

**Cour
Pénale
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**International
Criminal
Court**

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Date: **4 March 2022**

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.* MR ALI MUHAMMAD ALI ABD-AL-RAHMAN
("ALI KUSHAYB")**

Public Document

Pre-Trial Brief

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:

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Other

1. In accordance with the directions of the Honourable Trial Chamber I (“Chamber”) of 8 September¹ and 4 October 2021 (“Directions”),² the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”, “Defence”) submits this pre-trial brief (“Brief”).

2. This Brief in no way constitutes a response to the brief submitted by the Office of the Prosecutor (“OTP”) on 5 January 2022 (“Prosecution Brief”).³ It is classified as public for its lack of reference to any confidential information that might warrant a different classification. This Brief is confined to a discussion of the specific points raised in the Directions. The Defence will, if it sees fit or if so requested by the Chamber, submit a full trial brief, including a detailed statement of its arguments and evidence, after the conclusion of the Prosecution’s presentation of evidence and within such time as the Chamber may specify.

3. The information brought to the Chamber’s notice in this Brief is necessarily succinct. It has not been possible, to date, for the Defence to conduct investigations in Sudan. The reasons for that impossibility include but are not limited to: (i) the Defence’s real and well-founded fear that cooperation with the Court was capable of amounting, at least until 11 October 2021,⁴ to a criminal offence which carries the death penalty under Sudanese law, and that members of the Defence team as well as potential Defence witnesses and any providers of information could have been prosecuted in Sudan for that offence; (ii) the security situation in Darfur, which has at all times remained a conflict area to which all governments and the Court itself have

¹ [ICC-02/05-01/20-T-013-FRA](#), p. 74, lines 14-15.

² [ICC-02/05-01/20-478](#), para. 10.

³ ICC-02/05-01/20-550-Conf-Red-Corr.

⁴ The date of 11 October 2021 is that of the most recent communication from the Sudanese authorities on this subject (ICC-02/05-01/20-496-Conf-AnxI, para. 7), wherein they expressly confirm that the passing of the Miscellaneous Amendments Act of July 2020 (ICC-02/05-01/20-397-AnxI-Conf-Exp-tENG; ICC-02/05-01/20-397-AnxII-Conf-Exp) could not have repealed the criminalization of cooperation with the Court under Sudanese law: “the Criminal Procedure Act is a procedural law and is not concerned with criminalizing acts committed in violation of the provisions stipulated therein. The Criminal Act of 1991 would be more appropriate since it is criminal law that criminalizes conduct and determines the penalty applicable to violation of its provisions” (ICC-02/05-01/20-496-AnxV-tENG). The Defence would point out that the Miscellaneous Amendments Act of July 2020 is the instrument whereby the Sudanese authorities had previously claimed to have repealed the criminalization of cooperation with the Court under their national law (ICC-02/05-01/20-397-Conf-Exp, para. 9).

advised against travelling; and (iii) the security situation throughout Sudan, Khartoum included, since the military coup of 25 October 2021, which effectively brought the Juba Peace Agreement of 3 October 2020 and missions by the Court to an end. Together these factors have considerably hampered the Defence's preparation for trial.

I – Principal matters of fact and law on which the Defence intends to dispute the Prosecution case

4. Mr Abd-Al-Rahman denies the entirety of the charges laid against him in the Document Containing the Charges (“DCC”)⁵ and set out in the Prosecution Brief. The onus will be on the Prosecution to provide full and detailed proof beyond reasonable doubt of all their elements, save those, such as the existence of a non-international armed conflict, which have been expressly accepted by agreement reached with the Defence.

5. Specifically, Mr Abd-Al-Rahman denies that a person referred to by the alias “Ali Kushayb” exists or may have existed at the material time. Contrary to what the Honourable Pre-Trial Chamber II incorrectly states in its decision on the confirmation of the charges⁶ and what the Prosecution Brief suggests,⁷ the Defence never suggested or sought to show that “Ali Kushayb” denoted a third party or, for that matter, a homonym of Mr Abd-Al-Rahman. The onus will therefore be on the OTP to prove (i) that the individual nicknamed “Ali Kushayb” exists or did exist; and (ii) the connection between that person and Mr Abd-Al-Rahman.

