



Original: **French**

No.: ICC-02/05-01/20
Date: 23 September 2020

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

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

Public Document

Decision on the Request for Reconsideration of Decision ICC-02/05-01/20-110
Submitted by the Defence (ICC-02/05-01/20-113)

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

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PRE-TRIAL CHAMBER II of the International Criminal Court, in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”), having regard to article 21(2) of the Rome Statute (“*Statute*”), renders the following decision on the Defence’s “*Demande de reconsidération de la Décision ICC-02/05-01/20-110*” of 13 August 2020 (“*Request*”).¹ At the outset, the Chamber notes that the very title of the Request is incorrect: in accordance with the case law of the Court, the request must be tabled as a “*Demande de Réexamen*” of a decision rendered by the Chamber.

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute² and decided³ to issue a warrant of arrest for Mr Ali Muhammad Ali Abd-Al-Rahman (“*Mr Abd-Al-Rahman*”)⁴ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004.

2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the first warrant of arrest pursuant to article 58(6) of the Statute⁵ by issuing a second warrant of arrest for Mr Abd-Al-Rahman⁶ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, between on or about 5 to 7 March 2004.

¹ ICC-02/05-01/20-113.

² “Prosecutor’s Application under Article 58(7)”, 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, ICC-02/05-56).

³ “Decision on the Prosecution Application under Article 58(7) of the Statute”, ICC-02/05-01/07-1-Corr.

⁴ “Warrant of Arrest for Ali Kushayb”, ICC-02/05-01/07-3-Corr.

⁵ “Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”) by adding new crimes”, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and ICC-02/05-01/20-6-Red2).

⁶ “Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)”, ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red).

3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Court's Detention Centre, where he is currently detained. On the same day, Judge Rosario Salvatore Aitala was designated as Single Judge responsible for carrying out the functions of the Chamber in the present case.⁷

4. On 12 June 2020, the Chamber decided to sever the case against Mr Abd-Al-Rahman from the case of *The Prosecutor v. Ahmad Muhammad Haroun* ("Ahmad Haroun") and *Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb").⁸

5. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge, and the date of the hearing to confirm the charges was set for 7 December 2020.⁹

6. On 26 June 2020, the Defence submitted a "*Requête en vertu de l'article 115-b du Statut*" ("Article 115(b) Request")¹⁰ asking the Single Judge to, among other things, order the Registry or

[TRANSLATION] any other competent authority of the Court to: (i) submit without delay to the United Nations a funding request under article 115(b) of the Rome Statute, for an amount not less than the total updated costs of the Court's activities carried out to date in relation to the Situation in Darfur, Sudan;

[and]

(ii) [TRANSLATION] immediately engage with the United Nations in the negotiation of an agreement in that regard pursuant to article 13(1) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

7. On 23 July 2020, the Single Judge rejected the Article 115(b) Request on the grounds that it plainly fell outside the ambit of the Defence and of the Single Judge and that there was no legal basis for the Chamber to engage in the financial matters of the Court.¹¹

⁷ "Decision on the designation of a Single Judge", ICC-02/05-01/07-80.

⁸ "Decision severing the case against Mr Ali Kushayb", ICC-02/05-01/07-87.

⁹ Transcript of Hearing, ICC-02/05-01/20-T-001-ENG, p. 22, lines 23-25 and p. 23, lines 1-3.

¹⁰ ICC-02/05-01/20-10.

¹¹ "Decision on the Defence request under article 115(b) of the Rome Statute", ICC-02/05-01/20-101.

