties and participants may file their written observations' on the review of Mr Abd-Al-Rahman's continued pre-trial detention.¹
2. The Legal Representative respectfully submits that the suspect should remain in pre-trial detention because there has been no substantial change in circumstances that justifies modifying the Chamber's prior rulings ordering his detention under article 60(3).
3. This Chamber's latest decision on the suspect's continued detention was issued less than two months ago, on 12 April 2021, and the grounds the Chamber relied on to justify the suspect's continued detention are still cogent. Specifically: (i) there are still reasonable grounds to believe that the suspect committed crimes within the jurisdiction of the Court pursuant to article 58(1)(a) of the Court's Statute; and (ii) his detention continues to be necessary to ensure that he does not obstruct or endanger the investigation and the court proceedings, pursuant to article 58(1)(b)(ii). Although other grounds under article 58(1)(b) would also justify this conclusion, since 'the criteria under article 58(1)(b) of the Statute are alternative in nature', the Chamber need not make a determination on these additional grounds at this time.²

II. PROCEDURAL HISTORY

4. On 9 June 2020, the suspect surrendered himself and was transferred to the Detention Centre of the Court.

¹ Transcript of 27 May 2021, ICC-02/05-01/20-T-010-ENG RT, p. 4, lines 19-25 and p. 5, lines 1-3 (the official English version of this transcript has not yet been published); [ICC-02/05-01/20-T-010-FRA ET WT](#), p. 4, lines 8-12.

² See [ICC-02/05-01/20-115](#), para 30.

5. On 14 August 2020, the Single Judge issued the ‘Decision on the Defence Request for Interim Release’ ordering the continued detention of the suspect (‘First Decision’) on the basis that the conditions of articles 58(1)(a) and 58(1)(b)(ii) were fulfilled.³ On 8 October 2020, the Appeals Chamber upheld the First Decision.⁴
6. On 11 December 2020, the Single Judge issued the public-redacted version of the ‘Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118(2) of the Rules of Procedure and Evidence’, in which he ordered the continued detention of the suspect (‘Second Decision’).⁵ On 5 February 2021, the Appeals Chamber upheld the Second Decision.⁶
7. On 12 April 2021, the Chamber issued the ‘Decision on the review of detention’ in which it ordered the continued detention of the suspect (‘Third Decision’).⁷ On 2 June 2021, the Appeals Chamber upheld the Third Decision.⁸

III. OBSERVATIONS

8. Pursuant to article 60(3) of the Rome Statute, the Chamber ‘may modify its ruling’ as to a suspect’s detention, release, or the conditions of release ‘if satisfied that changed circumstances so require’. And according to the Appeals Chamber, ‘changed circumstances’ mean 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’.⁹
9. The Legal Representative submits that the circumstances underpinning this Chamber’s previous decisions ordering the suspect’s ongoing detention continue

³ [ICC-02/05-01/20-115](#), paras 26-29.

⁴ [ICC-02/05-01/20-177](#), para 63.

⁵ [ICC-02/05-01/20-230-Red](#), para 32.

⁶ [ICC-02/05-01/20-279-Red](#), operative paragraph.

⁷ [ICC-02/05-01/20-338](#), para 37.

⁸ [ICC-02/05-01/20-415](#), para 82.

⁹ Appeals Chamber, *Bemba*, [ICC-01/05-01/08-1019 \(19 November 2010\)](#), para 51. The ‘ruling on detention’ is construed ‘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’: Appeals Chamber, *Bemba*, [ICC-01/05-01/08-1019 \(19 November 2010\)](#), para 46.

to apply, namely: (i) there continue to be reasonable grounds to believe that the suspect committed crimes within the jurisdiction of the Court, and (ii) the suspect's continued detention remains necessary to prevent the obstruction or endangerment of the investigation and court proceedings.

(i) There are reasonable grounds to believe that Mr Abd-Al-Rahman committed the alleged crimes within the jurisdiction of the Court

10. In its previous decisions on the suspect's pre-trial detention, affirmed by the Appeals Chamber, this Chamber has consistently held that there are reasonable grounds to believe that the suspect committed crimes within the jurisdiction of the Court, as required under article 58(1)(a).

11. The Chamber's latest decision on the suspect's continued detention was issued less than two months ago, on 12 April 2021.¹⁰ And since then, the strength of the evidence against the suspect has only become clearer. The Prosecution presented compelling grounds to believe that the suspect committed the crimes alleged in the Document Containing the Charges¹¹ in its submissions at the confirmation of charges hearing.¹² And the Legal Representative of Victims confirmed in the course of the same hearing that victims' accounts of the harm they suffered fully support and align with the Prosecution's case.¹³

(ii) The suspect's continued detention remains necessary to prevent the obstruction or endangerment of the investigation and the court proceedings

12. In its previous decisions on the suspect's continued pre-trial detention, this Chamber has consistently held that detention was necessary 'to ensure' that the suspect does not obstruct or endanger the investigation or court proceedings

¹⁰ [ICC-02/05-01/20-338](#), paras 28-29, 37.

¹¹ [ICC-02/05-01/20-325-Anx1-Corr2-Red](#).

