



Original: English

No. ICC-02/05-01/20

Date: 17 August 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 with two public annexes

Order 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

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,¹ issues this Order on disclosure and related matters.

I. Procedural history

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Rome Statute (the ‘Statute’)² and decided³ to issue a warrant of arrest against 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 (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 against Mr Abd-Al-Rahman⁶ 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 surrendered himself and was transferred to the Detention Centre of the Court.

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

¹ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

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).

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

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. On 2 July 2020, the Single Judge issued the ‘Order seeking observations on disclosure and related matters’⁹ for the purposes of establishing a disclosure calendar.

7. On 23 July 2020, the Prosecutor submitted the ‘Prosecution’s observations pursuant to the “Order seeking observations on disclosure and related matters” (ICC-02/05-01/20-14)’ (the ‘Prosecutor’s Observations’).¹⁰

8. On 29 July 2020, the Defence submitted the ‘*Observations en réponse à l’Ordonnance ICC-02/05-01/20-14*’ (the ‘Defence Observations’).¹¹

II. Determinations of the Single Judge

9. The Single Judge has duly noted the information submitted in the Prosecutor’s Observations, in particular as to the status of (i) the review of evidentiary material, including for the purposes of applying redactions;¹² (ii) the translation of evidentiary material to be submitted pursuant to rule 76(3) of the Rules of Procedure and Evidence (the ‘Rules’);¹³ and (iii) the review of material to be disclosed that is protected under articles 54(3)(e), 72 and 93(8) of the Statute.¹⁴ The Single Judge considers that the provisional and tentative nature of this information renders it impossible to devise, at this stage, a calendar for disclosure. Accordingly, this Order is limited to those steps which are required for the process of disclosure to commence and a further decision addressing outstanding disclosure-related issues and setting specific timelines will be issued in due course.

10. The Single Judge has also noted the requests submitted in the Defence Observations (the ‘Requests’).¹⁵ However, in light of the above, the Single Judge

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

⁹ ICC-02/05-01/20-14.

¹⁰ ICC-02/05-01/20-103-Conf (a public redacted version was notified on 28 July 2020, ICC-02/05-01/20-103-Red).

¹¹ ICC-02/05-01/20-106-Conf.

¹² Prosecutor’s Observations, paras 4-9, 20-22, 25-27, 29-30, 37-38, 51-53.

¹³ Prosecutor’s Observations, paras 31-33.

¹⁴ Prosecutor’s Observations, paras 39-41.

¹⁵ Defence Observations, paras 18, 20, 22.

considers that since the Chamber is not in possession of sufficient information on a number of relevant issues, the Single Judge is not in a position to adjudicate the Requests and, accordingly, defers the determination of the Requests to a later stage. Additionally, the Single Judge orders the Defence to file a public redacted version of its observations by mirroring the redactions applied in the public redacted version of the Prosecutor's Observations.

A. *Registration of evidence*

11. The parties shall comply with the most recent version of the E-court Protocol, a copy of which is annexed to this decision (*see* Annex I). The Single Judge reiterates that the Registry must register any evidence disclosed between the parties and make it available to the Chamber. It is of the utmost importance that the parties provide all required metadata and the Single Judge stresses that they are responsible for the quality and accuracy of this information.

B. *Exceptions to disclosure (redactions)*

12. Noting the Prosecutor's and Defence Observations on the matter, and consistent with the practice of other pre-trial chambers, the Single Judge hereby adopts the procedure for exceptions to disclosure in the form of redaction of information under rules 81(2) and (4) of the Statute as contained in paragraphs 99 to 101 of the latest version of the Chambers Practice Manual,¹⁶ subject to the following clarifications:

- (i) the procedure is to be understood to apply to the Prosecutor as well as to the Defence (the Chamber will address the right of victims to present evidence in the decision concerning their participatory rights);
- (ii) in order to verify, at its discretion and pursuant to rule 81 of the Rules, the scope and validity of any redactions made by the disclosing party and, if necessary, order the disclosing party *proprio motu* to lift, partially or fully, any redactions, after having given the disclosing party the opportunity to submit its observations, the Single Judge considers it appropriate that the Chamber receive the disclosed evidence also in non-redacted form.

¹⁶ Chambers Practice Manual, paras 99-101 (pp. 31-34).

- (iii) any applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence shall be submitted to the Chamber no later than Friday, 11 September 2020 and such applications shall also be notified, with appropriate redactions, to the receiving party.

