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No.: **ICC-02/05-01/20**
Date: **20 August 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

Prosecution's response to "*Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433*" (ICC-02/05-01/20-448)

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I. INTRODUCTION

1. Pre-Trial Chamber II (“Chamber”) should dismiss the Defence’s “*Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433*” (“Request”),¹ as it does not meet the criteria for reconsideration, is repetitive of previous requests and, on the merits, it misrepresents the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (“Confirmation Decision”).²

II. PROCEDURAL BACKGROUD

2. On 7 August 2021, the Defence requested reconsideration of the Confirmation Decision based on the assertion that the information provided by the Registry³ (the “Addendum”) regarding the de-criminalisation of cooperation with the Court in Sudan was unsupported by its accompanying documents.

3. The Defence submits that this alleged unsupported assertion regarding the de-criminalisation of cooperation with the Court had a two-fold effect on the Confirmation Decision: first, it purportedly led the Chamber to mischaracterise the circumstances surrounding Mr Abd-Al-Rahman’s surrender to the Court⁴ and, second, it purportedly impacted the admissibility and probative value of an unidentified number of items of evidence collected by the Prosecution.⁵

III. SUBMISSIONS

The Request does not meet the criteria for reconsideration

4. The Request does not meet the test established by the Court – and as previously applied by this Chamber⁶ – to allow for the remedy of reconsideration of a decision.

¹ [ICC-02/05-01/20-448](#).

² [ICC-02/05-01/20-433](#).

³ ICC-02/05-01/20-397-Conf.

⁴ [Request](#), paras. 20-28.

⁵ [Request](#), paras. 29-30.

⁶ [ICC-02/05-01/20-163](#), para. 12; [ICC-02/05-01/20-372](#), para. 17.

5. As established in previous cases, this exceptional measure may be applied when a clear error in reasoning has been demonstrated or if it is necessary to prevent an injustice.⁷ A Chamber may also reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,⁸ or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.⁹

6. None of the reasons presented in the Request satisfy these requirements. The Defence argues that new information was disclosed after the Confirmation Decision, impacting the foundation of that decision. However, the Registry's Addendum was within the Chamber's contemplation at the time of issuing the Confirmation Decision.¹⁰ The Defence itself acknowledges that the Chamber was aware of the content of the Addendum and its annexes, as it had already analysed the Addendum even prior to the Confirmation Decision.¹¹ Therefore, there is no factual change in circumstances to warrant reconsideration.¹²

7. The Chamber, when issuing the Confirmation Decision, was aware of the content of the Addendum and no error of reasoning is elucidated by the Defence in the Request. The arguments presented by the Defence amount to mere dissatisfaction and disagreement with the outcome of the confirmation proceedings, which does not justify the application of the exceptional measure of reconsideration.

The Request impermissibly seeks to re-litigate issues already decided by the Chamber

8. The Defence surmises that the evidence submitted in support of the confirmation of charges should be dismissed because of the new information arising from the re-classification of the Registry's Addendum.

⁷ [ICC-01/04-02/06-519](#), para. 12; [ICC-02/04-01/15-1547](#), para. 7; [ICC-02/04-01/15-468](#), para. 4; [ICC-01/04-02/06-1049-Red](#), para. 12; [ICC-01/05-01/08-3343](#), para. 30.

⁸ [ICC-01/04-01/06-2705](#), paras. 13-18; [ICC-01/09-02/11-863](#), para. 11; [ICC-01/09-01/11-511](#), para. 6.

⁹ [ICC-01/05-01/08-1691-Red](#), para. 17.

¹⁰ [ICC-02/04-01/15-1527](#), para. 5.

¹¹ [ICC-02/05-01/20-402](#), para. 40.

¹² [ICC-01/05-01/08-3343](#), para. 30.

9. This argument fails to substantiate the Request. Instead, it simply repeats the Defence's previous reconsideration request¹³ and seeks to (once again) re-litigate decisions taken by the Chamber on a number of the Defence's motions¹⁴ and its subsequent decision rejecting the Defence's request for leave to appeal,¹⁵ presented on the same grounds as the present Request.¹⁶ This Chamber has already warned the Defence multiple times against submitting duplicative filings.¹⁷ Similarly, the Trial Chamber in the *Al Hassan* case, when rejecting a defence request for reconsideration, recently reiterated "in the strongest possible terms that repeating requests does not make them stronger, particularly when these are devoid of any legal basis. In fact, such repetitive and vexatious pleadings interfere with the expeditious administration of justice and may even be considered an abuse of process."¹⁸

10. In addition, the Request misstates the findings of the "Decision on Defence requests and procedural challenges", in which the Chamber expressly decided that it did not need to address the impact of Sudanese law criminalising cooperation with the Court, as this issue was irrelevant considering (i) the referral of the Darfur situation to the Court by the United Nations Security Council and (ii) the Juba Peace Agreement, which provides that all parties, including the Government of the Republic of Sudan, shall not interfere with investigations being conducted by the Court.¹⁹

11. The information presented by the Registry in the Addendum was not, therefore, the sole basis on which the Chamber dismissed the Defence's previous submissions, confirming once again the lack of basis for the Request.

¹³ ICC-02/08-01/20-338-Conf.

¹⁴ [ICC-02/05-01/20-402](#).

¹⁵ [ICC-02/05-01/20-433](#).

¹⁶ [ICC-02/05-01/20-413](#), paras. 5-11.

¹⁷ [ICC-02/05-01/20-372](#), para. 16. [ICC-02/05-01/20-186](#), para. 8.

¹⁸ [ICC-01/12-01/18-1122-Red](#), para. 8.

¹⁹ [ICC-02/05-01/20-402](#), para. 40.

The Request mischaracterises the Confirmation Decision

12. Lastly, the Defence submits that the association of Mr Abd-Al-Rahman with the alias Ali Kushayb was only confirmed on a fragile and contested basis, mainly provided by videos that Mr Abd-Al-Rahman provided to the Prosecution prior to his surrender.²⁰ The Defence then argues that this finding is tainted by an error of fact, asserting that the criminalisation of cooperation with the Court would have impacted Mr Abd-Al-Rahman's decision to identify himself as Ali Kushayb.²¹

13. This reasoning, however, both misconstrues the Confirmation Decision and lacks logic.

14. The link between Mr Abd-Al-Rahman and the alias Ali Kushayb is addressed at length in the Confirmation Decision,²² based on different pieces of evidence submitted by the Prosecution and the Registry. Therefore, the basis for this finding is neither "tenuous and contested",²³ nor is it restricted to the videos submitted voluntarily by Mr Abd-Al-Rahman to the Prosecution.

15. In addition, the fact that cooperation with the Court may or may not have been criminalised in Sudan at the time of Mr Abd-Al-Rahman's surrender does not affect the conclusions drawn by the Chamber in the Confirmation Decision. Cooperation with the Court would have been criminalised regardless of the way Mr Abd-Al-Rahman identified himself in the aforementioned videos.

16. Moreover, as determined by the Chamber, it is highly unlikely that an individual would identify himself by another name just to "be consistent with the choices made by the Court in its own documents".²⁴

²⁰ [Request](#), para. 20.

²¹ [Request](#), paras. 23-25.

²² [ICC-02/05-01/20-433](#), paras. 46-60.

²³ [Request](#), para. 20.

²⁴ [ICC-02/05-01/20-433](#), para. 55.

IV. CONCLUSION

17. For the foregoing reasons, the Chamber should dismiss the Request.



Karim A. A. Khan QC

Prosecutor

Dated this 20th day of August 2021

At The Hague, the Netherlands