

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 August 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

**Public Redacted Version of Victims' response to Defence 'Requête aux fins de
reconsidération de la Décision ICC-02/05-01/20-433', 20 August 2021, ICC-02/05-
01/20-456-Conf**

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 these submissions on behalf of 126 victims authorised to participate in this case,¹ pursuant to regulation 24 of the Regulations of the Court and the decision of the Single Judge of 19 March 2021.²

2. The Defence submits that the Chamber should reconsider its decision confirming 31 charges of war crimes and crimes against humanity against the defendant on the basis that it was made ‘without drawing the consequences’ of the fact that cooperation with the ICC was a crime in Sudan.³ The Legal Representative submits that this request is manifestly unfounded and should be dismissed.

3. The Defence submissions are based on an addendum to a Registry report which, according to the Defence, confirms that cooperation with the Court was a crime under Sudanese law and fails to show that any decriminalisation has occurred.⁴ The Defence argues that, as a result of this ‘new fact’ disclosed in the addendum, the Court should dismiss the pending charges because such criminalisation (i) meant that the defendant felt compelled to use the alias ‘Ali Kushayb’ when he surrendered to the Court and (ii) led witnesses to feel compelled to provide evidence to the prosecution.

4. The Defence does not, however, explain why alleged criminalisation would have forced the defendant to use a particular name nor why any individual would have felt compelled to cooperate with the Court. Indeed, it would be more logical to conclude the contrary: that the prospect of facing criminal prosecution would deter an individual from cooperating with the Court. The Defence also fails to identify any ‘new fact’ that provides a basis for reconsideration and presents no evidence of what is allegedly criminalised or what impact this had on any witness. And the Defence also

¹ [ICC-02/05-01/20-398](#).

² [ICC-02/05-01/20-314](#), §33.

³ [ICC-02/05-01/20-448](#), §13 (unofficial translation).

⁴ [ICC-02/05-01/20-448](#), §§14-15.

fails to explain why any of its arguments would justify the dismissal of any – let alone all – of the 31 charges against the defendant.

II. CLASSIFICATION

5. Pursuant to regulations 23*bis* (1) and (2) of the Regulations of the Court, this filing is marked confidential on the basis that it quotes from documents marked with the same classification. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

6. On 12 April 2021, the Registry submitted a report on the status of cooperation between the Court and the Republic of the Sudan.⁵ The following month, on 19 May 2021, the Registry submitted an *ex parte* addendum to its report ('Addendum') in which it stated that [REDACTED].⁶ The Registry appended two annexes to the Addendum: [REDACTED].⁷

7. On 1 July 2021, the Defence requested that the Addendum be disclosed to it⁸ and it became available to the Defence on 12 July 2021.⁹

8. On 9 July 2021, the Pre-Trial Chamber issued a decision confirming 31 charges of crimes against humanity and war crimes against the defendant ('Confirmation Decision').¹⁰

⁵ See, e.g., [ICC-02/05-01/20-402](#), §20 (referring to ICC-02/05-01/20-339-Conf-Exp). This report was filed *ex parte*. The Legal Representative of the Victims has not seen it.

⁶ ICC-02/05-01/20-397-Conf-Exp, §9.

⁷ ICC-02/05-01/20-397-Conf, §10, Annexes I – II. An English translation of Annex I was issued on 30 July 2021: ICC-02/05-01/20-397-Conf-AnxI-tENG.

⁸ [ICC-02/05-01/20-429-Red](#).

⁹ See ICC-02/05-01/20-397-Conf.

¹⁰ [ICC-02/05-01/20-433](#), pages 67-70.

