

International Criminal Court

Pre-Trial Chamber II

Situation: Darfur, Sudan

In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")

ICC-02/05-01/20

Presiding Judge Rosario Salvatore Aitala

Judge Antoine Kesia-Mbe Mindua

Judge Tomoko Akane

Confirmation of charges – Courtroom 3

Tuesday, 25 May 2021

(The hearing starts in open session at 9.35 a.m.)

...

MS CLOONEY [10.03 a.m.]:

Mr President, Your Honours, good morning. It is a privilege to appear before you today on behalf of victims of crimes against humanity committed during the war in Darfur. Almost 20 years ago, the forces of Sudanese President Omar Al Bashir launched a campaign against the citizens of the Darfur region of Sudan that the UN estimates has killed 300,000 civilians and displaced over 2 million others. The Sudanese government conducted this campaign hand in hand with Janjaweed militiamen and as you have heard from the Prosecution, their *agid al ogada* – *commander of commanders*, is a man in the room here today: Ali Abd-Al-Rahman – widely known as Ali Kushayb.

I wish that all the survivors could be with us in this courtroom today. Victims of these atrocities have waited 18 long years for this moment. 18 years to see a Janjaweed commander finally face justice for war crimes and crimes against humanity. As violent clashes continue *today* in this region of Sudan, with civilians attacked by the Janjaweed's successor -- the Rapid Support Forces -- we see the price that is paid for impunity. Cycles of violence continue. Victims' wounds cannot heal. And reconciliation is forestalled.

Your Honours, this case is, in many ways, unusual. This Court has put presidents on trial, and many cases involve questions about what a senior official, remote from a crime scene, mobilised others to do. That is not the case here. This suspect *is* accused of being a senior leader, but not one who simply approved battle plans from a distant capital. He is accused of

using his whistle to give orders to Janjaweed fighters from his horse. He is accused of stomping on detainees' backs as they lay face down on the ground. He is accused of murdering civilians by hacking them to death with an axe. My clients include the direct victims of these crimes and eyewitnesses to them: they *saw the suspect face to face*. And indeed many of the victims in this case *knew* the suspect before the conflict. One victim said just last week: 'I want my lawyer to tell the judges that ... [before the conflict] Ali Kushayb used to come to our house ... because my father was an *umdah* [meaning chief] ... he used to send me to run errands'. Other victims know the suspect from his pharmacy in Garsila. And a young Fur mother from Garsila told me that she grew up calling him 'Uncle Ali'. So this is personal – and a chance for a reckoning that many victims had long given up hoping for.

Your Honours, my submissions today will proceed in three parts. First, an introduction about the victims I represent and why they have chosen to participate in this process. Second, I will describe their views and concerns about the charges that the Prosecutor has presented for confirmation. And third, I will outline their views and concerns about the scope of these charges.

Mr President and Your Honours, it is a sobering responsibility to represent the interests of 126 survivors who have so much hope in what this Court can do. The victims in this case are orphans and widows. They discovered the corpses of their brothers, fathers, childhood friends. They witnessed the rape of their wives and sisters. They are themselves victims of such crimes. They are refugees.

But before that, they were farmers, drivers, cooks, traders, teachers and students. Many of them lost everything they owned, and their potential to live a happy and healthy life. Some still bear the scars of torture. Others lost the ability to ever have children. And, Your Honours, of the 126 victims I represent, more than three-quarters *still live* in a camp for the displaced. That's almost two decades after the devastation that was unleashed in Darfur. Your Honours, life in the camps means fighting each day to get enough food, water and medicine. It means knowing that any woman who leaves the camp to collect firewood is at risk of being attacked. It means, knowing that without education or opportunity there is no way out. And knowing that there is nowhere to go, because those who put you in the camp are still out there. One of the parents who is in a camp told me that 'we are living a very humiliating and undignified life' here. Yet many children have known no other home.

Your Honours, the victims I represent are members of the Fur tribe. That is of course, no accident. As the Prosecution evidence shows, the Fur were systematically persecuted by Janjaweed forces, acting in concert with the Sudanese military. And the unimaginable pain they have suffered has been rendered more acute by the complete absence of accountability. Instead of seeing the perpetrators in handcuffs or in a dock, the victims had to watch them go back to a normal life -- something the victims can never have. Indeed, Janjaweed leaders are today serving in government and the one senior leader who was imprisoned in Sudan was held on unrelated charges and pardoned and released earlier this year.

