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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
and Confidential Annex 3**

**Prosecution’s third 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 third 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

II. CLASSIFICATION

2. Pursuant to regulation 23bis(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.

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 second progress report, submitted on 7 September 2020.³ The Prosecution will address in turn each of the specific topics on which the Chamber has requested information.

*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*⁴

4. The Prosecution relied upon a total of 229 items of evidence in its applications pursuant to articles 58(7)⁵ and 58(6),⁶ respectively, in relation to Mr Abd-Al-Rahman.

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-02/05-01/20-146.

⁴ ICC-02/05-01/20-169, para. 19(i) and p. 20, order (f)(a).

⁵ ICC-02/05-56 (188 items).

⁶ ICC-02/05-01/20-6-Red2 (41 items).

Forty-seven of these items were disclosed to the Defence on 31 August 2020.⁷ Another 47 items are documents relating to the work of the United Nations International Commission of Inquiry on Darfur (“UNCOI”), which will be disclosed to the Defence next week, as detailed below.⁸ An additional 68 documents are currently being reviewed, and will be disclosed no later than 30 October 2020.

5. Of the remaining 72 items, 68 are witness statements or screening documents relating to 67 Prosecution witnesses.⁹ Five of these witness statements were disclosed to the Defence on 30 September 2020.¹⁰ An additional four statements have been reviewed and are planned for disclosure in mid-October 2020. Nine additional witnesses have recently been cleared for disclosure of their identities by the Protection and Strategies Unit of the Office of the Prosecutor (“PSU”), and the Prosecution plans to disclose these statements by 30 October 2020.

6. To date, the Prosecution has identified six witnesses relied upon for the purposes of the arrest warrants who will require applications for the authorisation of the non-disclosure of their identities.¹¹ The Prosecution intends to submit such applications in the coming weeks as a matter of priority.

7. The remaining 43 witnesses have not yet been cleared for disclosure by the PSU.¹² The Prosecution has asked the PSU to prioritise the clearance of these witnesses, and intends to disclose their statements on a rolling basis as soon as each witness is cleared. The Prosecution notes that 20 of the witnesses it relied upon in its first application, which also concerned Mr Ahmad Muhammad Harun,¹³ are assessed as having relatively low probative value in relation to the case against Mr Abd-Al-

⁷ ICC-02/05-01/20-170; ICC-02/05-01/20-170-Conf-AnxA. *See below*, para. 17.

⁸ *See below*, paras. 9-10.

⁹ Both a statement and screening were relied upon in relation to one Prosecution witness. In addition, one of the items is an audio recording of an interview, for which the transcription will be disclosed instead. The other four items are documents provided by Prosecution witnesses.

¹⁰ ICC-02/05-01/20-171; ICC-02/05-01/20-171-Conf-AnxA.

¹¹ Further witnesses are likely to require applications for non-disclosure of their identities. However, these six witnesses are identified as a first priority since their individual risk assessments are unlikely to significantly change in the near future. Three of the witnesses have been referred to the Victims and Witnesses Unit for protection purposes and cannot be disclosed until protection measures are implemented for their family members.

¹² One of these witnesses is subject to an agreement under article 54(3)(e) of the Statute. *See*, Annex 2.

¹³ ICC-02/05-56.

Rahman. They have therefore been removed from the list of witnesses the Prosecution intends to rely upon at the confirmation hearing. Nonetheless, the Prosecution will review and disclose these materials to the Defence as soon as the witnesses' individual security situations allow.

*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*¹⁴

8. There are currently 33,965 items (171,778 pages) registered in the Prosecution's Ringtail database. Excluding those items already disclosed, primary review has been carried out on 4,329 items (15,825 pages), of which 226 items (664 pages) have also been secondary reviewed.

9. The Ringtail database contains 5,068 items that are disclosable documents received from the Office of the High Commissioner for Human Rights relating to the work of the UNCOI. The UNCOI report and its underlying materials were relied upon by the Prosecution in preparing its first¹⁵ and second¹⁶ applications leading to arrest warrants against Mr Abd-Al-Rahman. As noted above, a total of 47 items from the UNCOI collection were specifically cited in those applications.¹⁷

10. The Prosecution has consulted with the Defence to ascertain the best, most efficient and useful manner to disclose the UNCOI collection in order to assist the Defence. The Defence has indicated that it would prefer to receive a bulk disclosure of this collection rather than wait for full classification of the individual documents by the Prosecution. The Prosecution is currently preparing the UNCOI collection for bulk disclosure and expects to make this disclosure on 15 October 2020. As the Prosecution continues its review of this collection and is able to further classify the documents, it will provide this information to the Defence.

¹⁴ ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

¹⁵ See ICC-02/05-56, paras. 8-10, 13-14.

¹⁶ See ICC-02/05-01/20-6-Red2, para. 17.

¹⁷ See above, para. 4.

11. Excluding the UNCOI collection, and the items already reviewed as indicated above,¹⁸ there remain 23,638 items (116,796 pages) in the collection still requiring both primary and secondary review. These items are of many different types, including witness statements, transcripts of interview, annexes, screening notes, investigator's notes, reports, photographs, audio and video files, witness expenses, and biographical and security questionnaires. The Prosecution's prioritisation of these items for review and disclosure is detailed in the following section.

