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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 sixth 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:

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I. INTRODUCTION

1. The Prosecution submits its sixth 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 fifth progress report submitted on 6 November 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-02/05-01/20-200.

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. On 16 November 2020, the Prosecution disclosed the remaining 21 video files and related translations to the Defence;⁷ which 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.⁸ Thus discharging this undertaking given in its fifth progress report to the Chamber.⁹ In addition, the Prosecution disclosed another batch of material to the Defence totalling 152 items (1, 210 pages) which were referred to in the Applications and/or relate to items requested by the Defence on 15 October 2020.

5. Also in its fifth progress report, the Prosecution undertook to “disclose materials related to at least 11 additional witnesses by mid-November 2020.”¹⁰ The Prosecution confirms that it discharged this undertaking and disclosed materials related to 18 witnesses on 16 November 2020 to the Defence.¹¹ The items disclosed in Pre-Confirmation INCRIM package 8 are related to these witnesses, of whom 14 were cited in the Applications and their evidence will be relied on for the confirmation hearing. The items in the remaining packages were either cited in the Applications or are the transcripts or translations of such items.

6. The Prosecution continues to progress its applications for the authorisation of the non-disclosure of witness identities, however this has not been without difficulties, as set out in a prior filing.¹² Since last progress report on 6 November 2020, the Protection Strategies Unit of the Office of the Prosecutor (“PSU”) has cleared 5 witnesses for disclosure.

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

⁷ ICC-02/05-01/20-204, para. 4.

⁸ ICC-02/05-01/20-191, para. 4.

⁹ ICC-02/05-01/20-200, para.4.

¹⁰ ICC-02/05-01/20-200, para.10.

¹¹ ICC-02/05-01/20-204, paras. 3 and 4.

¹² ICC-02/05-01/20-179, para. 19.

7. Consistent with our disclosure obligations, the Prosecution will continue to disclose all witness statements on a rolling basis, especially for the witnesses upon whom it intends to rely at the confirmation hearing.

*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*¹³

8. There are currently 34,289 items (172,850 pages) registered in the Prosecution's Ringtail database. Since the fifth progress report, primary review has been carried out on 562 items (1,498 pages), of which 371 items (820 pages) have been recommended for disclosure, however secondary review of these items is ongoing.¹⁴ There remain 22,514 items (109,851 pages) in the collection still requiring both primary and secondary review, which include newly registered evidence.¹⁵

*Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting*¹⁶

9. The Prosecution continues to do its best to disclose all witness statements upon which it intends to rely at the confirmation hearing by 7 December 2020, and all remaining witness statements (including witnesses of low relevance cited in the first Application) by 15 January 2021.¹⁷ The Prosecution is working to disclose all non-witness related material upon which it intends to rely at the confirmation hearing by Friday, 22 January 2021.¹⁸

10. The tentative number for the list of witnesses remains at 96.¹⁹ To date, the Prosecution has already disclosed material related to 44 witnesses.²⁰ The Prosecution continues to be faced with significant difficulties in meeting the deadlines in this

¹³ ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

¹⁴ This total number excludes items that have already been disclosed.

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

¹⁶ ICC-02/05-01/20-169, para. 19(iii) and p. 20, order (f)(c).

¹⁷ ICC-02/05-01/20-196, p. 20.

¹⁸ 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.

¹⁹ This revised number includes a new witness that was interviewed on 23 October 2020.

²⁰ 18 of these witnesses were cited in the Applications.

case. However, the Prosecution undertakes to disclose materials related to as many witnesses as possible by 4 December 2020.

Number and type of all items disclosed during the relevant period²¹

11. On 16 November 2020, the Prosecution disclosed to the Defence 152 items (1, 210 pages) and notified the Chamber of this disclosure on 17 November 2020.²² This disclosure consisted of 5 packages – Pre-Confirmation INCRIM package 8 with 101 items (629 pages); Pre-Confirmation INCRIM package 9 with 12 items (195 pages) including 6 video files; Pre-Confirmation INCRIM package 10 with 12 items (162 pages) including 6 video files; Pre-Confirmation Rule 77 package 11 with 23 items (202 pages) including 7 video files; and Pre-Confirmation PEXO package 1 with 4 items (22 pages) including 2 video files.