9. On 7 August 2021, the Defence filed a request for reconsideration of the Confirmation Decision, seeking to have all charges against the defendant dismissed ‘based on the ... new information disclosed in the Addendum’.¹¹

IV. SUBMISSIONS

A. Legal standard for reconsideration

10. As the Defence acknowledges, reconsideration of a decision by a Chamber is an ‘exceptional measure’.¹² According to the Court’s jurisprudence, reconsideration should only be undertaken if a ‘clear’ or ‘manifest’ error of reasoning has been demonstrated, if the decision is ‘manifestly unsound’, or if it is ‘necessary to prevent an injustice’.¹³ This Chamber has confirmed that the remedy of reconsideration is only allowed ‘under strict and limited conditions’¹⁴ and that this may arise ‘with the emergence of new facts relevant to a given decision after that decision has been rendered’.¹⁵

B. The request for reconsideration should be dismissed

11. The Defence argues that this Chamber should reconsider its Confirmation Decision on the basis that the Addendum filed by the Registry ‘confirms ... that cooperation with the Court was a crime under Sudanese law, at least until July 2020’

¹¹ [ICC-02/05-01/20-448](#), §3 (unofficial translation). The Defence has also filed a separate request for reconsideration of an earlier decision related to procedural issues in which the Chamber observed that the Sudanese authorities had confirmed that Sudanese law no longer criminalised cooperation with the ICC and that the law in question had been repealed in July 2020: [ICC-02/05-01/20-438-Red](#). This is still pending and the Defence requests that it be dealt with ‘separately’: [ICC-02/05-01/20-448](#), §3 (unofficial translation). The Defence’s contention that the ‘lack of opposition to the application for reconsideration’ of this earlier decision by parties and participants in the case ‘does justice to its compelling nature’ is incorrect.

¹² [ICC-02/05-01/20-448](#), §4.

¹³ TC X, *Prosecutor v. Al Hassan*, 9 April 2020, [ICC-01/12-01/18-734](#), §11; TC IX, *Prosecutor v. Ongwen*, 11 May 2018, [ICC-02/04-01/15-1259](#), §12; TC VI, *Prosecutor v. Ntaganda*, 18 March 2015, [ICC-01/04-02/06-519](#), §12.

¹⁴ PTC II, *Prosecutor v. Yekatom and Ngaïssona*, 11 March 2020, [ICC-01/14-01/18-477](#), §16.

¹⁵ [ICC-02/05-01/20-163-tENG](#), §12. See also TC X, *Prosecutor v. Al Hassan*, 9 April 2020, [ICC-01/12-01/18-734](#), §11; TC VI, *Prosecutor v. Ntaganda*, 22 February 2018, [ICC-01/04-02/06-2241](#), §4; Presidency, *Prosecutor v. Katanga*, 26 June 2019, [ICC-01/04-01/07-3833](#), §25.

and that, contrary to the Registry's suggestion, it does 'not confirm the decriminalization of cooperation with the Court in Sudanese law'.¹⁶ The Defence asserts that it obtained access to the Addendum after the Confirmation Decision,¹⁷ and that its request for reconsideration of that decision is made on the basis of the 'new information' disclosed in the Addendum and its annexes.¹⁸ It concludes that 'by not taking into account the impact of the criminalisation of acts of cooperation with the Court in Sudanese law on the confirmation of charges', the Chamber has 'rendered a manifestly uninformed and ill-founded decision' and that the evidence of the defendant's alias and that provided by witnesses in Sudan is not sufficiently reliable 'to confirm the charges and to send [the defendant] to trial'.¹⁹

12. The Defence argument is flawed for at least three reasons.

13. First, the Defence asserts that there is a 'new fact ... calling into question the basis' of the Confirmation Decision but the Defence fails to identify one.²⁰ The Registry submitted the Addendum to the Chamber on 19 May 2021, almost two months before the Confirmation Decision. The information contained in it was therefore not 'new'.²¹

14. Second, even if the information constituted a 'new fact', the Defence fails to establish what impact it had on the Confirmation Decision, let alone how it renders that decision 'manifestly unsound'.²²

15. According to the Defence, two aspects of the Confirmation Decision were impacted by the 'new information': (i) the reasoning underlying the conclusion that the defendant used the alias 'Ali Kushayb',²³ and (ii) the reliability and admissibility

¹⁶ [ICC-02/05-01/20-448](#), §§13-14 (unofficial translation). See also §§10, 12-17.

¹⁷ [ICC-02/05-01/20-448](#), §9.

¹⁸ [ICC-02/05-01/20-448](#), §12 (unofficial translation). See also §§2-4.

¹⁹ [ICC-02/05-01/20-448](#), §§18, 27 (unofficial translation).

²⁰ [ICC-02/05-01/20-448](#), heading above §5 (unofficial translation). See §10 of these submissions (above).