¹² The Prosecution also provided detailed written submissions on the suspect's alleged crimes in its Pre-Confirmation Brief submitted on 16 April 2021: [ICC-02/05-01/20-346-Red](#).

¹³ Transcript of 25 May 2021, ICC-02/05-01/20-T-008-ENG RT, p. 22, lines 5-6; p. 23, lines 6-16; p. 24 lines 5-13 (the official English version of this transcript has not yet been published); [ICC-02/05-01/20-T-008-Red-FRA WT](#), p. 17, lines 14-15, p. 18, lines 17-18, p. 19, lines 1-8.

because of the risk of harm to victims and witnesses. Each of these decisions has been upheld by the Appeals Chamber.

13. The Appeals Chamber has made clear that in ‘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’.¹⁴ And it confirmed that in determining whether the continued detention of a suspect remains ‘necessary’ for the purpose of article 58(1)(b), the Chamber should consider ‘the possibility, not the inevitability, of a future occurrence’ relevant to the grounds listed in article 58(1)(b).¹⁵
14. In his First Decision, the Single Judge held that ‘[i]n light of 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 who may have access to actual or potential witnesses’, interim release ‘would present an unacceptable risk that the suspect may exert pressure on witnesses, either directly or indirectly through his supporters.’¹⁶ The Single Judge therefore concluded that the suspect’s detention was justified ‘to ensure that the suspect does not obstruct or endanger’ the proceedings.¹⁷
15. In his Second Decision, the Single Judge also noted that the grounds warranting the suspect’s detention were ‘reinforced by the additional information provided by the Prosecutor, which shows that witness security is still far from guaranteed and that persons apparently related to Mr Abd-Al-Rahman indeed have access to certain witnesses’.¹⁸
16. And in this Chamber’s most recent decision on the suspect’s detention, it held that ‘there still exists a significant likelihood that if Mr Abd-Al-Rahman were to be

¹⁴ [ICC-02/05-01/20-117](#), para 27.

¹⁵ [ICC-02/05-01/20-177](#), para 33 (citing, inter alia, AC, *Katanga and Ngudjolo*, [ICC-01/04-01/07-572](#) (9 June 2008), para. 21).

¹⁶ [ICC-02/05-01/20-115](#), para 29.

¹⁷ *Ibid.*

¹⁸ [ICC-02/05-01/20-230-Red](#), para 28.

released he might pose a threat – directly or indirectly – to victims and witnesses in this case’ and that ‘this risk cannot be sufficiently minimised with the imposition of conditions’ on his release.¹⁹

17. This conclusion has only become clearer in the short time since that decision was reached. First, the Defence acknowledged during the confirmation of charges hearing that senior Janjaweed leaders today occupy the highest positions of power in Sudan.²⁰ Second, as the Defence also confirmed, camps in Darfur have recently been attacked by the Janjaweed and its successor, the Rapid Support Forces, including as recently as April 2021.²¹ And third, as set out at the detention-related hearing on 27 May, ‘victims have already been subject to intimidation and threats’.²²

18. The views and concerns of the victims now on record in this case also firmly support this conclusion. The vast majority of the victims represented by the Legal Representative live in displacement camps, and almost all of them have expressed security concerns corresponding to those that animated this Chamber’s previous decisions. Victims have relayed that the camps have inadequate security protections and that they fear violence by the suspect and his associates if he were released. One victim conveyed that he felt ‘scared and insecure because I am one of the witnesses against Ali Kushayb in the ICC; I belong to the Fur tribe; and these

¹⁹ [ICC-02/05-01/20-338](#), para 37.

²⁰ See, e.g., Transcript of 25 May 2021, ICC-02/05-01/20-T-008-ENG RT, p. 101, lines 18-25; [ICC-02/05-01/20-T-008-Red-FRA WT](#), p. 79, lines 13-21: ‘On 13 April 2019 Mr Hameti is named Deputy Head of Transitional Military Council [...] replacing the other Janjaweed chief...On 3 June 2012 the Rapid Support Force occupy Khartoum they carry out a campaign of terror over a hundred deaths, rapes so ... today at the moment Mr Hameti is the Deputy Head of the Transitional Military Council which means number 2 in Sudan.’

²¹ Transcript of 25 May 2021, ICC-02/05-01/20-T-008-ENG RT, p. 102, lines 17-25 and p. 103, lines 1-4; [ICC-02/05-01/20-T-008-Red-FRA WT](#), p. 80, lines 5-19.