6. Mr Abd-Al-Rahman denies that he ever held the position of *Agid Al Ogada* or any other position of authority in the group referred to by the term militias or Janjaweed in the Mukjar or Wadi Salih Localities. The highest rank he ever held in the army or police was that of *adjutant* [warrant officer].

7. Mr Abd-Al-Rahman denies that he ever played any role at all in recruiting, training, arming, supplying and/or financing the militias or Janjaweed or conducted military operations alongside them in the Mukjar or Wadi Salih Localities.

⁵ [ICC-02/05-01/20-325-Anx1-Corr2-Red.](#)

⁶ [ICC-02/05-01/20-433-Corr](#), para. 55.

⁷ ICC-02/05-01/20-550-Conf-Red-Corr, paras. 6, 25.

8. Mr Abd-Al-Rahman denies that he ever interacted with senior representatives of the Government of Sudan or Sudanese armed forces, at the local level or otherwise.

9. Mr Abd-Al-Rahman denies that he ever issued orders to members of the Sudanese armed forces or was ever, for that matter, in a position to do so.

10. Mr Abd-Al-Rahman is not in a position to accept that the Government of Sudan co-opted, recruited, trained, armed, supplied or financed armed groups referred to by the term militias or Janjaweds so that they could help the Sudanese armed forces in their military operations against the rebel movements, *viz.* the Sudan Liberation Movement/Army (SLM/A) and/or the Justice and Equality Movement (JEM). Mr Abd-Al-Rahman's specific position is that he has no particular information regarding this matter.

11. Nor is Mr Abd-Al-Rahman in a position to accept that the civilian population of the Mukjar and Wadi Salih Localities was specifically targeted as such by the forces of the Government of Sudan and/or armed groups referred to by the term militias or Janjaweds, or that it was a policy of the Government of Sudan to attack them. Mr Abd-Al-Rahman's specific position is that he is aware of the unfortunate fact that the civilian population has suffered greatly from the armed conflict in Darfur and other regions of Sudan – a fact which he finds deeply regrettable, and he prays daily for their salvation⁸ – but that he does not have any particular information that might assist the Court on this matter.

12. Mr Abd-Al-Rahman's position continues to be that he has nothing to do with the events recounted in the charges, never was nicknamed "Ali Kushayb", never took part in the counter-insurgency and is an ordinary Sudanese citizen of the Ta'aisha tribe who ran a pharmacy in Garsila in 2003 before attending a training centre for police reservists in 2004. The Defence submits, moreover, that, even taken at its most favourable to the Prosecution case, the evidence the Prosecutor presents in his pre-trial

⁸ [ICC-02/05-01/20-T-001-FRA](#), p. 21, lines 15-20; [ICC-02/05-01/20-175 OA2](#); ICC-02/05-01/20-363-Conf-Exp and public redacted version [ICC-02/05-01/20-363-Red](#), para. 21; [ICC-02/05-01/20-T-010-FRA](#), p. 3, lines 13-19.

brief in support of the charges against Mr Abd-Al-Rahman is not capable of sustaining a finding that Mr Abd-Al-Rahman is guilty of the offences charged.

II – Mr Abd-Al-Rahman’s reasons for disputing the Prosecution case

13. Mr Abd-Al-Rahman rejects the Prosecution case because it does not correspond to the truth. Mr Abd-Al-Rahman maintains his innocence of the crimes described in the charges irrespective of the mode of responsibility according to which he is alleged to have contributed to them.

14. Mr Abd-Al-Rahman sought reconsideration⁹ of and then leave to appeal¹⁰ the decision on the confirmation of the charges (“Decision #433”).¹¹ Both applications were denied.

15. The request for reconsideration of Decision #433¹² was dismissed at the outset on the ground that, because of the confirmation of the charges, the matter was no longer before the Honourable Pre-Trial Chamber II and it lacked competence to adjudicate the request,¹³ whereas the only Chamber competent to reconsider a decision is the one that issued it. At the time of filing of this Brief, the matter is again pending before the Honourable Pre-Trial Chamber II¹⁴ insofar as the condition it set for competence to revert in it was met by the filing of the OTP’s application to amend the charges.¹⁵ Whether Pre-Trial Chamber II will deign this time to exercise its competence or will repeat its previous denial of justice remains to be seen.