12. In addition to the items in its Ringtail collection, the Prosecution also possesses material in a separate database.¹⁹ The review of this database for disclosable material is now complete, and all relevant items have been registered in Ringtail.²⁰ The Prosecution has also devised parameters to review its investigation management system in order to identify any disclosable material that may be stored there.

Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting²¹

13. In accordance with the Chamber's expectations,²² the Prosecution is prioritising the review and disclosure of the most relevant and probative evidence in this case. It has narrowed the tentative list of witnesses upon which it intends to rely at the confirmation hearing from 119 to 95. This list may be further narrowed depending on the Prosecution's ongoing evidence assessment and its additional investigations.²³

¹⁸ See above, para. 8.

¹⁹ ICC-02/05-01/20-157-Corr-Red, para. 28.

²⁰ The Prosecution previously informed the Chamber that it anticipated approximately 4,000 items would be registered in Ringtail as a result of this database review. However, upon careful review of the items, only 619 were assessed as truly relevant to this case and these have been registered in Ringtail. See ICC-02/05-01/20-157-Corr-Red, para. 28.

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

²² See ICC-02/05-01/20-169, paras. 21-22.

²³ The Prosecution is taking steps to significantly reduce its tentative, approximate list of 1,527 items that it previously indicated it intended to rely upon at the confirmation hearing, and intends to provide more detailed information to the Chamber in this regard in subsequent progress reports. See, ICC-02/05-01/20-103-Red, para. 21.

14. In accordance with the Chamber's order,²⁴ the Prosecution's current priorities for evidence review and disclosure are a) the items relied upon in the two applications for warrants of arrest, and b) material relating to the 95 witnesses on its current list for the confirmation hearing.

15. The Prosecution's best estimate of the time that will be required to complete the review of the outstanding items in Ringtail,²⁵ as well as those soon to be registered as a result of the review of a second database,²⁶ is approximately 145 working days. This estimate is based on the current size of the Prosecution team, taking into account six additional staff hoped to join the team by the end of October 2020, and a rate of review of 50 pages per person, per day.²⁷ More specifically:

Disclosure of incriminating evidence under rule 76(1)

- a. In relation to the 95 witnesses upon whom the Prosecution intends to rely at the confirmation hearing, the Prosecution has already disclosed material relating to 11 of these witnesses, and will disclose material related to a further 24 witnesses in the coming weeks. The Prosecution will disclose items relating to the remaining 60 witnesses, subject to any necessary applications for non-disclosure of witnesses' identities, on a rolling basis. The Prosecution's best estimate at the current time is that it will not be able to complete this disclosure until approximately February 2021;
- b. In relation to witness evidence obtained since Mr Abd-Al-Rahman's surrender to the Court, and non-testimonial evidence, the Prosecution will review the evidence as it is collected and, subject to any necessary applications for non-disclosure of witnesses' identities, disclose relevant items to the Defence on a rolling basis. The Prosecution's best

²⁴ ICC-02/05-01/20-169, para. 19(i), 34 and p. 20, orders (d) and (f)(a).

²⁵ *See above*, para. 11 (23,638 items (116,796 pages)).

²⁶ *See above*, para. 12.

²⁷ Whether this rate of review can be achieved is dependent on the number and volume of other tasks that must be completed by the reviewers during any particular period.

estimate at this time is that it will be able to complete this disclosure within 145 working days.

Disclosure of material falling under article 67(2) or rule 77

- c. The Prosecution will disclose this evidence on a rolling basis, immediately after identifying this material for disclosure.²⁸

Number and type of all items disclosed during the relevant period²⁹

16. On 30 September 2020, the Prosecution disclosed 2 packages of evidence consisting of 83 items (865 pages).³⁰ The INCRIM package contained the statements of 11 Prosecution witnesses and related annexes. The Prosecution received clearance from the PSU to disclose these witnesses between 16 and 23 September 2020. Five of these witness statements were relied upon in the arrest warrant applications against Mr Abd-Al-Rahman,³¹ and the other six statements represent core evidence in this case. Six of the items in this package were seized from Mr Abd-Al-Rahman, and the package also contained miscellaneous documents identified for disclosure as part of the Prosecution's review of certain batches of non-witness material. The Rule 77 package consisted of 21 items (433 pages) comprising an additional two documents seized from Mr Abd-Al-Rahman, as well as other miscellaneous documents.

17. As previously reported,³² the Prosecution also made a disclosure of three packages of evidence on 31 August 2020, including an INCRIM package consisting of 47 items (393 pages).³³ These 47 items were relied upon by the Prosecution in its applications leading to arrest warrants against Mr Abd-Al-Rahman. However, the Prosecution acknowledges that the probative value of these items is low given that

²⁸ The Prosecution takes note of the Chamber's order in this regard. *See* ICC-02/05-01/20-169, para. 17 and p. 20, order (a).

²⁹ ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

³⁰ ICC-02/05-01/20-171; ICC-02/05-01/20-171-Conf-AnxA.