This is why the victims are all determined to pursue accountability for the crimes in Darfur – and why this case is the only chance they’ve got. This case is their first opportunity to see justice – and they don’t just want to *watch*; they want to *participate*. One victim I represent told me at the end of an interview, ‘I have to go now, [because] I am going into labour’ – she delivered a baby girl later that day. But she said she found it so important to speak to her lawyers because, as she put it to me, ‘for 17 years, nobody has asked me what happened to me’. Women who are victims of sexual violence have said that they haven’t even told their husbands what happened to them – but that they would be willing to speak about it before this Court, if invited to do so by the Prosecutor. Your Honours, this determination is humbling - and it is widespread. As one victim, a male nurse who lives in an IDP camp in Sudan, has put it: ‘I am ready to testify, even if I have to walk to the Court alone’.

In anticipation of this hearing, I asked my clients: what does justice mean for you? They all seek reparations for the harm they have suffered, but they affirmed that justice goes far beyond that.

Many victims highlighted that justice means an acknowledgment of the truth. I quote: ‘Justice is *recognition* of what was done to us, of our suffering.’ Another victim – a man suffering from malnutrition at a camp - echoed this idea, saying ‘Ali Kushayb should be tried and held accountable for his crimes in order to elevate the pain ... suffered by his victims’.

For others, justice means security and the ability to go home. In the words of one victim, ‘for me, justice means the safe return to our lands and villages and the ability to exercise our rights freely as we did before the conflict’.

Many victims said that justice also means stopping the cycle of violence. A Fur teacher living in West Darfur said that a lack of justice would ‘embolden [the suspect’s] associates who are

still roaming around with their arms and committing crimes’. Victims also highlighted that justice is for the next generation. As a Fur farmer who is almost 70 years old put it: ‘If I live until the judgment day of Ali Kushayb’s trial, I would like to take a photo with my legal team so that I can leave it to my children as a memory’.

Finally, a number of victims said that justice empowers those who were powerless and helps to restore the rule of law. As one survivor from Amjamena put it: ‘we were harmless. We didn’t even have cane sticks. And [yet they] came with machine guns’. This was also the conclusion of another survivor, a Fur man who still lives in a camp with his wife. He concluded that ‘[h]umans ... created laws to [stop] evil from prevailing. When those laws are rightfully applied, evil is stopped, and human dignity is restored. This is what justice means to me.’

Your Honours I would like to move now to the second part of my submissions, where I will convey the views and concerns of the victims about the charges that have been put before you for confirmation. It is my submission that, as the Prosecutor has argued, there is ample evidence before you to confirm the charges and commit this case to trial.

Under Article 61 of the Rome Statute, the Chamber *must* confirm the charges against a suspect if it determines that there is ‘sufficient evidence to establish *substantial grounds* to believe that the person [has] committed the crime charged’. And in the *Yekatom* case, this Chamber clarified that the standard is met when the Prosecutor offers ‘proof demonstrating a *clear* line of reasoning’ underpinning the allegations.

Your honours, the Prosecution’s theory of the case *is clear*. It is that Sudanese soldiers and Janjaweed militiamen committed crimes against humanity and war crimes in two municipalities of West Darfur. And that this was in furtherance of a state policy to attack the predominantly Fur civilian population in this area. Specifically, their case involves three key allegations: *first*, that there was an attack around Kodoom and Bindisi in August 2003 that resulted in mass killings, rapes, pillage and displacement. *Second*, that about six months later, Fur men were rounded up, detained, tortured and executed in and around the Mukjar police station; and *third* that shortly after that, the same thing happened in and around the Deleig police station. Your Honours, my submission is that, as my learned colleagues from the Office of the Prosecutor summarised yesterday, the prosecution has presented sufficient

evidence to meet the ‘substantial grounds’ test for each of these charged incidents and each of the 31 counts underlying them. And as a result, this case should proceed to trial.

