



Original: English

No. ICC-02/05-01/20

Date: 14 March 2022

PRE-TRIAL CHAMBER II

Before:

**Judge Rosario Salvatore Aitala, Presiding
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

Decision on the 'Prosecution's application to amend the charges'

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

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**Unrepresented Applicants for
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The Office of Public Counsel for Victims

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the ‘Prosecution’s application to amend the charges’ (the ‘Application’).¹

1. On 9 July 2021, the Chamber confirmed charges against Mr Abd-Al-Rahman and committed him for trial.² Following the transmission of the record of the proceedings by the Registry,³ the Presidency constituted Trial Chamber I and referred the case to it.⁴ On 8 September 2021, Trial Chamber I set the date for the commencement of the trial for 5 April 2022.⁵

2. On 15 November 2021, the Chamber *inter alia* dismissed *in limine* the Prosecution’s request for reconsideration of the Confirmation Decision and rejected the Prosecution’s request for leave to appeal the Confirmation Decision.⁶

3. On 25 January 2022, the Prosecution requested the Chamber, pursuant to article 61(9) of the Rome Statute (the ‘Statute’), to amend the charges of murder as a crime against humanity and as a war crime, as confirmed under Counts 2-3, 17-18 and 27-28.

4. On 4 February 2022, the Defence⁷ responded to the Application and the Common Legal Representatives of Victims (the ‘CLRv’) provided observations on the

¹ Prosecution’s application to amend the charges, 25 January 2022, ICC-02/05-01/20-563-Conf with confidential annexes 1-4 (public redacted versions notified on 4 February 2022; ICC-02/05-01/20-563-Red2, ICC-02/05-01/20-563-Anx1-Red, ICC-02/05-01/20-563-Anx2-Red2, ICC-02/05-01/20-563-Anx3-Red, ICC-02/05-01/20-563-Anx4-Red2).

² Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, ICC-02/05-01/20-433-Corr (the ‘Confirmation Decision’) with confidential annex 1 (ICC-02/05-01/20-433-Conf-Anx1-Corr).

³ Transmission to the Presidency of the record of the proceedings including the Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al Rahman (‘Ali Kushayb’), 16 July 2021, ICC-02/05-01/20-439.

⁴ Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), 21 July 2021, ICC-02/05-01/20-440.

⁵ Status Conference, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 77, l. 9-12.

⁶ Prosecution’s request for reconsideration or leave to appeal the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (ICC-02/05-01/20-433) and for correction/clarification of discrete findings, 6 September 2021, ICC-02/05-01/20-466-Conf (public redacted version notified on the same day; ICC-02/05-01/20-466-Red); Decision on requests for reconsideration, leave to appeal the confirmation decision and related matters (ICC-02/05-01/20-438-Conf, ICC-02/05-01/20-448, ICC-02/05-01/20-457, ICC-02/05-01/20-465, ICC-02/05-01/20-466-Conf), ICC-02/05-01/20-517 (the ‘15 November 2021 Decision’).

⁷ *Réponse de la Défense à la Requête ICC-02/05-01/20-563-Conf-Red*, ICC-02/05-01/20-583-Conf (public redacted version notified on 7 February 2022, ICC-02/05-01/20-583-Red).

Application.⁸ Following receipt of the Application’s translation into Arabic,⁹ and pursuant to the Single Judge’s instruction,¹⁰ the Defence filed additional submissions on 25 February 2022¹¹ in which it (i) further responded to the Application; (ii) responded to the CLRV Observations; and (iii) requested that the Chamber, prior to addressing the merits of the Application, adjudicate two requests for reconsideration filed by the Defence on 16 July 2021¹² and 7 August 2021.¹³ On 8 March 2022, the Defence filed an addendum in connection with its request to adjudicate two requests for reconsideration.¹⁴

Defence’s request to adjudicate two requests for reconsideration

5. The Chamber had dismissed the aforementioned requests for reconsideration *in limine* in its 15 November 2021 Decision by stating that:

The charges in the case having been confirmed, and the record of the case transmitted first to the Presidency and thereafter to Trial Chamber I for the trial, as provided for by article 61(11) of the Statute, this Chamber no longer retains general competence in the case, with the exception of the adjudication of requests for leave to appeal as per the disposition of the Confirmation Decision and without prejudice to the procedures envisaged in article 61(8) and (9) of the Statute. Accordingly, outside these limited exceptions, the Chamber is not competent to issue further decisions in the case, including decisions on requests for reconsideration. [...]¹⁵

6. The Defence relies on this statement by the Chamber. However, in doing so, it misconstrues the Chamber’s determination as meaning that the mere submission by the Prosecution of an application pursuant to article 61(9) of the Statute reinstates the Chamber’s competence to rule on the above-mentioned requests for reconsideration.