8. On 27 July 2020, the Defence submitted the “*Demande d’autorisation d’interjeter appel de la ‘Decision on the Defence Request under Aarticle 115(b) of the Rome Statute’ (ICC-02/05-01/20-101)*” (“Request for Leave to Appeal”).¹²

9. On 13 August 2020, the Single Judge rejected the Request for Leave to Appeal (“Decision to Reject”).¹³

10. On the same day, the Defence filed a request for Pre-Trial Chamber II to reconsider the Decision to Reject and rule again on the Request for Leave to Appeal. Whereas the Defence acknowledges that reconsideration of a decision “[TRANSLATION] is indeed an exceptional measure, which may not be taken under normal circumstances”, it submits “that the exceptional circumstances test is met in the present situation” because (i) the Article 115(b) Request defends “[TRANSLATION] the interests of the Court as a whole, in addition to the particular interests of the Defence”; (ii) “[TRANSLATION] the reconsideration sought will not prejudice any party or participant in the proceedings”; and (iii) in the Decision to Reject, the Chamber “[TRANSLATION] concurs unanimously with the key idea presented in the Article 115(b) Request, but refuses leave to appeal solely on the basis of a lack of understanding of the nature and scope of the issue at hand”.

11. The Chamber notes that, in principle, the statutory framework defined by the Statute and the other legal instruments applicable before the Court does not provide for a request for reconsideration as a procedural remedy against a decision of a Pre-Trial Chamber or a Single Judge. Such requests have, therefore, consistently been rejected for lack of a legal basis.¹⁴

¹² ICC-02/05-01/20-105.

¹³ “Decision on the Defence Request for Leave to Appeal the ‘Decision on the Defence request under article 115(b) of the Rome Statute’”, ICC-02/05-01/20-110.

¹⁴ See, for example, Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Édouard Ngaïssona*, “Second Decision on Disclosure and Related Matters”, 4 April 2019, ICC-01/14-01/18-163, paras. 34, 36; “Decision on the Request for Reconsideration of the Order on Reclassification”, 8 May 2019, ICC-01/14-01/18-190, para. 11 and references cited (Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo*, “Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for

12. Needless to say, the Court's well-established case law on this matter cannot be construed as categorically ruling out any possibility for a Chamber to reconsider a decision that it has rendered. As previously noted, this exceptional measure could be adopted where, for instance, "a clear error of reasoning" has been demonstrated, or if it "is necessary to prevent an injustice" or if the decision rendered is "manifestly unsound".¹⁵ The Chamber also finds that, not only does it have the right, it is indeed its duty to reconsider a decision when the very reasons for it are compromised, especially owing to a change in the circumstances leading to the said decision. This could be the case, in particular, with the emergence of new facts relevant to a given decision after that decision has been rendered.

13. In the Article 115(b) Request, the Defence simply claims that there are "exceptional circumstances" in the present situation, without, however, specifying those circumstances. As to the arguments seeking to establish that reconsideration of the Decision to Reject would be in the interest of the Court as a whole, and would prejudice no party or participant, the Chamber points out that the purpose of a request cannot, on its own, constitute "exceptional circumstances". Moreover, the arguments fail to establish that, after the Decision to Reject was rendered, any relevant new fact had emerged that would compel the Chamber to reconsider it. Regarding the Chamber's alleged "[TRANSLATION] lack of understanding of the nature and scope of the issue" considered in the Decision to Reject, the Chamber

Reconsideration, and Motion for Clarification", 28 October 2005, ICC-02/04-01/05-60, para. 18; "Decision on a Request for Reconsideration or Leave to Appeal the 'Decision on the "Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'" 22 September 2014, French translation registered on 2 October 2014, ICC-RoC46(3)-01/14-5, para. 5).

¹⁵ See, for example, Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, "Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements", 11 May 2018, ICC-02/04-01/15-1259, para. 12; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, "Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal", 18 March 2015, ICC-01/04-02/06-519, para. 12; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010", 30 March 2011, ICC-01/04-01/06-2705, para. 18.

notes that it is merely indicative of a simple disagreement the Defence has with that Decision.

FOR THESE REASONS, THE CHAMBER

DISMISSES the Request.

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

[signed]

Judge Antoine Kesia-Mbe Mindua
Presiding Judge

[signed]

Judge Tomoko Akane

[signed]

Judge Rosario Salvatore Aitala

Dated this 23 September 2020

At The Hague, Netherlands