



Original: English

No. ICC-02/05-01/20

Date: 26 June 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

Decision on the Defence request to amend the name of the case

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for Mr Abd-Al-Rahman
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court, issues this Decision on the Defence request to amend the name of the case (the ‘Request for Amendment’ or ‘Request’).¹

I. Procedural background

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Rome Statute (the ‘First Article 58 Application’ and the ‘Statute’, respectively)² and decided³ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (the ‘First Warrant of Arrest’ and ‘Mr Abd-Al-Rahman’, respectively)⁴ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas (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 Statute (the ‘Second Article 58 Application’)⁵ by issuing as secret, *ex parte* only available to the Prosecutor, a second warrant of arrest against Mr Abd-Al-Rahman (the ‘Second Warrant of Arrest’)⁶ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas (Darfur, Sudan) between on or about 5 to 7 March 2004.

3. On 9 June 2020, Mr Abd-Al-Rahman was transferred to the Detention Centre of the Court. On the same day, Judge Rosario Salvatore Aitala was designated by the

¹ Requête aux fins de modification du nom porté au dossier de l'affaire ICC-02/05-01/20, ICC-02/05-01/20-1.

² Prosecutor’s Application under Article 58(7), 27 February 2007, 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 Confidential Redacted Version of “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, 25 June 2020, ICC-02/05-01/20-6-Conf-Red.

⁶ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Conf.

Chamber as the Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.⁷

4. On 11 June 2020, the Chamber filed a public redacted version of the Second Warrant of Arrest.⁸

5. 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 Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”) and ordered the Registrar to open a new case record and assign it a new case number.⁹

6. On 15 June 2020, pursuant to the Chamber’s decision convening a hearing,¹⁰ Mr Abd-Al-Rahman made his first appearance before the Single Judge.¹¹ On this occasion (i) the suspect affirmed that he is to be referred to as Mr Abd-Al-Rahman, since ‘Ali Kushayb’ is not his name;¹² (ii) Counsel for the Defence confirmed that his client did not recognise ‘Ali Kushayb’ as his name and requested that, accordingly, the case ‘bear the name Mr Abd-Al-Rahman and not Ali Kushayb’;¹³ (iii) the Single Judge provisionally adopted the name ‘Abd-Al-Rahman’ to refer to the suspect¹⁴ and ordered Counsel for the Defence to file written submissions in support of his request.¹⁵ On 16 June 2020, by email, the Single Judge clarified that such submissions should be filed no later than 18 June 2020.¹⁶

7. On 17 June 2020, the Request was filed. Counsel for the Defence requested that the Single Judge issue an order to (i) amend the name of case ICC-02/05-01/20 by deleting the reference to ‘Ali Kushayb’, so as to rename it *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*; and (ii) implement such amendment with regard to all information available on the Court’s website and all future documents in this case.

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

⁸ Public redacted version of ‘Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)', 16 January 2018, ICC-02/05-01/07-74-Secret-Exp, ICC-02/05-01/07-74-Red.

⁹ Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87.

¹⁰ Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, 11 June 2020, ICC-02/05-01/07-82.

¹¹ Transcript of hearing, ICC-02/05-01/20-T-001-ENG.

¹² Transcript of hearing, ICC-02/05-01/20-T-001-ENG, p. 3, lines 19-21.

¹³ Transcript of hearing, ICC-02/05-01/20-T-001-ENG, p. 5, lines 7-10.

¹⁴ Transcript of hearing, ICC-02/05-01/20-T-001-ENG, p. 3, lines 22-23 and p. 5, line 15.

¹⁵ Transcript of hearing, ICC-02/05-01/20-T-001-ENG, p. 5, lines 16, 18, 25 and p. 6, lines 1-2.

¹⁶ Email on behalf of the Single Judge dated 16 June 2020, at 14:44.

8. On 19 June 2020, pursuant to the Single Judge's order,¹⁷ the Prosecutor responded to the Request (the 'Prosecutor's Response'), submitting that it should be rejected.¹⁸ The Prosecutor accepts that the appropriate form of addressing the suspect in court proceedings, official court documents and filings would be to abbreviate his name to 'Abd-Al-Rahman' or 'Mr Abd-Al-Rahman' as opposed to 'Ali Kushayb', which 'is a "nickname" or "alias" and not a legal name'. By the same token, however, the Prosecutor believes that the case should continue to be named 'The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (also known as "Ali Kushayb")', since this way of referring to suspects 'is an established practice in international criminal tribunals, in particular the International Criminal Tribunal for the former Yugoslavia, as well as in national jurisdictions', and would ensure both 'that his legal name is clearly distinguished from his widely known nickname' and 'the continuity of a case name that has been in use' since the First Warrant of Arrest.

9. On 21 June 2020, Counsel for the Defence requested leave to reply to the Prosecutor's Response (the 'Request for Leave to Reply').¹⁹

II. Determination by the Single Judge

A. The Request for Leave to Reply

10. Counsel for the Defence requests leave to reply to the Prosecutor's new submissions, noting that the Prosecutor appeared to support the requested amendment to the name of the case at the confirmation hearing and submitting that (i) the alleged connection between Mr Abd-Al-Rahman and the name 'Ali Kushayb' remains to be proved; (ii) the practice of incorporating a suspect's 'nickname' or 'alias' in the case name is unprecedented at the Court and only adopted by the International Criminal Tribunal for the Former Yugoslavia (the 'ICTY') in the absence of any objection by the suspects and in light of the relevant evidence; and (iii) the alleged necessity for

¹⁷ Email on behalf of the Single Judge dated 18 June 2020, at 09:28.