⁸ Observations on “Confidential Redacted Version of ‘Prosecution’ application to amend the charges”, ICC-02/05-01/20-584 (the ‘CLRV Observations’).

⁹ Prosecution’s submission of the Arabic translation of “Prosecution’s application to amend the charges”, 25 January 2022, ICC-02/05-01/20-563-Conf, 16 February 2022, ICC-02/05-01/20-598 with confidential annexes A and A1-A4.

¹⁰ Email sent on 14 February 2022 at 15:47.

¹¹ *Rectificatif à la Réponse Consolidée de la Défense à la Requête aux fins d’Amendement des Charges et aux Observations des Représentants Légaux des Victimes*, ICC-02/05-01/20-607-Conf-Corr (public redacted version notified on 3 March 2022; ICC-02/05-01/20-607-Corr-Red).

¹² *Requête aux fins de reconsidération partielle de la Décision ICC-02/05-01/20-402*, ICC-02/05-01/20-438-Conf (public redacted version notified on the same day, ICC-02/05-01/20-438-Red).

¹³ *Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433*, ICC-02/05-01/20-448.

¹⁴ *Addendum à la Réponse Consolidée de la Défense à la Requête aux fins d’Amendement des Charges et aux Observations des Représentants Légaux des Victimes*, ICC-02/05-01/20-622-Conf (public redacted version notified on 9 March 2022; ICC-02/05-01/20-622-Red) with confidential Annexes A-C.

¹⁵ 15 November 2021 Decision, para. 11.

7. This is incorrect. As already clearly indicated in the 15 November 2021 Decision, following the issuance of the Confirmation Decision and the transmission of the case record to the Presidency and the Trial Chamber, the Chamber only retains a limited competence. Now that the Prosecution has initiated a procedure under article 61(9) of the Statute, the Chamber may only address the application submitted under that provision and any related procedural matters; it does not retain a general competence. The request to adjudicate the two above-mentioned Defence requests for reconsideration is therefore rejected.

Prosecution's Application to amend the charges

8. The Prosecution requests the Chamber to amend the particulars of: (i) 'Counts 2 and 3 (murder as a crime against humanity and a war crime), relating to the Kodoom/Bindisi incident, from 51 persons/civilians to at least 63 persons/civilians'; (ii) 'Counts 17 and 18 (murder as a crime against humanity and a war crime), relating to the Mukjar incident, from 49 persons to at least 122 persons'; and (iii) 'Counts 27 and 28 (murder as a crime against humanity and a war crime), relating to the Deleig incident, from 34 persons to at least 137 persons'. The Prosecution also 'requests that the Chamber amend Annex 1 to the Confirmation Decision to include the identities of these additional victims'.

9. The Prosecution submits that, following the filing of the Document Containing the Charges (the 'DCC') on 29 March 2021, it continued investigating 'in order to gather evidence to establish the truth in this case'. The Application contains an outline of the evidence that, in the Prosecution's submission, establishes 'substantial grounds to believe that the additional victims sought to be specified in the charges were killed'. The Prosecution also explains the reasons for its inability to collect and disclose the relevant evidence, 'with the exception of evidence relating to two victims', before the filing of the DCC.

10. In the Prosecution's view, amending the charges as requested would: (i) enable 'the effective prosecution of Mr Abd-Al-Rahman without adversely impacting the fairness and expeditiousness of the proceedings and the rights of the accused'; and (ii) 'reflect the true scope of the victimisation in this case', thus allowing 'the Trial Chamber to effectively exercise its truth-seeking function' and preserving the rights of victims to reparations and participation in the proceedings.

11. The CLRV support the Application. They submit that it ‘satisfies the relevant balancing test for amendment of the confirmed charges’ and that it is ‘justified by the investigative difficulties faced by and the diligent conduct of the Office of the Prosecutor’.