12. The Prosecution also informed the Chamber in its filing on 17 November 2020 that Pre-Confirmation INCRIM package 8 with 101 items (629 pages) relates to 14 Prosecution witnesses²³ whose evidence was cited in the Applications²⁴ and/or will be relied upon at the confirmation hearing.

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 them²⁵

13. In relation to witness protection issues, and as the challenges previously reported to the Chamber persist,²⁶ since 6 November 2020 the PSU has provided clearance in relation to an additional 5 witnesses, amounting to a total of 65 witnesses. The Prosecution continues to re-establish contact with relevant witnesses.

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

²² ICC-02/05-01/20-204, para. 3.

²³ ICC-02/05-01/20-204, para. 4.

²⁴ ICC-02/05-56 and ICC-02/05-01/20-6-Red2.

²⁵ ICC-02/05-01/20-169, para. 19(v) and p. 21, order (f)(e).

²⁶ ICC-02/05-01/20-179, para. 19.

*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*²⁷

14. Annex 1, to this report contains an updated list of investigative steps that the Prosecution plans to conduct before the confirmation hearing. As stated in our fifth progress report,²⁸ Covid-19 continues to impact the Prosecution's work, primarily as it relates to the collection of additional evidence.²⁹ Nonetheless, the Prosecution has sought to mitigate the effect of Covid-19 on its work by organising remote interviews with the assistance of member states.

15. In addition, notwithstanding the current acceleration of Covid-19 infections across Europe, the Prosecution continues to actively plan missions, schedule face to face interviews, while observing Covid-19 safety measures and is actively engaged with the Sudan authorities for them to green light the mission planned to conduct investigative activities and related assessments.

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*³⁰

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 regard*³¹

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 6 November 2020, the Language Services Unit ("LSU") has completed draft translations of 6 witness statements relating to 5 witnesses, from English to Arabic (144 pages), these items are reflected in the Annex. LSU also completed the

²⁷ ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

²⁸ ICC-02/05-01/20-200, paras.14 and 15.

²⁹ See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

³⁰ ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

³¹ ICC-02/05-01/20-169, p. 21, order (f)(h).

translation of 4 other items - transcripts, notes and a sketch relating to 3 witnesses, from English to Arabic (51 pages), these items are also reflected in the Annex.

18. For translations in progress, LSU confirms that 21 items (508 pages) of evidence have been assigned and that these translations will be completed in early December, unless additional items are added. For transcriptions related to two witnesses, these are expected to be completed in draft form by 26 November 2020.

19. The Prosecution further updates the Chamber on a commitment given in the fifth progress report to complete the translation of a witness statement originally scheduled for the 30 October 2020, and shifted to 6 November 2020.³² The Prosecution confirms that this deadline was met and the witness statement is item 1 in the Annex.

20. As reported in the fifth progress report,³³ the Prosecution has not received any information from the Defence on specific sections of statements to prioritise for translation.³⁴ Additionally, while the Prosecution has made contact with the Defence on 22 October 2020 to progress this issue, we are still awaiting acknowledgement of the communication and/or the provision of the requested information.

*Update on an additional issue in accordance with the Chamber's order, issued on 12 October 2020*³⁵

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

IV. CONCLUSION

22. The Prosecution continues to make every possible effort to progress the preparation of this case as quickly and effectively as possible, but challenges remain. However, consistent with our obligations, the Prosecution stands ready to provide the Chamber with any further information it may require.

³² ICC-02/05-01/20-200, para.17.

³³ ICC-02/05-01/20-200, para.18.

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

³⁵ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.



James Stewart
Deputy Prosecutor

Dated this 20th day of November 2020

At The Hague, The Netherlands