13. With regard to non-standard redactions, i.e. any redactions that do not fall under the standard categories listed in the Chamber's Practice Manual, the Single Judge recalls that they shall be subject to a discrete application to the Chamber for authorisation, a redacted version of which shall also be provided to the receiving party. Noting the Prosecutor's Observations on the matter,¹⁷ and mindful that the time necessary for the adjudication of such requests should not unduly prolong the process of disclosure to the detriment of the Defence, the Single Judge finds it appropriate for the Prosecutor to proceed to disclosure with redactions as proposed simultaneously with the application: the Single Judge will then either authorise the redactions or order their lifting.

C. Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant (the 'Protocol')

14. The Protocol constitutes "a set of minimum rules" which are designed to safeguard, to the greatest degree possible, the security of witnesses during the investigations, whilst taking into account the rights and the obligations of the parties, in particular the suspect's right at the confirmation hearing, pursuant to [a]rticle 61(6) of the Statute, to challenge the evidence presented by the Prosecutor and to present evidence'.¹⁸ The Single Judge thus adopts the Protocol as annexed to the latest version of the Chambers Practice Manual (*see* Annex II to this decision).

¹⁷ Prosecutor's Observations, para. 19.

¹⁸ *See inter alia* Pre-Trial Chamber III, *The Prosecutor v. Laurent Gbagbo*, Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 7 March 2012, ICC-02/11-01/11-49, para. 13.

D. Date of the confirmation of the charges hearing

15. Finally, the Single Judge notes the Prosecutor's Observations to the effect that, in light of the information provided therein, 'it is apparent that the Prosecution will not be able to adequately discharge its statutory duties vis-à-vis the Defence, or victims and witnesses, and will not be ready to proceed to a confirmation hearing on 7 December 2020', and that, '[a]ccordingly, the Prosecution is preparing a request for postponement of the confirmation hearing, which [...] will be submitted as soon as the Prosecution has gathered all of the information relevant and useful to the Chamber's determination of this request'.¹⁹

16. The Single Judge recalls that, pursuant to article 61(1) of the Statute, the Chamber has the duty to hold the confirmation hearing 'within a reasonable time after the person's surrender or voluntary appearance before the Court', consistently with the rights of the suspect under article 67(1)(a) and (c) of the Statute '[t]o be informed promptly and in detail of the nature, cause and content of the charge[s]' brought against him and '[t]o be tried without undue delay'. The Single Judge recalls that a fundamental aspect of this right consists in the suspect's right to have the evidence underpinning the charges disclosed as soon as practicable. This right is all the more fundamental in light of the fact that the suspect is currently deprived of his liberty, which, in accordance with the Court's jurisprudence, is the exception and not the rule.²⁰

17. Accordingly, and in order to ensure that the disclosure process unfolds smoothly and under satisfactory conditions, the Single Judge orders the Prosecutor to submit, every other week starting on Monday, 24 August 2020, a detailed report to keep the Chamber abreast of any progress made with regard to the evidence review, translation and disclosure process.

¹⁹ Prosecutor's Observations, para. 60.

²⁰ See Decision on the Defence Request for Interim Release, 14 August 2020, ICC-02/05-01/20-115, para. 23.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

DECIDES to defer the Defence Requests in accordance with paragraph 10 above;

ORDERS the Defence to file a public redacted version of the Defence Observations in accordance with paragraph 10 above;

ORDERS the Registrar to ensure unrestricted access to the Chamber of all evidence disclosed between the parties;

ORDERS the parties to comply with the E-court Protocol as annexed to this decision (*see* Annex I);

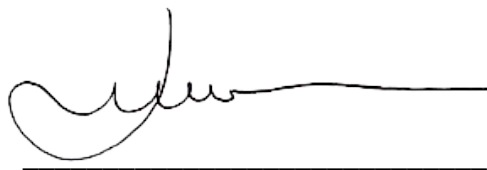
ORDERS the parties to comply with the redaction regime as set forth in paragraphs 12-13 above;

ORDERS that any applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence, in accordance with paragraph 12(iii) above, be submitted no later than Friday, 11 September 2020;

ORDERS the parties to comply with the 'Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant' as annexed to this decision (*see* Annex II);

ORDERS the Prosecutor to submit a progress report, in accordance with paragraph 16 above, every other week, starting on Monday, 24 August 2020.

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



Judge Rosario Salvatore Aitala
Single Judge

Dated this Monday, 17 August 2020

At The Hague, The Netherlands