16. The application for leave to appeal against Decision #433 was also rejected on the decisive ground that, in Pre-Trial Chamber II’s view,

[i]ssues relating to the core question of confirmation of charges, which hinges on the fact-finding to the evidentiary standard applicable and on the legal qualification of the facts thus found, may by their very nature never be able to affect the fair and expeditious conduct of proceedings or the outcome of the trial, for the fundamental reason that the core reasoning of the decision on the confirmation of charges is not interlocutory to the trial [...]

and that

⁹ [ICC-02/05-01/20-448](#).

¹⁰ [ICC-02/05-01/20-465](#).

¹¹ [ICC-02/05-01/20-433-Corr](#).

¹² [ICC-02/05-01/20-448](#).

¹³ [ICC-02/05-01/20-517](#), para. 11.

¹⁴ [ICC-02/05-01/20-607-Conf-Corr](#), paras. 6-19.

¹⁵ [ICC-02/05-01/20-563-Conf-Red](#) and public redacted version [ICC-02/05-01/20-563-Red](#).

[...] decisions on the confirmation of charges are not appealable under article 82(1)(d) of the Statute.¹⁶

Quite apart from the fundamental incorrectness of Pre-Trial Chamber II's view, unsupported by any of the Court's instruments, that its decisions on the confirmation of charges are not open to challenge – whereas a decision as important as that confirming the charges satisfies by definition the criteria of article 82(1)(d) of the Statute – the refusal to put the decision on the confirmation of charges before the Honourable Appeals Bench for its consideration is highly prejudicial. Contrary to what Pre-Trial Chamber II asserts without competence to do so,¹⁷ whenever leave to appeal a decision confirming charges is refused, a decision pursuant to article 74 of the Statute may be challenged on appeal on grounds, *inter alia*, that the confirmation of the charges was flawed. This argument is among those the Defence will set out, if necessary, in the case *sub judice*, in the event that it lodges an appeal against the decision subsequently handed down pursuant to article 74 of the Statute. Were the Honourable Appeals Chamber to allow the Defence's grounds of appeal on this point, its judgment would later bring to naught the months, if not years, since spent on the trial, resulting in an inexcusable waste of the Court's resources that is the very antithesis of any notion of judicial efficiency or respect for Mr Abd-Al-Rahman's rights.

17. It appears from the rejection of the requests for reconsideration and leave to appeal against Decision #433 that the trial must now open with issues that have not been finally adjudicated and are central to Mr Abd-Al-Rahman's denial of the charges.

III – Nature of Mr Abd-Al-Rahman's defence

18. The nature of Mr Abd-Al-Rahman's defence is that he is not the person referred to by the alias "Ali Kushayb", if indeed such a person ever existed. As summarized at paragraph 2 of the Prosecution Brief, Mr Abd-Al-Rahman is an ordinary citizen of the Ta'aisha tribe, born in 1949; in 1990 he retired from the army, where he held the rank of warrant officer in the medical corps; he sold medicine out of a shop at the

¹⁶ [ICC-02/05-01/20-517](#), paras. 46, 50.

¹⁷ [ICC-02/05-01/20-517](#), para. 49.

Garsila market and in July 2005 was re-enlisted into the central police reserve (“CRF”) as a “*débutant* [junior recruit]”.¹⁸

19. The Prosecution Brief in no way clarifies or explains the vast discrepancy between the position of authority held under the alias “Ali Kushayb” from August 2003 to April 2004 and Mr Abd-Al-Rahman’s humble station in life before and after that time. It in no way clarifies or explains the transformation from ordinary medicine seller to all-powerful warlord, or the relegation, one year on, of that all-powerful warlord to mere junior recruit in the Central Police Reserve. It in no way clarifies or explains how a member of the Ta’aisha tribe can transgress as seriously as the charges and the Prosecution Brief suggest against his tribe’s known stance of not taking part in the counter-insurgency against the Fur without finding himself cast out for good, and still, on the contrary, retain the esteem of the tribe. Not one paragraph is devoted to clarifying these substantial contradictions, which the Defence nonetheless underscored at length at the confirmation hearing (“CH”).¹⁹ These gaping holes in the narrative cast doubt on the entirety of the evidence which sets out to establish a connection, at the material time, between Mr Abd-Al-Rahman and the acts of warlords ascribed to him. The Defence will argue that Mr Abd-Al-Rahman cannot be both the ordinary individual described at paragraph 2 of the Prosecution Brief and the all-powerful warlord portrayed in the charges and the rest of the Prosecution Brief.

