



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**

Mr Karim A. A. Khan QC  
Mr Julian Nicholls

**Counsel for Mr Ali Muhammad Ali**

**Abd-Al-Rahman**

Mr Cyril Laucci, Lead Counsel  
Mr Iain Edwards, Associate Counsel

**Legal Representatives of Victims**

Ms Amal Clooney  
Mr Nasser Mohamed Amin Abdalla

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda  
Ms Sarah Pellet

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

Mr Xavier-Jean Keïta  
Ms Marie O'Leary

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

Mr Pieter Vanaverbeke

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

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”)<sup>1</sup> and the Legal Representative of the Victims (“Victims’ Response”)<sup>2</sup> 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”).<sup>3</sup> The Defence filed its *“Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433”* on 7 August 2021 (“Request”).<sup>4</sup>
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”)<sup>5</sup> 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.<sup>6</sup>
4. The Prosecution and Victims recognise that the information in the Addendum was not available to the Defence until after the Confirmation Decision.<sup>7</sup> 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.

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<sup>1</sup> [ICC-02/05-01/20-455](#)

<sup>2</sup> ICC-02/05-01/20-456-Conf

<sup>3</sup> [ICC-02/05-01/20-433](#)

<sup>4</sup> [ICC-02/05-01/20-448](#)

<sup>5</sup> ICC-02/05-01/20-397-Conf

<sup>6</sup> [ICC-02/05-01/20-455](#) paras 6-7; ICC-02/05-01/20-456-Conf para. 13.

<sup>7</sup> [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 Evidence<sup>8</sup>. 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",<sup>9</sup> 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,<sup>10</sup> 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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<sup>8</sup> ICC-02/05-01/20-349-Red.

<sup>9</sup> [ICC-02/05-01/20-455](#) para. 6.

<sup>10</sup> [ICC-02/05-01/20-455](#) paras 10, 15-16; ICC-02/05-01/20-456-Conf paras 14-18.

6. The Defence could not reasonably have anticipated the opposition of the Office 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 #402<sup>11</sup>, 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.



Mr Cyril Laucci,  
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 25<sup>th</sup> day of August 2021

At The Hague, The Netherlands

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<sup>11</sup> ICC-02/05-01/20-438.