Mr President, I need not repeat what you have already read in the case file and heard from the Prosecution. But on behalf of victims I can, pursuant to Article 68 of the Rome Statute, convey their ‘views’ on these charges.

First, in relation to Kodoom and Bindisi, the views of the victims are fully aligned with what the Prosecutor submits. Victims who were present in these areas have described the impact of a large Janjaweed and Sudanese government force attacking these areas in Land Cruiser vehicles, on horses, camels and on foot. One female survivor recounts how she started running for her life as she witnessed, as she put it, people ‘falling on the ground like locusts’. Another victim, who is a mother of seven, reports the ‘anxiety, anger [and] fear’ she still feels after witnessing these attacks during which her family was killed in front of her and her entire village burned ‘to the ground’.

The Prosecutor charges sexual violence as part of this incident as well and this is supported by victims who have relayed harrowing accounts of rape and gang rape at these locations. The Prosecution’s description of pillage also mirrors the harm suffered by many victims who shared that their homes, livestock and crops were burned, and who seek, as one put it, to ‘rebuild what the war has destroyed’ by participating in this case.

Finally, the Prosecution alleges that the attacks in Kodoom and Bindisi served ‘to expel ... the predominantly Fur population of these places’ by forcing them to flee into the surrounding mountains and forests. I have heard from victims who found themselves in this exact situation: forced to flee into the wilderness, without food or shelter, as it was the only option, in the words of one victim, ‘to save’ ourselves.

Your Honours, the second set of charges relates to the events in Mukjar. This incident is of course connected to the first because, as the Prosecution explained yesterday, victims fled the devastation in Kodoom and Bindisi seeking refuge in nearby towns. But instead of finding sanctuary they walked straight into an execution site. The Prosecution submits that Janjaweed and government forces arrested ‘hundreds of predominantly Fur’ men, and then transferred detainees to Mukjar police station ‘where they were mistreated’ and ultimately executed.

Here too, the Prosecution's charges align with the harm that victims recount suffering in Mukjar at this time. For instance, the accounts of prosecution witnesses that *the suspect* struck an *umdah* named Yahya Zarruq 'to his skull and shoulder bone with an axe' are consistent with the views of a number of victims who saw this gruesome attack. And many of my clients, were – like prosecution witnesses -- detained at Mukjar police station. One victim had his leg broken from a beating in detention, and a 50-year old Fur farmer and father of six was beaten so badly that he was left with medical issues affecting his kidneys and pelvis to this day. Others report severed nerves as a result of stab wounds and one of my clients had to have his shoulder amputated after being stabbed in his shoulder with a bayonet. So the victims fully support the inclusion of these charges.

Finally, as your Honours know, the third charged incident took place in Deleig in March 2004. The Prosecution submits that Janjaweed and Sudanese government forces arrested 'between 1- and 200 Fur' men in one day and then tortured and murdered detainees at the police station and nearby locations. According to prosecution witnesses, at least two Fur men detained at the police station were beaten to death with an axe-like object by the suspect himself.

Victims fully support the inclusion of these charges as well. My clients include victims who witnessed the deaths of detainees who are alleged to have been killed by the suspect. They include a family member of one of the *umdahs* who was allegedly killed during these incidents and a family member of three victims identified by the Prosecution as having been killed during these events.

The Prosecutor's allegation that detainees were forced to lie down outside the station in the hot sun while they were walked on and beaten, including *by the suspect*, also describes the experience of many of my clients. Victims described being forced to lie face-down with their open mouth in the dirt and being beaten with a bayonet or with a stick. And like a number of prosecution witnesses, many victims recount the trauma of witnessing the suspect beating detainees and stomping on their backs with his boots. Such victims have spoken of the 'severe sorrow' that resulted from witnessing these events, and also of rage, because as one victim put it: 'the mass killing happened before my eyes, and I was helpless, unable to do anything'.

Finally, the victims have spoken of the harm they suffered as a result of the campaign of persecution described in the charges. The Prosecution submits that the suspect and his men targeted and denigrated Fur civilians. And this is unfortunately entirely in line with the harm described by victims I represent, who have recounted that they were called ‘sons of dogs’, slaves, ‘Nubian[s]’ and ‘*zarga*’, meaning blue, on account of their darker skin.