20. Since the Sudanese authorities have not responded to the Defence’s requests for cooperation, and since it has thus far been impossible to undertake missions to Sudan to conduct its investigations there, the Defence is not in a position to meet its obligation under rule 79 of the RPE to give notice of a particular defence. It will give any such notice once in possession of all the information required by rule 79 for that purpose.

¹⁸ Although the Prosecution Brief makes no mention of it, the document on which Mr Abd-Al-Rahman’s enlistment in the CRF in July 2005 rests is the document presented by the Defence at the CH and to which the Prosecution has not objected, DAR-D31-0002-0007 at 0009, line 189, stating that he entered as a “*débutant* [junior recruit]”.

¹⁹ [ICC-02/05-01/20-T-008-Red-tFRA](#), p. 48, line 22 to p. 82, line 27.

IV – Matters of fact on which Mr Abd-Al-Rahman intends to rely for the purposes of his defence

21. The Defence will rely on all the factual particulars proved by the documents and information thus far disclosed by the Prosecution that conflict with the allegations contained in the charges and the Prosecution Brief. The Defence will also rely on all the factual particulars proved by the documents and information which the Defence will be in a position to gather once it has been able to travel to Sudan to investigate, and once the Sudanese authorities have responded to its cooperation requests.

V – Points of law on which Mr Abd-Al-Rahman intends to rely for the purposes of his defence

22. The Defence refers to its previous submissions challenging the admissibility of the evidence on which the OTP rests the Prosecution Brief for unreliability owing to the combined effect of (i) non-compliance with the rules for the protection of confidential information and documents at the Court; (ii) the duress that witnesses and other sources of information and evidence came under as a result of the lack of legal basis for the collection of information and documents on the territory of non-Party States that have not entered into agreements with the Court under article 4(2) of the Statute, which was the case of Sudan until at least 10 May 2021; (iii) the duress that witnesses and other sources of information and evidence came under as a result of the criminalization of cooperation with the Court under Sudanese law until at least 11 October 2021;²⁰ and (iv) the duress that witnesses and other sources of information and evidence came under as a result of the fact that it was impossible to protect them in Sudan.

23. The Chamber has now rejected most of those submissions, although did not grant the Defence leave to appeal its decisions. These issues, therefore, have also not been put to the Honourable Appeals Chamber for consideration but will be, unless resolved in the interim, should the Defence appeal a decision handed down pursuant to article 74 of the Statute. Like the Honourable Pre-Trial Chamber II before it in the case

²⁰ ICC-02/05-01/20-496-Conf-AnxI, para. 7. See footnote 4, above, for the choice of date.

of Decision #433, the Chamber has opted to wriggle out of scrutiny by its colleagues in the Appeals Chamber on such crucial issues going to the admissibility of the entirety of the evidence on whose basis the trial will proceed. In so doing it has run the risk of subsequent invalidation of its judgment on these issues, at the expense of judicial economy and respect for Mr Abd-Al-Rahman's rights. The Defence finds this regrettable but will stand by the positions it has taken on the issues so as to preserve Mr Abd-Al-Rahman's right to bring them before the Honourable Appeals Chamber for consideration.

24. These issues of unreliability of evidence for want of protection are all the more crucial in the case *sub judice*, in which the Defence is noticing the emergence, as it analyses the OTP's evidence and conducts its own research, of one or more patterns of alteration of evidence and making of false evidence by various central figures in connection with the Sudanese cases. During its presentation of evidence, the Defence will argue that the heightened vulnerability of the evidence for lack of proper protection – a fact which the Chamber has acknowledged but upon which it has declined to act on the ground that evidence of prejudice was absent – has facilitated the alteration and falsification by enabling those behind it to gain access to and capitalize on existing genuine evidence and information to bolster the credibility of their false evidence.

25. The Defence will also challenge the admissibility of those items of evidence that are irrelevant and/or whose probative value is outweighed by the prejudice their admission would cause, in violation of article 69(4) of the Statute, to the fairness of the trial or the objective evaluation of witness testimony.