12. The Defence opposes the Application and requests the Chamber to dismiss it *in limine*. According to the Defence, the Application: (i) merely reiterates arguments and requests already brought before and rejected by the Chamber; (ii) unnecessary and unjustified; and (iii) inexcusably late. In the alternative, the Defence requests that the Application be considered as a request to substitute more serious charges, which would require the Chamber to hold a new confirmation hearing pursuant to article 61(9) of the Statute.

13. The Application shows that the Prosecution understands the Confirmation Decision as the Chamber having confirmed a limitative list of victims in relation to the charges of murder under Counts 2-3, 17-18 and 27-28. According to the Prosecution, adding victims to the existing murder charges would therefore appropriately be regarded as an amendment.

14. Both in the Confirmation Decision and in Annex 1 thereto, the Chamber has indicated precise numbers of victims for the confirmed charges of murder and rape. As to the murder charges in particular, the Chamber has mentioned 51 victims relating to the Kodoom/Bindisi incident (Counts 2-3), 49 victims relating to the Mukjar incident (Counts 17-18) and 34 victims relating to the Deleig incident (Counts 27-28).

15. Be that as it may, as recalled in section III.A. of the Confirmation Decision, the confirmation process serves to determine, pursuant to article 61(7) of the Statute, ‘whether there is sufficient evidence to establish substantial grounds to believe that Mr Abd-Al-Rahman committed the crimes with which he is charged’.¹⁶ The Pre-Trial Chamber thus enters its findings based on the charges as brought by the Prosecution which, in the present case, provided non-exhaustive lists of persons killed or raped in

¹⁶ Confirmation Decision, para. 33.

the charged locations as annexes to the DCC.¹⁷ The Chamber assessed the evidence in support that was available at the time of confirmation. It confirmed each instance of murder and rape satisfying the applicable standard, which ‘is met as soon as the Prosecutor offers concrete and tangible proof demonstrating a clear line of reasoning underpinning the specific allegations’.¹⁸

16. As indicated at the relevant time, the Chamber’s approach follows from the ‘limited and specific scope and purpose’ of pre-trial proceedings, namely to protect ‘the suspect from wrongful and unfounded accusations, by ensuring that only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought are committed for trial’.¹⁹ While ‘[t]he confirmation of charges procedure *also* ensures that the parameters of the case are set for trial and that the charges are clear and not deficient in form’,²⁰ the primary function and objective of the Pre-Trial Chamber, and of the confirmation of charges decision, is the filtering out of unmeritorious cases by ensuring that only those that are properly substantiated by evidence proceed to trial.

17. Indeed, a ‘confirmation hearing is not, nor should be seen or become, a “mini-trial” or “a trial before the trial”’.²¹ The Confirmation Decision therefore does not provide a conclusive determination on the charged crimes and the suspect’s responsibility. Rather, it ‘only addresses what the Chamber considers necessary and sufficient for its determination on the charges’:²² the Chamber only refers in the Confirmation Decision ‘to those elements [...] which it considers necessary to show the line of reasoning underpinning its conclusions’,²³ such as specific figures relating to the victims of confirmed charges. As noted by the Appeals Chamber, in relation to the confirmation stage in the *Ntaganda* case, a Pre-Trial Chamber may consider ‘evidence of *some aspects* of the crimes charged’, and based on that evidence, it may

¹⁷ ICC-02/05-01/20-325-Anx1A-Corr, ICC-02/05-01/20-325-Conf-Anx1B, ICC-02/05-01/20-325-Anx1C, ICC-02/05-01/20-325-Anx1D *annexed to* Prosecution’s submission of the Document Containing the Charges, 29 March 2021, ICC-02/05-01/20-325.

¹⁸ Confirmation Decision, para. 37.

¹⁹ Confirmation Decision, paras 34, 39.

²⁰ Confirmation Decision, para. 35 (emphasis added).

²¹ Confirmation Decision, para. 40.

²² Confirmation Decision, para. 39.

²³ Confirmation Decision, para. 39.

confirm ‘the crimes charged *in their entirety*’.²⁴ The crimes of murder and rape can be committed against one or more persons. If there is sufficient evidence to establish substantial grounds that some persons were murdered or raped, as alleged, and the relevant elements of the crimes are fulfilled, the charged crime may be confirmed – irrespective of the number of persons killed or raped.