²² Transcript of 27 May 2021, ICC-02/05-01/20-T-010-ENG RT, p. 8, line 25 and p. 9, lines 1-2; [ICC-02/05-01/20-T-010-FRA ET WT](#), p. 7, line 3. See also [ICC-02/05-01/20-209-Red](#), paras 3, 14 (‘Prosecution witnesses have received threats in relation to the unfolding proceedings against Mr Abd-Al-Rahman’); [ICC-02/05-01/20-230-Red](#), para 28.

camps are not secure'.²³ And others – both within and outside the camps – have expressed concern that their lives will be at risk if the suspect is released before the conclusion of the trial.²⁴

19. Victims also believe that the suspect's release would embolden and empower his supporters and associates to harm victims and witnesses. As one victim put it: '[i]f he is released our people will continue to suffer because even if he doesn't return to Darfur himself, he has the ability to instruct his militias to commit atrocities'.²⁵ Another stated that if released the suspect would 'return and reorganise and mobilise his associates, who will be confident that there is no real accountability'.²⁶ This fear has been echoed by other victims who have conveyed that the suspect's release would 'incentivise [his militias] to kill people in Darfur'²⁷ and provide them with a 'licence' to kill.²⁸ And victims indicated that the suspect's release would cause 'security unrest' in Darfur and that they would have to leave the region as a result.²⁹
20. These fears accord with the statement by the Prosecution that 'unrestricted access to telephones, the internet, and even bank transfers extends the reach of the influence' that the suspect 'may exert from afar to indirectly intimidate, coerce and silence witnesses' and that there would be 'virtually no ability to control or monitor his interaction with his associates' if he were released.³⁰ And, as the Appeals Chamber held, '[t]he fact that Mr Abd-Al-Rahman currently has access to

²³ Transcript of 27 May 2021, ICC-02/05-01/20-T-010-ENG RT, p. 6, lines 22-24; [ICC-02/05-01/20-T-010-FRA ET WT](#), p. 5, lines 17-19.

²⁴ Transcript of 27 May 2021, ICC-02/05-01/20-T-010-ENG RT, p. 6, line 25 and p. 7, lines 1-5; [ICC-02/05-01/20-T-010-FRA ET WT](#), p. 5, lines 20-24.

²⁵ Consultations with victim admitted to participate in the proceedings.

²⁶ Transcript of 27 May 2021, ICC-02/05-01/20-T-010-ENG RT, p. 7, lines 9-11; [ICC-02/05-01/20-T-010-FRA ET WT](#), p. 5, lines 27-28, p. 6, lines 1-2.

²⁷ Consultations with victim admitted to participate in the proceedings.

²⁸ Transcript of 27 May 2021, ICC-02/05-01/20-T-010-ENG RT, p. 7, lines 6-7; [ICC-02/05-01/20-T-010-FRA ET WT](#), p. 5, lines 24-26.

²⁹ Transcript of 27 May 2021, ICC-02/05-01/20-T-010-ENG RT, p. 7, lines 14-18; [ICC-02/05-01/20-T-010-FRA ET WT](#), p. 6, lines 3-6.

³⁰ [ICC-02/05-01/20-95](#), para 28.

telephone communication in the detention centre, where the Court is in principle able to passively monitor his calls [...] cannot be equated with' the level of risk to victims and witnesses that would exist if the suspect were 'released in The Netherlands'.³¹

21. The Legal Representative also agrees with the Prosecution that the risk of interference with the proceedings is further elevated following recent disclosure of evidence to the Defence, up to and including last month,³² since 'the disclosure of the statements and identity of witnesses' presents 'a heightened risk' especially for those 'residing in Chad and Sudan'.³³ This conclusion is also supported by the jurisprudence of the Court finding that the 'disclosure of evidence "amplifies" the risk to the investigation and the court proceedings'³⁴ and 'may lead to the grave endangerment of the security of victims and witnesses'.³⁵
22. Given the victims' fear of retaliation, it is likely that the release of the suspect would also discourage victim participation in the Prosecution's investigation, despite the fact that many victims have indicated a willingness to cooperate so far.³⁶
23. Victims have waited almost two decades for this suspect to face the prospect of trial, and, for the reasons outlined above, the Legal Representative respectfully submits that the Chamber should order his continued pre-trial detention at this time.

³¹ [ICC-02/05-01/20-415](#), para 61.

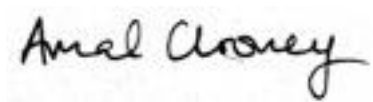
³² [ICC-02/05-01/20-404](#).

³³ [ICC-02/05-01/20-309-Red](#), para 12; [ICC-02/05-01/20-338](#), para 30.

³⁴ Appeals Chamber, *Gbagbo*, [ICC-02/11-01/11-278-Red](#) (26 October 2012), para 65; see also Trial Chamber X, *Ongwen*, [ICC-02/04-01/15-483-Red](#) (12 July 2016), para 26.

³⁵ Pre-Trial Chamber I, *Lubanga*, [ICC-01/04-01/06-826](#) (14 February 2007), p. 6. See also Appeals Chamber, *Lubanga*, [ICC-01/04-01/06-824](#) (13 February 2007), para 136 ('[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') and Pre-Trial Chamber I, *Mbarushimana*, [ICC-01/04-01/10-163](#) (19 May 2011), para 58 (referring to 'the advanced stage of the disclosure process' as a factor that makes a suspect 'more likely to abscond').

³⁶ See [ICC-02/05-01/20-95](#), para 28.

A handwritten signature in black ink that reads "Amal Clooney". The signature is fluid and cursive, with the first name "Amal" and the last name "Clooney" clearly distinguishable.

Ms Amal Clooney

Legal Representative of Victims

Dated this 11th day of June 2021