26. In accordance with article 69(7) of the Statute, the Defence will also challenge the admissibility of any evidence obtained in violation of the Court's Statute or international human rights standards. Under this head the Defence will continue, as a matter of course, to challenge the admissibility of the video on which the Prosecution relied in rebuttal, at the CH,²¹ to supplement its evidence that Mr-Abd-Al-Rahman is the

²¹ [ICC-02/05-01/20-T-009-Red-FRA](#), p. 37, line 17 to p. 38, line 9.

person referred to by the alias “Ali Kushayb”. Having come to appreciate fully the extreme weakness of its evidence regarding the alias, the OTP staked its all on the urgent submission of a document it had until then disregarded, *viz.* a video²² recorded by Mr Abd-Al-Rahman before his surrender, when he lacked the assistance of counsel. In the process, the OTP misled the Honourable Pre-Trial Chamber II by claiming it had not asked Mr Abd-Al-Rahman for the video,²³ whereas the OTP investigator’s contemporaneous notes explicitly prove the contrary²⁴ and that the OTP had violated article 55(2) of the Statute. This point formed one of the grounds of the application for leave to appeal²⁵ against Decision #433, an application which the Honourable Pre-Trial Chamber II rejected. It has therefore not been resolved. Hence the Defence will continue to object to the admission in evidence of that video and/or any other items of evidence affected by similar irregularities.

27. Furthermore, the Defence will object to the admission of the evidence gathered by the OTP after the CH on subjects as to which it was clear and known, from the start of the proceedings, that they were disputed by the Defence. Evidence that Mr Abd-Al-Rahman is the person referred to by the alias “Ali Kushayb” falls under this head. When, upon his first appearance on 15 June 2020, Mr Abd-Al-Rahman first addressed the Court, and when his Defence did so, it was to dispute the alias “Ali Kushayb”²⁶ hitherto used to refer to him. In its Decision of 26 June 2020, the Honourable Pre-Trial Chamber II rightly observed that

neither the Prosecutor, nor previous Chambers provided any detailed reasons for respectively using the name “Ali Kushayb” as a short form when referring to Mr Abd-Al-Rahman, or for deciding to include this “nickname” or “alias” in the name of case ICC-02/05-01/07.²⁷

²² DAR-OTP-0216-0795. The Prosecution Brief relies on this video at paras. 8 and 11. The same objections apply to the telephone calls mentioned at para. 8 of the Prosecution Brief.

²³ [ICC-02/05-01/20-T-009-Red-FRA](#), p. 37, lines 12-13.

²⁴ ICC-02/05-01/20-495-Conf-AnxA: doc. DAR-OTP-0215-7063-R01: “26 December 2019: [...] Investigator [...] contacted P-0869 and informed him that the Prosecution required conformation that he was in contact with the suspect”.

²⁵ [ICC-02/05-01/20-465](#), paras. 41-48.

²⁶ [ICC-02/05-01/20-T-001-FRA](#), p. 3, lines 20-22; p. 5, lines 6-12.

²⁷ [ICC-02/05-01/20-8](#), para. 15.

The OTP was, therefore, clearly put on notice that the alias “Ali Kushayb” was disputed. Having secured the referral of the alias issue for determination at trial²⁸ by a narrow margin and only by misleading the Honourable Pre-Trial Chamber II about the inadmissible video recording referred to in the preceding paragraph being unsolicited, the OTP has clearly focused its investigations since the confirmation of the charges on bolstering its evidence of the alias. New, serendipitous witnesses have suddenly come forward.²⁹ The Defence intends to challenge the admissibility of this new witness testimony insofar as the taking of it after the CH came unjustifiably late and exceeded the limited scope of the investigations which the OTP is permitted to continue post-confirmation.

28. Lastly, the Defence will rely on any points of law going to proof of the elements of the crimes which it is able to identify in the light of the Prosecution Brief. Such points include but are not limited to those already set out at the CH regarding the lack of evidence of the common mental element of “knowledge” required by article 30(3) of the Statute.³⁰ The onus will also be on the Prosecutor to provide full and detailed proof beyond reasonable doubt of the elements common to crimes against humanity, including the widespread and systematic nature of the attack.

[signed]

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

Dated this 4 March 2022,
At The Hague, Netherlands

²⁸ [ICC-02/05-01/20-433-Corr](#), para. 59.

²⁹ Specifically, Witnesses P-0589, P-0903, P-0932, P-0954, P-0986, P-0987, P-0990, P-0994 and, subject to disclosure of the exact dates of their statements – dates which thus far remain redacted – Witnesses P-0874, P-0973 and P-1021.

³⁰ [ICC-02/05-01/20-T-009-Red-FRA](#), p. 5, line 10 to p. 33, line 10.