18. The indication of specific figures as to the victims of murder and rape in the Confirmation Decision is therefore dictated by the limited and specific scope and purpose of the pre-trial proceedings and of the confirmation of charges decision, in which the Chamber addresses only what is necessary and sufficient to decide whether or not to confirm the charges based on the evidence available at that specific point in time. Accordingly, such indication ought not to be understood as limitative or restrictive, i.e. it is not a finding that there can be no further victims beyond those specifically mentioned.²⁵ Rather, as revealed by relevant portions of the Confirmation Decision, the Chamber recognised that the extent of the victimisation in connection with the confirmed charges of murder and rape was broader than the individual instances it specifically mentioned.

19. Before indicating that, ‘[a]s a result of the attack on Kodoom and Bindisi, 51 persons [...] were killed’,²⁶ the Chamber, for example, found that in Kodoom ‘the attackers [...] chased and shot at the inhabitants from all directions, *killing several of them*’ and that they ‘assaulted the population by insulting, chasing and opening fire against the civilians, either *wounding or killing several* and causing the rest of them to flee’.²⁷ Similarly, with regard to the Mukjar incident, the Chamber indicated that ‘49 people were killed’, after having found that, following the charged events, ‘people from Mukjar found in the town’s outskirts *a number of* mass graves where dead bodies were

²⁴ Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, ICC-01/04-02/06-2666-Conf (public redacted version notified on the same day, ICC-01/04-02/06-2666-Red) (the ‘*Ntaganda Appeals Judgment*’), para. 336 (emphasis added).

²⁵ See also *Ntaganda Appeals Judgment*, para. 335, in which the Appeals Chamber ‘agree[d] with the following observation by the Trial Chamber: “As a general principle, [...] where the Pre-Trial Chamber was silent on a particular allegation in the DCC, it cannot be presumed to have been rejected, and such silence need not automatically result in its removal from the Updated DCC”’.

²⁶ Confirmation Decision, para. 92.

²⁷ Confirmation Decision, para. 88 (emphasis added).

lying on the ground, the vast majority presenting traces of gunshots: *some of them* were identified as those of the prisoners being held at and brought away from the Mukjar police station'.²⁸ In connection with the Deleig incident, the Chamber referred to 34 people being killed as a result of the charged events only once it had found that (i) '[b]etween 100 and 200 arrested men [...] were brought to several locations outside of Deleig', where they were 'shot at by the Militia/*Janjaweed* and GoS Forces, who thus *killed all or most of them*';²⁹ and, (ii) among those found in execution sites outside Deleig, '*some bodies* could be identified as those of prisoners who had been held before the Deleig police station'.³⁰

20. The Chamber's findings as to the specific number of alleged victims therefore must not be considered as definitive figures, as they reflect the Chamber's assessment of the available evidence at the time of confirmation by setting out the parameters of Mr Abd-Al-Rahman's involvement in the charged events. The Chamber recalls the accused's alleged position as a senior Militia/*Janjaweed* leader and his role in the alleged crimes, as charged by the Prosecution and confirmed by the Chamber. In such a circumstance, the essential component of the charges relates to the accused's alleged conduct, not to the number of victims. As the Prosecution itself noted, the Application 'merely identifies further victims of the same crimes' as already confirmed by the Chamber, and '[t]he requested amendment would not expand the temporal or geographical scope of the confirmed charges, nor alter the material facts except in relation to the number of persons killed'.³¹ Indeed, as it explained, it 'does not change the Prosecution's theory of the case nor would it require any material shift in the Defence's strategy'.³²

21. The Chamber notes that the manner in which it has confirmed the charges is consistent with the Appeals Chamber's jurisprudence on the specificity of the charges. The Appeals Chamber held that, '[f]or the purposes of article 74(2) of the Statute, the charges must be described in such a way that the trial chamber as well as the parties and participants are able "to determine with certainty which sets of historical events, in

²⁸ Confirmation Decision, para. 103 (emphasis added).

²⁹ Confirmation Decision, paras 109-110 (emphasis added).

³⁰ Confirmation Decision, para. 112 (emphasis added).

