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No.: ICC-02/05-01/20
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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

**with SECRET, *EX PARTE*, only available to the Prosecution, Annex 1
Confidential, *EX PARTE*, only available to the Prosecution, Annex 2
Confidential Annexes 3 and 4**

**Prosecution’s fifth progress report on the evidence review, translation and
disclosure process**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr James Stewart

Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**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

I. INTRODUCTION

1. The Prosecution herewith submits its fifth progress report on the evidence review, translation and disclosure process in accordance with the orders of Pre-Trial Chamber II (“Chamber”), issued on 17 August 2020¹ and 2 October 2020.² The Prosecution also provides updates on an additional issue in accordance with the Chamber’s decision, issued on 12 October 2020.³

II. CLASSIFICATION

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court and regulation 14 of the Regulations of the Registry, the Prosecution classifies Annex 1 to this report as secret, *ex parte*, only available to the Prosecution, since it contains highly sensitive information relating to the Prosecution’s ongoing investigation. Annex 2 is classified as confidential, *ex parte*, only available to the Prosecution, since it contains information pertaining to documents in the Prosecution’s collection subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute. Annex 3 is classified as confidential since it contains information relating to the Prosecution’s witness list. Pursuant to regulation 23*bis*(2), Annex 4 is classified as confidential as it concerns a decision and filings with the same classification.

III. SUBMISSIONS

3. This report updates the Chamber on progress made in relation to the evidence review, translation and disclosure process since the Prosecution’s fourth progress report submitted on 23 October 2020.⁴ The Prosecution will address in turn each of the specific topics on which the Chamber has requested information. The last section of this report and Annex 4 provide an update on an additional issue in accordance with the Chamber’s decision, issued on 12 October 2020.⁵

¹ ICC-02/05-01/20-116, paras. 16-17 and p. 8.

² ICC-02/05-01/20-169, para. 19 and p. 20-21, order (f).

³ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.

⁴ ICC-02/05-01/20-191.

⁵ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.

*Confirmation as to when the Prosecutor has made available to the Defence all evidence and supporting material relied upon for the purposes of the First Warrant and the Second Warrant, subject only to the adoption of protective measures pursuant to rule 87 of the Rules*⁶

4. In its fourth progress report, the Prosecution informed the Chamber of its corrected total number of 283 items of evidence that it relied upon in its arrest warrant applications pursuant to articles 58(7) and 58(6) (“Applications”), respectively, in relation to Mr Abd-Al-Rahman.⁷ The Prosecution has disclosed 200 items to the Defence that were referred to in the Applications. The Prosecution will disclose the remaining 21 video files by mid-November 2020. This also includes the majority of the items that the Defence requested on 15 October 2020.

5. The Prosecution disclosed 9 witness statements on 30 October 2020 as planned.⁸ All items that were disclosed in Pre-Confirmation INCRIM package 5 are related to 9 Prosecution witnesses whose evidence was cited in the Applications. The items in the remaining packages were either cited in the Applications or are the transcripts or translations of such items.

6. The Prosecution is progressing its applications for the authorisation of the non-disclosure of witness identities. Since 23 October 2020, 10 witnesses have been cleared for disclosure by the Protection Strategies Unit of the Office of the Prosecutor (“PSU”). Based on the recently revised assessment from the Victims and Witnesses Section, the Prosecution now plans to disclose the identities of three witnesses that were previously identified as candidates for non-disclosure. The Prosecution will disclose all witness statements for witnesses upon whom it intends to rely at the confirmation hearing on a rolling basis.

*Number and type of the items of evidence in the possession or control of the Prosecutor still requiring first and/or second review in order to determine whether it should be disclosed*⁹

⁶ ICC-02/05-01/20-169, para. 19(i) and p. 20, order (f)(a).

⁷ ICC-02/05-01/20-191, para. 4.

⁸ ICC-02/05-01/20-179, para. 5.

⁹ ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

7. There are currently 34,148 items (172,388 pages) registered in the Prosecution's Ringtail database. Since the fourth progress report, primary review has been carried out on 472 items (2,905 pages), of which 87 items (825 pages) have also been secondary reviewed.¹⁰ There remain 23,016 items (111,131 pages) in the collection still requiring both primary and secondary review, which include newly registered evidence.¹¹

Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting¹²

8. The Prosecution has reassessed its estimated timeline for evidence review, disclosure and translation in light of the new date for the confirmation of charges hearing and relevant disclosure deadlines set out by the Chamber on 2 November 2020 in its decision on the postponement request.¹³

9. The Prosecution will strive to disclose all witness statements upon which it intends to rely at the confirmation hearing no later than 7 December 2020, and all remaining witness statements (including witnesses of low relevance cited in the first Application) no later than 15 January 2021.¹⁴ The Prosecution will also aim to disclose all non-witness related material upon which it intends to rely at the confirmation hearing no later than Friday, 22 January 2021.¹⁵

10. The tentative number for the list of witnesses has been revised to 96.¹⁶ To date, the Prosecution has already disclosed material related to 26 witnesses.¹⁷ The Prosecution plans to disclose materials related to at least 11 additional witnesses by mid-November 2020.

¹⁰ This total number excludes items that have already been disclosed.

¹¹ This number excludes materials from the UNCOI collection that were disclosed in bulk on 15 October 2020.

¹² ICC-02/05-01/20-169, para. 19(iii) and p. 20, order (f)(c).