²¹ See also [ICC-02/05-01/20-340-Red](#), §§15, 20, 22. The Chamber considered the Defence's submissions in its decision dated 21 May 2021: [ICC-02/05-01/20-402](#), §§27 and 40. See further TC X, *Prosecutor v. Al Hassan*, 9 April 2020, [ICC-01/12-01/18-734](#), §19.

²² See §10 of these submissions (above).

²³ [ICC-02/05-01/20-448](#), §§20-28.

of ‘OTP evidence obtained in Sudan’ that the Chamber relied on to confirm the charges.²⁴ More specifically, the Defence argues that the fact that the defendant faced criminal penalties for cooperating with the Court meant that he ‘had no choice but to do whatever he believed was necessary for his surrender to succeed’, including using the name ‘Ali Kushayb’ that was used by the Court.²⁵ And it argues that the risk of criminal prosecution faced by witnesses constituted coercion that renders their evidence unreliable.²⁶

16. But the Defence fails to explain what acts are allegedly criminalised, whether or when this alleged criminalisation was known to any person, or how it may have impacted a witness and their evidence in the case. Indeed, as this Chamber has already concluded, ‘the Sudanese authorities have confirmed that Sudanese law no longer criminalises cooperation with the ICC and that the law in question was repealed in July 2020’.²⁷ The Chamber has also noted that ‘article 24 of the Juba Peace Agreement, which is part of the Constitutional Charter for the Transitional Period, expressly provides that the parties, including the current government, “shall not interfere with the investigations and trials conducted by the ICC and shall ensure the protection and safety of all prosecutors, victims, and witnesses”’. And the Office of the Prosecutor has similarly confirmed that in July 2020 Sudan ‘passed into law several legislative amendments, including the repeal of criminal law provisions that prevented cooperation with the ICC’.²⁸

17. The Legal Representative also notes that [REDACTED] annexed to the Addendum does refer to decriminalisation of cooperation as stated by the Registry.

²⁴ [ICC-02/05-01/20-448](#), §§29-30.

²⁵ [ICC-02/05-01/20-448](#), §23.

²⁶ [ICC-02/05-01/20-448](#), §§29-30. Nor has the defence established any basis for its highly objectionable suggestion that the other parties and participants in the case may have violated a ‘duty of candour’: [ICC-02/05-01/20-448](#), §29.

²⁷ See [ICC-02/05-01/20-402](#), §40.

²⁸ Office of the Prosecutor, [32nd Report of the Prosecutor on the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 \(2005\)](#), 10 December 2020, §4. See also §6. The Defence also accepts that some aspects of the Addendum are valid: [ICC-02/05-01/20-448](#), §§14, 25, 29.

[REDACTED].²⁹ And Article 3(3) of that Act in turn provides that ‘no ... person may provide assistance or support to any entity to hand over any Sudanese national in order to be prosecuted overseas for committing any crime that constitutes violation of ... International Humanitarian Law including crimes against humanity, genocide and war crimes’.³⁰

18. The Defence argument is also illogical since any criminalisation of cooperation would provide witnesses with a reason *not to* provide evidence to the Court – rather than a reason to feel any compulsion to do so. Nor would a defendant who was on the run for over 13 years have been deemed to have been ‘cooperating’ with the Court such that his surrender would have become necessary for his own ‘protection’, as the Defence suggests.³¹ As a result, the Chamber’s conclusions on these points in the Confirmation Decision clearly cannot be considered manifestly unsound or unjust.³²

19. Third, even if the ‘new information’ were in fact new and in some way relevant, the Defence has not established a link between its arguments and its request for the dropping of all charges.³³

20. The Confirmation Decision followed a three-day hearing convened to determine whether there were ‘substantial grounds to believe that the person committed the crimes charged’.³⁴ It reflects the Chamber’s analysis of ‘the totality of the evidentiary material disclosed by the Prosecutor, including all 2,837 items of

²⁹ ICC-02/05-01/20-397-Conf-AnxI-tENG, p.11. See also Annex II, ICC-02/05-01/20-397-Conf-Exp-AnxII, p. 10 [REDACTED].