Your Honours, this concludes the second part of my submissions. And before I close, I have a third issue to briefly address. This is to follow up on my written submissions filed in advance of this hearing summarising the views and concerns of victims about the scope of the charges. Your Honours, as you have recognised in a previous case, ‘the victims’ right to present their views and concerns ... may include concerns as to the choices made by the Prosecutor in the formulation of the charges’. And as I explained in my written submissions, the victims are concerned that the charges as presently formulated are unduly narrow.

Your Honours, I am well aware that once a trial has begun at this Court, the factual basis of the charges cannot change. So my submissions at this stage focus on the need to expand the investigation, *before* the start of trial, to include additional crimes within the geographic scope of the case – in Arawala, Mukjar and Garsila – but also, critically, to focus on crimes of sexual violence.

The Prosecutor has confirmed in her Policy Paper on Sexual and Gender-Based Violence that she will ‘ensure that charges’ for such crimes are brought ‘whenever there is sufficient evidence to support’ them – and she repeated this commitment yesterday. Yet, Your Honours, at the moment two of the three incidents covered by the charges relate *only to male victims*. And the only charges of sexual violence relate to a two-day period in 2003 when Janjaweed and government forces are alleged to have raped at least 17 women, including one rape victim who was relied on yesterday at the hearing by the Prosecution.

This tiny slice of accountability leaves *so many women* excluded. One of my clients, a father of 8 daughters, stated that this exclusion is ‘very frustrating and shocking’ since ‘the Janjaweed used rape as a weapon’ and female survivors ‘are ready to testify before the Court’. In the words of another victim, who was only 15 when he saw his mother shot to death as she tried to prevent his sister from being raped: ‘Rape is a very serious crime because it destroys communities’ and if rape is not charged ‘ongoing rape will never stop’.

In my written submissions I outlined the fact that the current charges do not reflect the accounts of *three* victims I represent who have stated that *this suspect personally raped them* within the timeframe and at locations covered by the current charges. These victims, and others highlighted in the submission, believe that their accounts must be fully investigated so that further charges can potentially be brought and so that their voices are not silenced. Victims have also spoken of their concern that the crime of genocide has not been charged and the issue of legal characterisation will be addressed in due course.

Your Honours, Mr President, there is nothing more cowardly than what Ali Kushayb and his men are accused of doing to innocent and defenceless civilians: men shot in the back as they tried to run away, young girls held down to be raped, children ripped off their mothers' backs and slaughtered. And yet I've never seen courage like that of victims determined to tell their story and fight for justice – even though they risk violence from the same people in doing so. So I stand here today on behalf of courageous victims in this case and on behalf of all the victims of the Bashir regime and its Janjaweed allies. And I ask you to allow this trial to go ahead.

Because, Your Honours, if perpetrators can continue to get away with these crimes, they are destined to be repeated. This is why, when Justice Jackson opened the trial at Nuremberg, he said that 'the wrongs which we seek to condemn' are 'so devastating ... that civilization cannot tolerate their being ignored, because it *cannot survive their being repeated*'. Victims of the war in Darfur – who have had to watch the Janjaweed simply rebrand themselves, be pardoned or even promoted – speak of the same imperative. I would like to end with a quote from a victim because I can't put it more eloquently than a young Fur man who was only nine when he witnessed the Janjaweed slaughter his father and brothers. He said that justice 'means preventing what happened to us from happening to others by ensuring that criminals face the same consequences as Ali Kushayb if they commit crimes like this' in the future.

Mr President, I hope that this hearing will mark a turning point in the history of Darfur, and that a trial in this case is only the beginning of the reckoning that the victims deserve.

Your Honours, that concludes my opening submissions and I thank you very much for your attention. [10.32 a.m.]

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ICC-02/05-01/20

Presiding Judge Rosario Salvatore Aitala

Judge Antoine Kesia-Mbe Mindua

Judge Tomoko Akane

Confirmation of charges – Courtroom 3

Wednesday, 27 May 2021

(The hearing starts in open session at 9.33 a.m.)

(Recess taken at 12.36 p.m.)

