



Original: English

No. ICC-02/05-01/20

Date: 2 July 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

Order seeking observations on disclosure and related matters

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
Mr Nigel Verrill

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 Order seeking observations on disclosure and related matters.

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)¹ and decided² 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)³ 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’)⁴ 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’)⁵ 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 Chamber as the Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.⁶

¹ 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).

² Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

³ WARRANT OF ARREST FOR ALI KUSHAYB, ICC-02/05-01/07-3-Corr.

⁴ 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).

⁵ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), 16 January 2018, ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red).

⁶ Decision on the designation of a Single Judge, ICC-02/05-01/07-80.

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 Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”).⁷

5. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge and, on that occasion, the confirmation hearing was scheduled to commence on Monday, 7 December 2020.⁸

6. The Single Judge notes articles 43(6), 54(3)(e), 56, 61(3), (5) and (6), 67(2), 68(1) and (5), 72 and 93(4) and (8) of the Statute and rules 76 to 83, 87, 88 and 121(2) of the Rules of Procedure and Evidence (the ‘Rules’).

7. With a view to ensuring that the disclosure process begins as soon as possible, particularly in light of the suspect’s right to be ‘informed of the evidence on which the Prosecutor intends to rely’ at the confirmation hearing ‘[w]ithin a reasonable time’ before its commencement under article 61(3)(b) of the Statute, the Single Judge considers it necessary to receive detailed and exhaustive observations from both parties on the questions set forth below with regard to disclosure and related matters, including the time needed to effectuate the disclosure and/or submit related requests to the Chamber. The information will enable the Single Judge to (i) establish a calendar for disclosure ensuring a transparent and expeditious disclosure process; (ii) issue any necessary ‘orders regarding the disclosure of information for the purposes of the [confirmation] hearing’ pursuant to article 61(3) of the Statute; and (iii) convene ‘status conferences to ensure that disclosure takes place under satisfactory conditions’, as provided for in rule 121(2)(b) of the Rules.

8. The Single Judge notes the duties, powers and pivotal role of the Prosecutor during pre-trial proceedings, as well as the mandate of the Victims and Witnesses Unit (‘VWU’) that ‘shall provide, in consultation with the [...] Prosecutor, protective measures’ for witnesses, victims and other persons at risk under article 46(3) of the Statute. Accordingly, the Single Judge finds it necessary to receive information on the following questions:

⁷ Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87.

⁸ Transcript of hearing, ICC-02/05-01/20-T-001-ENG, p. 22, lines 23-25 and p. 23, lines 1-3.

- (i) What is the overall amount of written pieces of evidence the Prosecutor intends to rely upon at the confirmation hearing? How many pages does this evidence amount to? What is the original language of such evidence?
- (ii) Does the Prosecutor intend to rely upon other non-written pieces of evidence such as photographs, video, or audio recordings? If so, what is the total length/time span and original language of such pieces of evidence?
- (iii) How many and which pieces of evidence can be immediately disclosed to the Defence without redactions? How many pages/time span does this evidence amount to?
- (iv) What is the overall amount of exculpatory evidence that the Prosecutor shall disclose to the Defence as soon as practicable pursuant to article 67(2) of the Statute? How many pages/time span does this evidence amount to? Does this exculpatory evidence require redactions?
- (v) How many witnesses, if any, does the Prosecutor intend to call to testify at the confirmation hearing?
- (vi) How many witness statements does the Prosecutor intend to provide the Defence with for the purposes of the confirmation hearing, as provided in rule 76 of the Rules? Does the Prosecutor intend to provide such statements in their entirety or in the form of summaries, pursuant to articles 61(5) and 68(5) of the Statute?
- (vii) What is the original language of the witness statements the Prosecutor intends to rely upon at the confirmation hearing? If applicable, have those statements been translated into Arabic, the language that the suspect fully understands and speaks, as required in rule 76(3) of the Rules? In the negative, what is the Prosecutor's estimate regarding the time needed to provide such translations?
- (viii) Does the Prosecutor intend to submit requests to withhold the identity of witnesses and, in the affirmative, how many witnesses would be concerned by such requests and how many statements of anonymous witnesses does the Prosecutor intend to rely upon?