³¹ Application, para. 14.

³² Application, para. 17.

the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not”’. Indeed, ‘[i]t is not necessarily the case that such determination is possible only where the charging documents list all criminal acts underlying each charge exhaustively’. As noted by the Appeals Chamber, ‘[d]epending on the circumstances of the case, the charges may be described in a less specific manner, for instance, by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims’. Importantly, while the document containing the charges ‘may also list or make reference to specific criminal acts, the scope of the case is not necessarily limited to them – “other criminal acts not mentioned in the document containing the charges may still fall within the – broadly described – facts and circumstances of the charges”’.³³

22. In the Confirmation Decision, the Chamber found that, at the time of confirmation, it was presented with sufficient evidence to establish substantial grounds to believe that the suspect had committed the alleged crimes against humanity and war crimes of murder and rape. The commission of these alleged crimes was materially described, and also in terms of the temporal and geographical scope of the alleged conduct, with reference to the accused’s alleged role. The number of persons who were mentioned as having been murdered or raped in the charges as confirmed was based on the information placed before the Chamber at the time of confirmation. However, this number, while providing some indication of the scope of the charged crime, does not change the crime as charged if it is varied. As such, it does not constitute an upper limit of the number of victims of the conduct described in the charge.

23. The mention of exact numbers of victims in a confirmation of charges decision, and the listing of a specific number of persons in an annex thereto, must therefore not be understood as preventing the trial chamber hearing the case from finding that a larger number of persons fell victim to the relevant crime. So long as other persons, who are at a later stage found to have been murdered or raped, fall within the temporal and geographical parameters, as well as within the charged role of the accused, a trial

³³ *Ntaganda Appeals Judgment*, para. 326.

chamber assessing the relevant evidence may include those persons in the crime as charged.

24. To avoid any doubt at a later stage of the trial, the Chamber considers it appropriate to emphasise that in addition to the numbers mentioned in the Confirmation Decision not indicating an absolute maximum of victims, these numbers must similarly not be understood as minimum amounts. A trial chamber may still find the crime as charged to have been committed if the evidence, as presented at trial, establishes that a lower number of persons had been murdered or raped.

25. Naturally, any change in numbers of alleged victims and presentation of evidence thereof must not come as a surprise. The Prosecution and the chambers confirming a case and hearing a trial have a shared duty to ensure that the accused has received proper notice of the content and scope of the charges against him or her by the time the trial commences. The Pre-Trial Chamber can provide such notice in the confirmation decision. It would be unworkable for the Prosecution to come back to the Pre-Trial Chamber every time it has identified one or more further victims of a specific incident that has already been confirmed. However, the Defence needs to be put on notice: subsequent to the confirmation decision, and prior to the commencement of trial, the burden shifts to the Prosecution to provide more detailed notice if information has become available that allows further specification. This may be done by way of auxiliary documents, such as a trial brief.³⁴

26. In light of the above, the Chamber concludes that the charges as confirmed allow for the exercise by Trial Chamber I of its powers and functions relevant to the assessment of the evidence relating to the further alleged victims of murder indicated in the Application, which, as anticipated by the Prosecution, ‘will in any event be presented at trial’.³⁵ Accordingly, the procedure envisaged in article 61(9) of the Statute does not constitute an appropriate avenue to request a modification of the charges such as that sought by the Prosecution in the present case.

³⁴ See *Ntaganda Appeals Judgment*, para. 325.

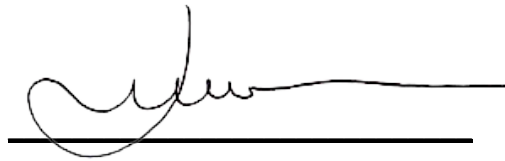
³⁵ Application, paras 12, 15 and footnote 17. See also Defence, *Réponse de la Défense à la Requête ICC-02/05-01/20-563-Conf-Red*, ICC-02/05-01/20-583-Conf (public redacted version notified on 7 February 2022, ICC-02/05-01/20-583-Red), para. 41.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence's request to adjudicate two requests for reconsideration; and

REJECTS the Prosecution's Application.

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



**Judge Rosario Salvatore Aitala,
Presiding**



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Monday, 14 March 2022

At The Hague, The Netherlands