³¹ *See above*, para. 5.

³² ICC-02/05-01/20-146, para. 5.

³³ ICC-02/05-01/20-170; ICC-02/05-01/20-170-Conf-AnxA.

they are all press releases and reports from international or non-governmental organisations.³⁴

18. The Prosecution acknowledges that it filed a notification to the Chamber in relation to its 31 August 2020 disclosure of evidence approximately one month after the disclosure took place, on 2 October 2020.³⁵ This delay was the result of efforts by the Prosecution to obtain signed copies of the disclosure reports from the Defence to annex to its notification.³⁶ Ultimately, the Prosecution decided to file its notification with unsigned reports. In relation to its 30 September 2020 disclosure, the Prosecution filed its notification promptly, on 2 October 2020.³⁷ In future, as ordered by the Chamber, the Prosecution will submit without delay, after receipt of the disclosure packages by the Defence, a disclosure notification to the Chamber.³⁸

*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 them*³⁹

19. At the present time, a major obstacle to the Prosecution's ability to disclose the core evidence in this case, namely witness statements and related materials, is witness security. The staff of the PSU, assigned to the Darfur situation, in addition to their duties on other cases, are working extremely hard to clear witnesses for disclosure of their identities as quickly as possible, and collaborating closely with investigators who are re-contacting witnesses as a matter of high priority. The Prosecution has previously made the Chamber aware of some specific challenges faced by the PSU in relation to witness security in this case.⁴⁰ Despite these

³⁴ See ICC-02/05-01/20-169, paras. 20-21.

³⁵ ICC-02/05-01/20-170; ICC-02/05-01/20-170-Conf-AnxA.

³⁶ On 16 September 2020, the Defence communicated to the Prosecution that it had identified some discrepancies in the 31 August 2020 disclosure report. The Prosecution asked the Defence to identify the discrepancies so that it could provide any necessary assistance. To date, the Defence has not provided the Prosecution with further clarification on this issue nor returned the signed disclosure reports for the 31 August 2020 or 30 September 2020 disclosures.

³⁷ ICC-02/05-01/20-171; ICC-02/05-01/20-171-Conf-AnxA. These disclosure reports were also annexed to the notification unsigned. The Defence acknowledged receipt of the 30 September 2020 disclosure package only on 7 October 2020.

³⁸ ICC-02/05-01/20-169, para. 25 and p. 20, order (c).

³⁹ ICC-02/05-01/20-169, para. 19(v) and p. 21, order (f)(e).

⁴⁰ ICC-02/05-01/20-157-Conf-Exp-Corr, para. 42; ICC-02/05-01/20-149-Conf-Exp, paras. 14-16.

challenges, the PSU has so far provided clearance in relation to 39 witnesses and continues to make steady progress, working as hard and fast as possible.

*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 arise*⁴¹

20. Annex 1 to this report contains a list of investigative steps the Prosecution plans to conduct before the confirmation hearing.

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*⁴²

21. Annex 2 to this report contains detailed 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 regard*⁴³

22. Annex 3 to this report contains a list of the witness statements and transcripts that the Prosecution intends to rely upon for the purposes of the confirmation hearing, and the progress made to date in relation to their transcription or translation into Arabic.

23. The Language Services Unit ("LSU") of the Office of the Prosecutor is currently prioritising the preparation of draft translations for disclosure. Due to its limited resources,⁴⁴ it is unfortunately impossible for the LSU to prepare reviewed translations of all required witness statements and transcripts in time for a confirmation hearing on the current scheduled date of 7 December 2020. Indeed, it remains a significant challenge for the LSU to produce all required translations in draft format in this timeframe.

⁴¹ ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

⁴² ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

⁴³ ICC-02/05-01/20-169, p. 21, order (f)(h).

⁴⁴ The LSU is continuing its efforts to recruit additional external Arabic language translation resources on an expedited basis.

24. The Prosecution has not yet been in communication with the Defence in relation to the specific portions of the witness statements so far disclosed and which the Defence would consider as “core to the preparation of the defence”.⁴⁵ It will liaise with the Defence in relation to this matter.

Identification of relevant parts of the evidence

25. The Prosecution notes the Chamber’s order in relation to indicating, for each disclosed item, which sections are deemed incriminating and/or exonerating,⁴⁶ and that a new dedicated E-court metadata field has very recently been created for this purpose.⁴⁷ The Prosecution also notes that this order will substantially increase the time required for the primary and secondary review of items for disclosure, especially in relation to lengthy documents, such as interview transcripts.

IV. CONCLUSION

26. The Prosecution team is making 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. It stands ready to provide the Chamber with any further information it may require.



James Stewart
Deputy Prosecutor

Dated this 9th day of October 2020

At The Hague, The Netherlands

⁴⁵ ICC-02/05-01/20-169, para. 34 and p. 20, order (e).

⁴⁶ ICC-02/05-01/20-169, para. 24 and p. 20, order (f)(b).

⁴⁷ The Prosecution has consulted with E-court support and Court Management Section staff and notes that the use of the highlight function will not technically be possible due to the way in which the Prosecution’s version of the Ringtail database interacts with E-court.