



Original: English

No. ICC-02/05-01/20

Date: 1 December 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

Decision on Defence Request for Reclassification or Disclosure of Certain Filings

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
Mr Julian Nicholls

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 (the ‘Court’),¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), having regard to articles 54(1)(c), 57(3)(b), 67(2) of the Rome Statute (the ‘Statute’), rules 77-83 of the Rules of Procedure and Evidence (the ‘Rules’) and regulation 23bis and 42 of the Regulations of the Court (the ‘Regulations’), issues this Decision on Defence’s *Requête en vertu de l’Article 67-2 du Statut et/ou de la norme 23bis(3) du Règlement de la Cour*.

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute² and decided³ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’) for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004 (‘First Warrant’).⁴
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the First Warrant pursuant to article 58(6) of the Statute,⁵ issuing a second warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, between on or about 5 to 7 March 2004 (‘Second Warrant’).⁶
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, as ordered by the Chamber,⁷ Mr Abd-Al-Rahman made his first appearance before the Single Judge.⁸

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 on the convening of a hearing for the initial appearance of Mr Ali Kushayb, 11 June 2020, [ICC-02/05-01/07-82](#).

⁸ Transcript of hearing of Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#) (‘Initial Appearance’).

4. On 20 November 2020, the Defence filed its *Requête en vertu de l'Article 67-2 du Statut et/ou de la norme 23bis(3) du Règlement de la Cour* (the 'Request').⁹

5. On 30 November 2020, the Prosecutor responded to the Request, asking that it be rejected (the 'Response').¹⁰

II. ANALYSIS

6. The Defence requests the Chamber to reclassify a number of documents into the case record in order to allow the Defence to refer to them in the context of this case. In particular, the Defence wishes to obtain the following documents:

- a. Documents submitted to the Court by Mr David Nyekorach Matsanga in June or July 2016 regarding allegations of corruption against several current and former ICC officials, particularly former Judge Silvia Fernández de Gurmendi;
- b. All documents pertaining to the internal investigations into such allegations;
- c. Possible filings by the parties and participants, including Mr David Nyekorach Matsanga, in the proceedings related to the Situation in Darfur (ICC-02/05) and/or related cases (ICC02/05-01/07, ICC-02/05-01/09, ICC-02/05-02/09, ICC-02/05-03/09, and ICC-02/05-01/12);
- d. Any decisions rendered by the Court in relation to these documents.

7. The Defence argues that it must be able to access these documents in order to determine their possible implications for the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman. However, apart from a vague insinuation about possible corruption inside the Office of the Prosecutor, the Defence provides no cogent argument showing that any of the categories of documents could reasonably be expected to contain information relevant to the defence of the suspect in the case at hand. The

⁹ *Requête en vertu de l'Article 67-2 du Statut et/ou de la norme 23bis(3) du Règlement de la Cour*, 20 November 2020, ICC-02/05-01/20-208-Conf. A public redacted version was filed on the same day under [ICC-02/05-01/20-208-Red](#).

¹⁰ *Prosecution's response to "Requête en vertu de l'Article 67-2 du Statut et/ou de la norme 23bis(3) du Règlement de la Cour"*, 20 November 2020, ICC-02/05-01/20-208-Conf, ICC-02/05-01/20-215-Conf.

Defence's claim that they might cast doubt on the credibility of a number of video recordings of meetings between members of the Office of the Prosecutor and representatives of the Sudanese authorities that took place in 2007 is entirely speculative and unsubstantiated. The Defence were expected at the very least to identify which parts of the exhibits in question could potentially be tainted by the supposed illegal or unethical conduct of some members of the Office of the Prosecutor and would have had to explain how these videos could affect the defence of the suspect.

8. The Single Judge further notes that the primary obligation to disclose potentially exonerating evidence rests upon the Prosecutor. If the Prosecutor is in possession of material or information related to allegations of wrongdoing that is relevant to the present case, it is incumbent upon the Office of the Prosecutor to disclose this to the Defence. There is no indication that the Prosecutor has hitherto deliberately withheld relevant information.

9. The Chamber is not aware of any filings pertaining to the allegations of Mr David Nyekorach Matsanga in any of the proceedings related to the situation in Darfur. To the extent that some of the documents sought by the Defence, assuming that they exist, are not in the case record or in the possession of the Prosecutor, it is not the Chamber's responsibility to locate them. As far as filings in other situations or cases is concerned, the Single Judge notes that this Chamber does not have the power to reclassify them.

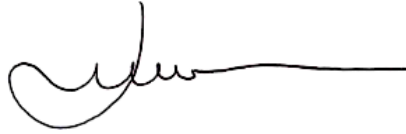
10. As regards the Defence's request to obtain access to documents pertaining to possible internal investigations, the Single Judge notes that the Chamber does not have the power to compel the Internal Oversight Mechanism ("IOM") to divulge information pertaining to its investigations, which are subject to strict confidentiality.¹¹ The Single Judge further understands that in the matter referred to in the Request, the IOM has already transmitted its report to the relevant Head(s) of Organ(s). If wrongdoing on the part of current or former OTP elected officials or staff members has been established by the IOM, this information should thus already be in the possession of the Prosecutor. As noted above, it is the Prosecutor's responsibility to determine whether such information, if it exists, is of exculpatory nature and therefore subject to disclosure. In case of doubt, the Prosecutor can seize the Chamber pursuant to rule 83 of the Rules.

¹¹ ICC-ASP/8/Res.1; ICC-ASP/12/Res.6 Independent Oversight Mechanism

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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

A handwritten signature in black ink, consisting of a stylized 'R' followed by a long horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Tuesday, 1 December 2020

At The Hague, The Netherlands