¹³ ICC-02/05-01/20-196, p. 20.

¹⁴ ICC-02/05-01/20-196, p. 20.

¹⁵ ICC-02/05-01/20-196, p. 20. The Prosecution notes that this date is 31 days prior to 22 February 2021, the currently scheduled date of the confirmation hearing.

¹⁶ This revised number includes a new witness that was interviewed on 23 October 2020.

¹⁷ 18 of these witnesses were cited in the Applications.

Number and type of all items disclosed during the relevant period¹⁸

11. On 30 October 2020, the Prosecution disclosed to the Defence 185 items (2,333 pages).¹⁹ This disclosure consisted of 4 packages, including 92 items (656 pages) in Pre-Confirmation INCRIM package 5, 6 video files (12 pages) in Pre-Confirmation INCRIM package 6, 81 items (1,618 pages) in Pre-Confirmation INCRIM package 7, and 6 items including 3 video files (47 pages) in Pre-Confirmation Rule 77 package 10. As mentioned previously, all of the items in Pre-Confirmation INCRIM package 5 are related to 9 Prosecution witnesses whose evidence was cited in the Applications.

12. As requested by the Chamber, the Prosecution re-issued the “Disclosure Notes” field for 47 items that were previously disclosed in Pre-Confirmation INCRIM package 4. In addition, the Prosecution reclassified the legal characterisation as INCRIM of 3 items that were previously disclosed as Rule 77.²⁰

Number and type of items identified as disclosable but not yet disclosed, including a detailed explanation as to the relevance to the Prosecutor’s case, the obstacles that have prevented the Prosecutor from disclosing the items, and steps taken to overcome them²¹

13. In relation to witness protection issues, and as the challenges previously reported to the Chamber persist,²² since 23 October 2020 the PSU has provided clearance in relation to an additional 10 witnesses, amounting to a total of 60 witnesses. The Prosecution continues to re-establish contact with relevant witnesses.

A detailed schedule of any investigative step the Prosecutor may plan to conduct before the confirmation hearing, notifying the Chamber of any obstacles that may arise²³

14. Annex 1 to this report contains an updated list of investigative steps that the Prosecution plans to conduct before the confirmation hearing. The Prosecution has encountered several obstacles in relation to these investigative activities. These

¹⁸ ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

¹⁹ ICC-02/05-01/20-197, para. 3.

²⁰ ICC-02/05-01/20-197, para. 5.

²¹ ICC-02/05-01/20-169, para. 19(v) and p. 21, order (f)(e).

²² ICC-02/05-01/20-179, para. 19.

²³ ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

obstacles result from COVID-19 travel restrictions and other causes which continue to impact the Prosecution's ability to collect additional evidence.²⁴

15. Both the Prosecution staff and witnesses are subject to quarantine in the countries where the interviews are currently taking place, which results in delaying the interview process. Although members of the Prosecution staff benefit from certain privileges and immunities under the Headquarters Agreement with the Host State, these exemptions do not extend to witnesses who are unable to travel under the current restrictions. Additionally, the privileges and immunities accorded to Prosecution staff do not necessarily exempt staff from all COVID-19 related travel restrictions. Nevertheless, the Prosecution team continues to explore alternative interview options and other solutions.

Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute²⁵

16. Annex 2 to this report contains the updated information in relation to the documents in the Prosecution's collection subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute.

Detailed list of all witness statements to be relied upon for the purposes of the confirmation hearing, indicating whether transcripts and/or translation into Arabic so far exist and the progress made in this regard²⁶

17. Annex 3 to this report contains a list of the witness statements and transcripts upon which the Prosecution intends to rely for the purposes of the confirmation hearing. Since 23 October 2020, the Language Services Unit has completed the draft translations of 31 witness statements from English to Arabic (897 pages), which are highlighted in the Annex. The draft translation for one witness statement that was scheduled for completion by 30 October is now scheduled for completion by 6 November 2020. In addition, the Prosecution informs the Chamber that the draft translations for two witness statements were erroneously marked for completion by

²⁴ See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

²⁵ ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

²⁶ ICC-02/05-01/20-169, p. 21, order (f)(h).

30 October in Annex 3 to the previous report. Draft translations for these two statements were already completed in 2007-2008²⁷ and September 2020, respectively.

18. To date, the Prosecution has not received information from the Defence on specific section of statements to prioritise for translation.²⁸ The Prosecution notes that it contacted the Defence to enquire about such information on 22 October 2020, prior to the last progress report.

*Update on an additional issue in accordance with the Chamber's order, issued on 12 October 2020*²⁹

19. Annex 4 to this report contains the relevant information on this matter.

IV. CONCLUSION

20. The Prosecution continues to make every possible effort to progress the preparation of this case as quickly and effectively as possible with the resources available to it. In this report, the Prosecution has attempted to provide the Chamber with clear updates and substantial details on the requested topics. The Prosecution stands ready to provide the Chamber with any further information it may require.



James Stewart
Deputy Prosecutor

Dated this 6th day of November 2020

At The Hague, The Netherlands

²⁷ However, it is not clear that drafts completed in 2007 and 2008 are of sufficient quality and accuracy for use in confirmation proceedings. These translations are currently being quality checked.

²⁸ ICC-02/05-01/20-169, para. 34 and p. 20, order (e).

²⁹ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.