(Upon resuming in open session at 2.10 p.m.)

...

MS CLOONEY [14.10 p.m.]:

Your Honours, Mr President, thank you very much. It is a pleasure and privilege to be addressing you once again. I believe I have 15 minutes so in that time I will focus on the victims' views regarding the key issues that have arisen during this hearing and I will try not to go so fast that I make the interpreters' lives too difficult!

Mr President, you have heard from the Office of the Prosecutor of the compelling grounds to commit this case to trial. And in my earlier submissions I sought to illustrate the extent to which the views of the victims accord with the Prosecution's case. As the evidence shows, the suspect in this case was not only commanding his men from afar, nor merely present, but as the Prosecution put it on Monday, he was a 'knowing, willing and energetic perpetrator' who would show no mercy to his victims. We have now heard a detailed account about his actions: commanding thousands of troops, choosing the routes for fighters, ordering them to shoot and kill, supervising arrests and the loading of cars to execution sites, beating detainees with his axe and whip and, when he felt like it, killing them. We heard his words: 'Prepare their graves'; 'Just shoot, just kill'; 'Repeat for these people, maybe there are some you have missed'; 'Don't leave me one person alive'; 'Wipe out and sweep'. Your Honours, these are

merely illustrations, and my submission is that the evidence is more than sufficient to meet the burden required at confirmation.

Your Honours, in my submission the defence arguments about a supposed mistake of identity did nothing to change this conclusion. This Chamber has made clear in its confirmation decision in *Yekatom* that this stage of the proceedings does not involve ‘the full presentation of the evidence’, and that you are generally not required to ‘resolve any apparent contradictions in the evidence’ or address its ‘probative value’ at this stage.

And, in any event, the Prosecution has easily demonstrated – both in their written filings and before the Court-- that this suspect and Ali Kushayb are the same man. The suspect has indeed said it himself – and you heard this in the video that was played this morning. I can also confirm that none of the victims I have consulted since the beginning of this hearing have suggested that this Court has the wrong man – quite the contrary, they are elated to see him here. As one victim stated just this morning: ‘I’ve been following the hearing and the man sitting in that courtroom is Ali Kushayb exactly. ...[W]e’ve seen him up close because he attacked and killed us in Mukjar and elsewhere. If his lawyer needs people to identify him and the Court needs clarification, we [the victims] are ready to testify’.

And, of course, Your Honours, this argument can be quickly and easily tested at trial when witnesses are in the courtroom. As I said in my opening, the victims in this case know Ali Kushayb. They knew him before the conflict, they saw him commit crimes during the conflict, and they would recognise him if they saw him again.

Of course, the Defence is free to raise any arguments they wish to raise. It is their duty to defend their clients to the best of their abilities and of course we all respect that. But I have to confess this defence argument was rather difficult to understand. We heard, basically, that the man in this courtroom is not Ali Kushayb. So, does that mean there is another man hiding somewhere who *is* Ali Kushayb who the Defence *agrees* should face trial for the 31 counts presented by the Prosecution? Or are they saying that all the Prosecution witnesses and victims conspired to concoct uncannily consistent stories about a man who does not exist? And what then of the man who is in the courtroom today: is the Court being told that he was simply selling medication at his pharmacy while the charged events unfolded? If so, why did the Defence not invoke the defence of ‘alibi’ for the suspect, under Rule 79, specifying where

he claims to have been at the time of the alleged crime and the names of the witnesses who can confirm this?

Your Honours, I am afraid that your analysis of whether the ‘substantial grounds’ test has been met by the Prosecution may not be taken much further based on what you heard yesterday. You heard that the suspect could not be the Janjaweed leader he is accused of being because he has a different tribal background to other Janjaweed leaders, a different military background to them, and because he was not as famous as the other leaders until he was subject to an ICC warrant. But it is not clear why any of these issues would undermine the Prosecution’s case. You heard that the suspect was a bicycle delivery boy and that he would have had to rise to a position of power so quickly that it begs the question of how such a rise to the top could take place in this timeframe. There was even an ironic reference to the film *Slumdog Millionaire*. Your Honours, I am afraid this argument is as spurious as it is insulting to victims. The trajectory to becoming a Janjaweed commander is not a precocious rise to the top: it is a precipitous slide to the bottom.