- (ix) For the purposes of requesting to withhold the identity of a witness and related requests for redactions, have detailed and comprehensive security assessments been prepared for each witness on which the Prosecutor intends to rely at the confirmation hearing and, in the negative, what is the Prosecutor's estimate regarding the time needed to prepare them?
- (x) Does the Prosecutor possess or control any books, documents, photographs or other tangible objects that the Defence shall be permitted to inspect as material to the preparation of the Defence under rule 77 of the Rules?
- (xi) Are any of the Prosecutor's pieces of evidence, in particular exculpatory evidence or evidence considered as material for the preparation of the defence, affected by confidentiality agreements in accordance with articles 54(3)(e), 72 and 93 of the Statute? In the affirmative, has the Prosecutor undertaken, or will the Prosecutor undertake, steps to obtain the consent of the information provider(s) regarding the disclosure of such material?
- (xii) Does the Prosecutor intend to request protective measures for witnesses, victims or other persons at risk prior to disclosure of the names of the witnesses and/or of certain documents, pursuant to rules 87 and 88 of the Rules? Has the Prosecutor held consultation with the VWU regarding protective measures for witnesses, victims or other persons at risk? How many witnesses have been referred to the VWU for protection purposes, including relocation? How many witnesses does the Prosecutor intend to refer to the VWU for protection purposes, including relocation, before the confirmation hearing? What is the Prosecutor's estimate regarding the time needed for such measures to be put in place?
- (xiii) Does the Prosecutor intend to submit requests in relation to unique investigative opportunities under article 56 of the Statute? What could be the impact of such requests on the disclosure process and the commencement of the confirmation hearing?
- (xiv) Is the Prosecutor continuing the investigation regarding Mr Abd-Al-Rahman? What could be the impact of an ongoing investigation on the

disclosure process, the protection of witnesses and the commencement of the confirmation hearing?

- (xv) Does the Prosecutor intend to enlarge or reduce the factual scope of the charges brought against Mr Abd-Al-Rahman as compared to the incidents and alleged crimes currently set out in the ‘counts’ listed in the arrest warrants?
- (xvi) Does the Prosecutor intend to charge different legal characterisations of the same conduct as separate counts (as in the First Warrant of Arrest) or as alternatives (as in the Second Warrant of Arrest)?
- (xvii) Bearing in mind the scheduled date for the confirmation hearing, when does the Prosecutor anticipate she will be able to complete disclosure?

9. The Single Judge is aware that the Defence’s position as to whether to object to the charges, challenge the Prosecutor’s evidence and, in particular, present evidence pursuant to article 61(6) of the Statute will depend, to a large extent, on the disclosure of evidence by the Prosecutor and the provision of the document containing the charges. Nonetheless, the Single Judge considers it a matter of fairness of the proceedings to invite the Defence to provide (i) observations on the information to be submitted by the Prosecutor in accordance with this decision; and (ii) information on the following questions:⁹

- (i) Does the Defence anticipate invoking any ground for excluding criminal responsibility and/or alibi?
- (ii) Does the Defence anticipate the need to conduct investigations before the confirmation hearing?
- (iii) Does the Defence anticipate presenting evidence at the confirmation hearing? In the affirmative, what is the prospective overall amount and types of evidence the Defence intends to rely upon?
- (iv) Does the Defence anticipate calling witnesses to testify at the confirmation hearing?

⁹ If required, the Defence may file some of this information *ex parte*.

- (v) Does the Defence intend to rely on written testimonial evidence at the confirmation hearing? In the affirmative, in what format does the Defence intend to provide such evidence?
- (vi) Does the Defence possess or control any books, documents, photographs or other tangible objects that the Prosecutor shall be permitted to inspect as material intended for use by the Defence as evidence under rule 78 of the Rules?

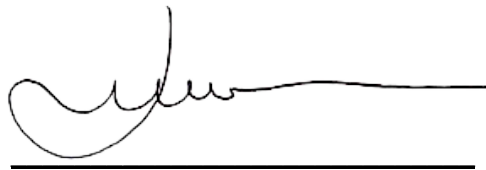
10. Furthermore, both the Prosecutor and the Defence are invited to indicate how they plan to deal with the constraints arising in connection with the current ongoing COVID-19 pandemic. This reality and the unpredictability of how the situation will develop should be taken into consideration in providing answers to the queries raised in this order. The parties are also invited to raise any additional concerns that may arise in this regard.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Prosecutor to provide the information requested in this order (in paragraphs 8 and 10) no later than Thursday, 23 July 2020; and

ORDERS the Defence to provide the information requested in this order (in paragraphs 9 and 10) no later than Thursday, 30 July 2020.

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

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Thursday, 2 July 2020

At The Hague, The Netherlands