



Original: English

No. ICC-02/05-01/07

Date: 12 June 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. AHMAD MUHAMMAD HARUN ('AHMAD HARUN') and
ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')***

Public

Decision severing the case against Mr Ali Kushayb

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for Mr Kushayb
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court, issues this Decision severing the case against Mr Ali Kushayb.

1. On 31 March 2005, the United Nations Security Council referred the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor.¹
2. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor's application under article 58(7) of the Rome Statute (the 'Statute')² and decided³ to issue warrants of arrest for Mr Ahmad Muhammad Harun ('Mr Harun')⁴ and Mr Ali Muhammad Ali Abd-Al-Rahman ('Mr Kushayb')⁵, for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas (Darfur, Sudan) between August 2003 and March 2004.
3. On 15 March 2012, the Presidency reassigned the situation in Darfur, Sudan, to Pre-Trial Chamber II,⁶ the current composition of which was decided on 16 March 2018.⁷
4. On 9 June 2020, Mr Ali Kushayb arrived at the Detention Centre of the Court. On the same day, Judge Rosario Salvatore Aitala was designated by the Chamber as the Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.⁸
5. On 11 June 2020, the Chamber filed a public redacted version of a second warrant of arrest against Mr Kushayb⁹ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas (Darfur, Sudan) between on or about 5 to 7 March 2004. This second warrant was originally issued on 16 January 2018 as secret, *ex parte* only available to the Prosecutor, by Pre-Trial

¹ S/RES/1593(2005).

² Prosecutor's Application under Article 58(7), ICC-02/05-56, 27 February 2007.

³ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

⁴ WARRANT OF ARREST FOR AHMAD HARUN, ICC-02/05-01/07-2-Corr.

⁵ WARRANT OF ARREST FOR ALI KUSHAYB, ICC-02/05-01/07-3-Corr.

⁶ Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations, ICC-02/05-01/07-65.

⁷ Decision assigning judges to divisions and recomposing Chambers, ICC-02/05-01/07-75.

⁸ Decision on the designation of a Single Judge, ICC-02/05-01/07-80.

⁹ 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, ICC-02/05-01/07-74-Red.

Chamber II,¹⁰ granting the Prosecutor's application to amend the first warrant of arrest pursuant to article 58(6) of the Statute dated 3 November 2017.¹¹

6. On 11 June 2020, the Single Judge issued a decision convening a hearing for the initial appearance of Mr Ali Kushayb for Monday, 15 June 2020.¹²

7. The present case opened in 2007 with the issuance of warrants of arrest against two suspects: one of these, Mr Harun, has not yet been surrendered to the Court. While Mr Kushayb is in the Court's custody, having arrived at the Detention Centre on 9 June 2020, no information has been submitted or is otherwise available to the Chamber indicating that Mr Harun's surrender might also be imminent or likely.

8. The Single Judge is mindful that article 61(2) of the Statute allows the Pre-Trial Chamber, whether upon request of the Prosecutor or on its own motion, to hold a hearing in the absence of the person charged to confirm the charges. However, it does not seem necessary or appropriate at this stage to consider this scenario. First, none of the requirements set forth in article 61(2)(b) (i.e. the relevant person having waived the right to be present; or having fled or not being found and all reasonable steps having been taken to secure his or her appearance before the Court and to inform him or her) appears to have been fulfilled; second, and critically, proceeding *in absentia* against Mr Harun would inevitably entail delays and therefore potentially prejudice Mr Kushayb's fundamental right to be tried fairly and expeditiously, as provided by articles 64(2) and 67(1) of the Statute.

9. Accordingly, without prejudice to reviewing the situation in light of relevant developments, it is at this stage necessary to sever the case against Mr Kushayb from the present case, as provided by article 64(5) of the Statute and rule 136 of the Rules, both with a view to protecting Mr Kushayb's right to a fair and expeditious trial and in the interest of judicial economy.

¹⁰ ICC-02/05-01/07-74-Secret-Exp.

¹¹ ICC-02/05-01/07-73-Secret-Exp.

¹² Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, ICC-02/05-01/07-82.

10. The Registry is directed to open a new case record and transfer all documents relevant to Mr Kushayb to it, pursuant to regulation 22 of the Regulations of the Registry. The newly established case record shall contain all documents relevant to Mr Kushayb in all available versions, including translations, and their level of confidentiality shall remain the same, subject to being revised by the Chamber in due course.

11. Finally, the Single Judge recalls Pre-Trial Chamber I's 'Decision on 6 Applications for Victims' Participation in the Proceedings' dated 17 June 2010,¹³ authorising six applicants to participate as victims in the proceedings at the pre-trial stage in this case and clarifies that the present decision does not in any way affect the right to participation of those victims; the issue of victims' participation in the new case to be opened will be addressed in a separate decision in due course.

¹³ ICC-02/05-01/07-58.

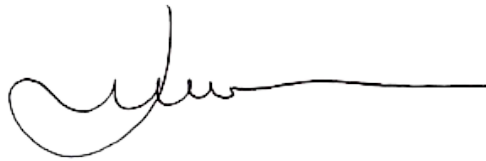
FOR THESE REASONS, THE SINGLE JUDGE HEREBY

DECIDES to sever the case against Mr Ali Kushayb from the present case;

ORDERS the Registrar to open a new case record and assign it a new case number in accordance with regulation 27(1) of the Regulations of the Registry; and

RECALLS that, following the decision designating Judge Aitala as the Single Judge in the case of *Prosecutor v. Ahmad Harun and Ali Kushayb*, Judge Aitala will remain in charge as the Single Judge for the two cases, as severed by the present decision.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of loops and a long horizontal stroke extending to the right.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Friday, 12 June 2020

At The Hague, The Netherlands