Cour Pénale Internationale



International Criminal Court

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

Date: **25 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

Motion seeking leave to file consolidated reply to Prosecution and Legal Representative of Victims' responses to "Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433"

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

The Office of the Prosecutor Counsel for Mr Ali Muhammad Ali

Mr Karim A. A. Khan QC Abd-Al-Rahman

Mr Julian Nicholls Mr Cyril Laucci, Lead Counsel

Mr Iain Edwards, Associate Counsel

Legal Representatives of Victims Legal Representatives of the Applicants

Ms Amal Clooney

Mr Nasser Mohamed Amin Abdalla

Unrepresented Victims Unrepresented Applicants

(Participation/Reparation

The Office of Public Counsel for The Office of Public Counsel for the

Victims Defence

Ms Paolina Massidda Mr Xavier-Jean Keïta Ms Sarah Pellet Ms Marie O'Leary

States' Representatives Amicus Curiae

REGISTRY

Registrar Counsel Support Section

Mr Peter Lewis Mr Pieter Vanaverbeke

Victims and Witnesses Unit Detention Section

Victims Participation and Reparations

Section

Mr Nigel Verrill

- 1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman ("Defence") seeks leave to file a consolidated reply to responses of the Prosecution ("Prosecution Response")¹ and the Legal Representative of the Victims ("Victims' Response")² to the Defence's "Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433" pursuant to Regulation 24(5) of the Regulations of the Court. The Responses raise new issues that the Defence could not reasonably have anticipated.
- 2. On 9 July 2021, Pre-Trial Chamber II delivered the "Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')" ("Confirmation Decision").³ The Defence filed its "Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433" on 7 August 2021 ("Request").⁴
- 3. In both the Prosecution Response and the Victims' Response, it is submitted that information provided by the Registry purportedly confirming that cooperation with the Court has been decriminalised in Sudan ("Addendum")⁵ had been before the Pre-Trial Chamber at the time of the Confirmation Decision. They accordingly allege that this information would not amount to new or previously unavailable information.⁶
- 4. The Prosecution and Victims recognise that the information in the Addendum was not available to the Defence until after the Confirmation Decision.⁷ That the Defence was unaware of that information before 12 July 2021 is a matter of public record. The relevance of that information is that it unambiguously confirmed for the first time that prior to July 2020 at the earliest, persons who cooperated with the Court risked prosecution in Sudan.

¹ ICC-02/05-01/20-455

² ICC-02/05-01/20-456-Conf

³ ICC-02/05-01/20-433

⁴ ICC-02/05-01/20-448

⁵ ICC-02/05-01/20-397-Conf

⁶ ICC-02/05-01/20-455 paras 6-7; ICC-02/05-01/20-456-Conf para. 13.

⁷ ICC-02/05-01/20-455 paras 6; ICC-02/05-01/20-456-Conf para. 7.

- 5. However, of relevance to the instant Motion, the Defence could not reasonably have anticipated that the Prosecution and Victims would seek to characterise the Defence's unawareness of this unambiguous confirmation of such criminal sanction in Sudan as irrelevant to the admissibility of the Request. The Defence wishes to make substantive submissions in a consolidated reply to fully explain:
 - (i) the relevance of the information contained in the Addendum being new and previously unavailable *to the Defence*, as distinct from being new and previously unavailable to the Pre-Trial Chamber;
 - (ii) how the Defence's consequent inability to deploy the information in the Addendum during the course of pre-confirmation litigation, and particularly during the pre-confirmation hearing, precluded it from making the fullest and most relevant submissions relating to (a) the reasonableness of Mr Abd-Al-Rahman's apparent use of the Ali Kushayb nickname in videos allegedly provided to the Prosecution prior to his surrender and (b) the admissibility of evidence challenged in the Defence Second Request on Exclusion of Evidence⁸. The Defence seeks to advance substantive arguments that, notwithstanding the fact the information in the Addendum may have been "within the Chamber's contemplation at the time of issuing the Confirmation Decision",9 there is nothing in the Confirmation Decision to indicate that the Pre-Trial Chamber made the requisite connection between that information and Mr Abd-Al-Rahman's apparent choice of words in the videos and/or the admissibility of evidence;
 - (iii) how, contrary to the Prosecution and Victims' submissions, ¹⁰ this inability to advance the fullest and most relevant submissions is entirely relevant to the matter of the admissibility of the Request.

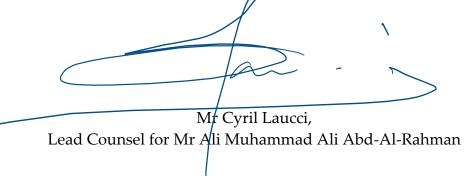
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⁸ ICC-02/05-01/20-349-Red.

⁹ <u>ICC-02/05-01/20-455</u> para. 6.

¹⁰ ICC-02/05-01/20-455 paras 10, 15-16; ICC-02/05-01/20-456-Conf paras 14-18.

- of the Prosecutor and of the Legal Representative of Victims for the reason that the Request for reconsideration of Decision #433 does no more than draw the consequences of the requested reconsideration of Decision #402¹¹, to which they did not oppose and are now time-barred to oppose. The Office of the Prosecutor and the Legal Representative of Victims fail to justify how admitting the reconsideration of Decision #402 could be reconciled with the denial of the consequent reconsideration of Decision #433.
- 7. For the foregoing reasons, the Defence respectfully asks the Pre-Trial Chamber to grant leave to file the requested reply.



Dated this 25th day of August 2021

At The Hague, The Netherlands

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¹¹ ICC-02/05-01/20-438.