¹⁸ Prosecution's Response to "Requête aux fins de modification du nom porté au dossier de l'affaire ICC-02/05-01/20", ICC-02/05-01/20-4.

¹⁹ Demande d'autorisation de déposer une Réplique en vertu de la Norme 24-5 du Règlement de la Cour et Réplique de la Défense à la soumission du Bureau du Procureur ICC-02/05-01/20-4, ICC-02/05-01/20-5.

identification continuity in the case and publicity of the proceedings cannot infringe upon the suspect's presumption of innocence.

11. The Single Judge recalls regulation 24(5) of the Regulations of the Court (the 'Regulations'): participants may only reply to a response with leave of the Chamber and, unless otherwise permitted, a reply must be limited to new issues raised in the response which could not have been reasonably anticipated.

12. The Single Judge considers that he has sufficient information upon which to make a decision on the Request for Amendment. Furthermore, he regrets that, in violation of regulation 24(5) of the Regulations, the Request for Leave to Reply contains an extensive discussion of the points raised by the Prosecutor, in so doing putting the Chamber before a *fait accompli* and virtually defeating the purpose of the provision.

B. The Request for Amendment

13. In support of the Request, Counsel for the Defence recalls the assertions made during Mr Abd-Al-Rahman's first appearance: the only officially registered name of the suspect is 'Ali Muhammad Ali Abd-Al-Rahman' and he does not recognise the name 'Ali Kushayb'. In the Prosecutor's view, instead, the suspect's statement indicating that 'Ali Kushayb' is not his legal name is not a sufficient reason to remove 'Ali Kushayb' from the case name, particularly if preceded by the qualification 'also known as'; furthermore, preserving the reference to 'Ali Kushayb' in the name of the case would (i) 'ensure that his legal name is clearly distinguished from his widely known nickname'; (ii) preserve 'the continuity of a case name that has been in use since the First [Warrant of Arrest] was publicly issued'; and (iii) 'enable the public to continue to follow the proceedings in this case', particularly in 'Darfur and elsewhere in Sudan, where the name "Ali Kushayb" is inextricably linked to Mr Abd-Al-Rahman's case'.

14. The Single Judge notes that previous Chambers chose to adhere to the Prosecutor's use of the 'nickname' or 'alias' 'Ali Kushayb' as a short form to refer to Mr Abd-Al-Rahman and to include it in the name of the case. The First Article 58

Application indicated the suspect's name as 'Ali Muhammad ALI ABD-AL-RAHMAN', 'also known as Ali KUSHAYB' and referred to him as 'Ali KUSHAYB' or 'KUSHAYB';²⁰ Pre-Trial Chamber I noted the suspect's name as 'Ali Muhammad ALI ABD-AL-RAHMAN' and proceeded to refer to him as 'Ali Kushayb' throughout both its decision granting the First Article 58 Application²¹ and the First Warrant of Arrest.²² Similarly, the Second Article 58 Application designated the suspect as 'Ali Muhammad Ali ABD-AL-RAHMAN, also known as Ali KUSHAYB ("Ali KUSHAYB")' and clarified that 'Ali KUSHAYB' is 'a transliteration from Arabic' which 'can also be spelled as Ali Kosheib, Ali Kouchib, Ali Mohamed, Ali Kosheb, Koshib and Ali Koship', and then referred to him throughout as 'Ali KUSHAYB';²³ in the Second Warrant of Arrest, Pre-Trial Chamber II also called the suspect 'Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")', noting the alternative spellings of the name and referring to him as 'Ali Kushayb' thereafter.²⁴

15. The Single Judge notes 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. The submissions made by both the suspect and his Counsel before the Single Judge during the first appearance hearing and in the context of the Request make it now necessary to clarify that, from now on, the suspect will have to be addressed as 'Abd-Al-Rahman' or 'Mr Abd-Al-Rahman' as opposed to 'Ali Kushayb' in court proceedings, official court documents and filings, as well as in the context of public information material emanating from the Court.

16. By the same token, and without prejudice to the relevance that the 'nickname' or 'alias' may, or may not, otherwise have in these proceedings, the Single Judge notes that it would be premature to proceed to amend the name of the case at this stage. The name of a case is *per se* a neutral tool, providing an objective way of

²⁰ First Article 58 Application, para. 1.

²¹ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr, para. 4.

²² First Warrant of Arrest, para. 1.

²³ Second Article 58 Request, para. 1.

²⁴ Second Warrant of Arrest, introductory paragraph.

identifying the cases pending before the various Chambers of the Court and aimed at facilitating the correct and efficient management of the proceedings by ensuring that all relevant documents are filed in the record of the case to which they pertain; as such, it does not have any impact or role on determinations relating to the merits of the case. Accordingly, a determination as to whether the ‘nickname’ or ‘alias’ ‘Ali Kushayb’ should or not be retained as part of the name of the case is deferred until the Chamber will be in a position to make an informed decision on the matter.


FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for Leave to Reply;

DECIDES that, starting with this decision, the suspect will have to be addressed as ‘Abd-Al-Rahman’ or ‘Mr Abd-Al-Rahman’ as opposed to ‘Ali Kushayb’ in court proceedings, official court documents and filings, as well as in public information material emanating from the Court;

DECIDES to refrain from amending the name of the case until the Chamber is in a position to make an informed decision on the matter.

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

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a long horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Friday, 26 June 2020

At The Hague, The Netherlands