³⁰ An Arabic version of this law is available here: <https://redress.org/wp-content/uploads/2021/08/Criminal-Procedures-Act-1991-2009-Amendment-FINAL-DRAFT-Pending-Presidential-Signature-2009-05-21-ARABIC.pdf>, and an unofficial English translation of this law provided by the NGO Redress is available here: <https://redress.org/wp-content/uploads/2021/08/Criminal-Procedures-Act-1991-2009-Amendment-FINAL-DRAFT-Pending-Presidential-Signature-2009-05-21-ENGLISH-3.pdf>.

³¹ [ICC-02/05-01/20-448](#), §23.

³² [ICC-02/05-01/20-448](#), §§23, 26, 30. See also [ICC-02/05-01/20-433](#), §§39, 54-55.

³³ [ICC-02/05-01/20-448](#), §§28, 30, Prayer for Relief (‘For these reasons, lead counsel humbly requests honourable Pre Trial Chamber II ... To dismiss the charges against Mr Ali Muhammad Ali Abd-Al-Rahman in their entirety’ (unofficial translation)). See also [ICC-02/05-01/20-448](#), §27 (arguing that a video should be excluded from the evidence).

³⁴ See [ICC-02/05-01/20-433](#), §§12, 34.

evidence enumerated in the Prosecutor's List of Evidence', encompassing 'the statements ... of the 111 Witnesses upon whom the Prosecutor relies', other witnesses 'included in the Prosecutor List of Evidence' and non-witness evidence.³⁵ The Chamber 'fully met its duty to provide adequate reasoning for its determination on the charges' by providing 'detailed and specific references to the content of the evidence retained as instrumental to its findings' throughout the 72-page Confirmation Decision and confirmed 31 charges of war crimes and crimes against humanity as a result.³⁶

21. The Defence argues that the Chamber's reliance on a video in which the suspect uses the alias 'Ali Kushayb' was improper and that the Confirmation Decision should be overturned as a result.³⁷ But, contrary to the Defence submissions, the Chamber explicitly stated that it did not consider this video evidence to be 'decisive' on the issue of the alias.³⁸ Indeed, the Defence acknowledges that the Chamber 'relies on other sources'³⁹ and the Chamber makes clear that this and another video of the suspect before his surrender are 'obviously not decisive on their own' but were 'suitable to be considered by the Chamber in the context of its *overall assessment of the evidence* submitted in support of the issue of the identity'.⁴⁰ The alleged improper reliance on this video cannot therefore be a basis for reconsidering the entire decision and dismissing all pending charges against the defendant.

22. Similarly, the argument related to allegedly unreliable witness evidence fails as there is no logic to – let alone proof of – the assertion that any witness who provided incriminating evidence was coerced into doing so.⁴¹ Indeed, if the Defence arguments were accepted, this would demonstrate the opposite conclusion: that there was a reason for witnesses *not* to cooperate with the Court. There is therefore no basis

³⁵ [ICC-02/05-01/20-433](#), §39. See also, e.g., §53.

³⁶ See [ICC-02/05-01/20-433](#), §40 (referring to article 61(7) of the Rome Statute).

³⁷ See §§15, 18 of these submissions (above).

³⁸ [ICC-02/05-01/20-448](#), §§24-26.

³⁹ [ICC-02/05-01/20-448](#), §22.

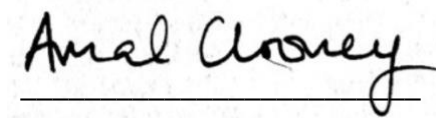
⁴⁰ [ICC-02/05-01/20-433](#), §55 (emphasis added). See also §53 (in which the Chamber refers to other items of evidence that 'make an explicit and credible connection between the nickname and the name "Abd-Al-Rahman"').

⁴¹ See §§15-18 of these submissions (above).

whatsoever for the Court to find that the high bar for reconsidering its earlier decision has been met, let alone the drastic proposed remedy of dismissing the case against this defendant.

V. CONCLUSION

23. For these reasons, the Legal Representative submits that the Defence request for reconsideration of the Confirmation Decision should be rejected.

A handwritten signature in black ink, reading "Amal Clooney", is positioned above a solid horizontal line.

Amal Clooney
Legal Representative of the Victims

Dated this 23rd day of August 2021