There was also much discussion yesterday about what the suspect did in 2005 or 2012, events clearly irrelevant since they *post-date* the incidents described in the charges. You heard as well that the suspect’s official title did not reflect what he is accused of doing in this case. Well, Your Honours this Court has affirmed an arrest warrant for crimes against humanity against the suspect’s colleague Mr Ahmed Harun, and *his* official title at the time of the warrant was Minister of State for *Humanitarian Affairs*. So clearly official titles are not determinative of the issues you are dealing with. Nor is there a need for me to discuss the argument put forward that the suspect could not be Kushayb because Kushayb is a type of wine and this suspect is not a drunk. Your Honours, this argument simply does not warrant further response from the victims’ representative in the limited time available.

Your Honours, the other defence argument is that there was no way the suspect could have known that – and here I quote something that the Defence said this morning – no way he could have known that ‘something bad was happening’ – without extensive legal training. And this is also, at best, I would submit an issue for trial. Let us remember that the suspect is accused of hacking unarmed people to death with an axe, commanding men who shot people in the back as they ran away, inducing troops to rape young girls, torturing innocent farmers and young boys and working with Janjaweed to burn villages full of defenceless civilians to

the ground. I am not convinced that the Court will need much assistance in analysing the merits of this argument but I am grateful to the prosecutor and to my colleague from the OPCV for providing a detailed response to it earlier today.

So Your Honours, my submission to you is that the Prosecution evidence was compelling, certainly sufficient for purposes of confirmation, and that nothing this Court has heard from the Defence changes that. Your Honours, I'd also like to note what Mr Nicholls, the Prosecutor, said this morning. He stated that the Prosecution will '100 per cent continue to investigate' and that this would be with the view to potentially *adding or seeking* to add more charges in this case. And this is in response to some of the most important submissions I have made on behalf of the victims I represent, an issue of great concern to them, and so I am grateful that the Prosecutor has agreed that more investigations are needed and that a request for further charges could follow in due course.

Your Honours, I'd like to end with two final points which are important to the victims.

First, the victims have conveyed to me that accountability in this case means bringing the other suspects sought by the ICC to The Hague as well. The Prosecution has clearly shown through their arguments this week that the Janjaweed acted pursuant to a state policy. We know that this Court has approved arrest warrants for three of the top state officials: that's Bashir, Hussein and Harun. And we heard the Prosecution describe the chilling testimony of witness P-106 that the victims were told 'you Fur kept saying Allah, Allah, but your God will not protect you from us. Bashir is our God.'

So it is perhaps not surprising, Your Honours, that, when asked about their views and concerns, some of the victims point to the empty chairs in this courtroom where they believe the other perpetrators should be sitting. In the words of one victim 'I want those in power, who are in so-called prison, to be taken, put beside Ali Kushayb and held accountable for the same crimes'.

Your Honours, my final point is about what this hearing has already meant for victims who have waited so long for the chance to see justice being done.

[REDACTED.]

Your Honours, the victims know that if this case moves to trial, the world will finally hear what happened in these forgotten prisons and execution sites, in these villages that were people's homes.

When I consulted victims this week about the ongoing hearing, they highlighted that for the first time they know that they are not alone. That someone – finally – is listening. One of my clients, a 40-year-old merchant living in an IDP camp, put it this way. 'Since yesterday I feel relaxed and comfortable. It is as if we were reborn! [Since 2003] the perpetrators made us feel like we were in a box Seeing the perpetrators before the Court, we feel we will be free and get our rights back'. Another client explained: 'I am happy because the impossible became possible; Ali Kushayb appeared before the Court'. And finally, in the words of another victim who is an *umdah* or chief, 'We are so happy today, because we thought the international community turned a blind eye to us and that our case fell on deaf ears. But finally, after 18 years, we feel that the international community will deliver justice to us [and this] is all we want'.

Your Honours, the victims in this case are prepared to testify to this suspect's crimes, and wish to participate in his trial. I stand with the victims in their march for justice. And I urge you to move this case forward to trial. Thank you very much. [14.25 p.m.]