



Original: English

No. ICC-02/05-01/20

Date: 8 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

Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence

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, issues this Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence (the ‘Rules’).

I. Procedural background

1. On 31 March 2005, the United Nations Security Council referred the situation in Darfur, Sudan, since 1 July 2012 to the Prosecutor.¹
2. On 27 April 2007, Pre-Trial Chamber I 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.
3. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, issued a second warrant of arrest against Mr Abd-Al-Rahman (the ‘Second Warrant of Arrest’)⁴ 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.
4. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court, and 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.⁵
5. On 12 June 2020, the Chamber severed 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”)* and ordered the Registrar to open a new case record and assign it a new case number.⁶

¹ S/RES/1593(2005).

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 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).

⁵ Decision on the designation of a Single Judge, ICC-02/05-01/07-80.

⁶ Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87.

6. On 15 June 2020, during his first appearance, Mr Abd-Al-Rahman suggested, through his counsel, that a minute of silence be observed in memory of the victims of the situation in Darfur. The Single Judge, while ‘understand[ing] the purpose of the request’, noted that the courtroom was ‘not the place’ to submit this type of requests, and, accordingly, rejected the request;⁷ subsequently, the 18 August 2020 ‘Decision on the Defence Request to provide written reasoning for two oral decisions’⁸ further clarified that hearings before a Chamber are governed by strict rules and that, accordingly, proposing a minute of silence fell outside the object and purpose of the hearing, exceeded the prerogatives of the suspect and impinged upon the Chamber’s powers and duties, no matter how worthy or otherwise important the reflection might be.

7. In its 17 July 2020 ‘*Requête et observations sur les réparations en vertu de l’Article 75-1*’,⁹ as well as in several subsequent filings,¹⁰ the Defence for Mr Abd-Al-Rahman reiterated the suspect’s concern for all the victims in the situation, including in light of the seriousness of their suffering as a consequence ‘*des conflits au Darfour*’;

⁷ Transcript of hearing, 15 June 2020, ICC-02/05-01/20-T-001-ENG, page 22, lines 4-12.

⁸ ICC-02/05-01/20-118.

⁹ ICC-02/05-01/20-98, paras 4 (‘Mr Ali Muhammad Ali Abd-Al-Rahman [...] est animé d’une préoccupation sincère à l’égard des victimes de la Situation au Darfour et des affaires y relatives, y compris la sienne. [...] [I]l émet la crainte que les victimes qui ont souffert des conflits au Darfour doivent encore faire face à d’amères déceptions à l’issue d’une procédure longue, sans perspective de réparations significatives’), 99 (‘la nécessité d’offrir à l’ensemble des victimes de la Situation au Darfour une réparation appropriée, adéquate et rapide trouvent leur solution dans l’analyse proposée des dispositions du droit international pertinent [...]').

¹⁰ *Mémoire d’appel de trois décisions*, 9 September 2020, ICC-02/05-01/20-148, para. 23 (‘La demande formulée par Mr Ali Muhammad Ali Abd-Al-Rahman de procéder à une minute de silence à l’audience en mémoire des victimes de crimes au Darfour et, plus largement, au Soudan s’inscrivait dans le cadre de ses prérogatives, en qualité d’individu certes accusé par le BdP mais présumé innocent venu de sa propre initiative et librement comparaître devant la Cour pour y trouver la justice, aussi bien pour lui-même que pour toutes les victimes de la violence armée dans son pays. Elle témoignait de sa préoccupation sincère pour les souffrances des victimes, dont l’authenticité a depuis été confirmée par ses Requête et Observations sur les réparations en vertu de l’Article 75-1 du Statut [...]); *Mémoire d’appel de la décision ICC-02/05-01/20-117*, 9 September 2020, ICC-02/05-01/20-147, para. 44 (‘[...] son droit, enfin, de contribuer à son humble mesure au retour de la paix et à la réconciliation dans le pays qu’il affectionne tant et qu’il a choisi de quitter afin de venir se présenter librement à la justice de la Cour, le Soudan’); *Réponse aux Observations du Bureau du Procureur ICC-02/05-01/20-209-CONF*, 26 November 2020, ICC-02/05-01/20-213-Conf, para. 11 (‘Quels que soient les motifs de la reddition de Mr Ali Muhammad Ali Abd-Al-Rahman – qui ne sont ici ni admis, ni discutés –, le BdP ne peut refaire l’histoire et nier que ce dernier a pris l’initiative de se rendre volontairement afin de se soumettre à la justice de la Cour et que ce fait doit être mis à son crédit’).

the request to honour the victims by observing a minute of silence was also submitted before the Appeals Chamber.¹¹

II. Analysis

8. Pursuant to rule 69 of the Rules, '[t]he Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims'.

9. The Single Judge notes that the possibility for the parties to agree on issues and facts relevant to the charges constitutes an important procedural tool, allowing both the parties and the Chamber to narrow the scope of the matters to be addressed and to focus on those in dispute, by eliminating the need to discuss the facts covered by the agreement; as such, it is a tool directly instrumental to the overall efficiency and expeditiousness of the proceedings. The Single Judge also recalls that in the same vein, under art. 69(6) of the Statute the Court may take judicial notice of facts of common knowledge.

10. Parties have therefore often been encouraged to explore the possibility to reach such an agreement, both at the pre-trial¹² and at the trial¹³ stage; in some instances, the

¹¹ *Requête relative au déroulement de l'audience du 8 octobre 2020*, 5 octobre 2020, ICC-02/05-01/20-175, para. 1.

¹² Pre-Trial Chamber I, *The Prosecutor v. Bahr Idriss Abu Garda*, Open Session Hearing with the Office of the Prosecutor, the Defence and the Registry, 23 September 2009, ICC-02/05-02/09-T-11-ENG, pp. 27-28 ('The Chamber encourages the Prosecution to take the initiative and maybe we can shorten the duration of the confirmation hearing on the basis of agreed facts that need not be discussed during the hearing').

¹³ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision Setting the Commencement Date of the Trial, 6 January 2020, ICC-01/12-01/18-548, para. 20; Trial Chamber II, *The Prosecutor v. Germain Katanga*, Open Session Hearing with the Office of the Prosecutor, Defence and Legal Representatives, 2 October 2009, ICC-01/04-01/07-T-72-ENG, p. 31; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58, para. 27; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440.

initiative to propose a list of potential agreed facts¹⁴ and/or to file joint submissions before the relevant Chamber¹⁵ was taken by the parties themselves, with the agreement in some cases covering a number of sections of the Document Containing the Charges,¹⁶ in others extending to the entirety of the material facts alleged therein.¹⁷

11. The case of Mr Abd-Al-Rahman, who repeatedly stated having voluntarily surrendered to the Court with a view to find justice, not only for himself but to the benefit of all victims of conflicts and armed violence in Darfur and, more broadly, in Sudan,¹⁸ would seem particularly suited to allow the parties to reach an agreement potentially broad and significant in scope. The Single Judge also recalls the precedent in point of the *Abu Garda* case, where the Chamber highlighted that it was not required to analyse in detail the factual background on the situation in Darfur, Sudan, since much of it was either a matter of public knowledge or had been agreed on by the parties.¹⁹

12. The Single Judge specifically encourages the parties to reach an agreement on the contextual element for war crimes, namely the existence of an armed conflict not of an international character in Darfur during all times relevant to the alleged events, as well as on the factual aspects of the contextual element for crimes against humanity as presented by the Applications of the Prosecutor under article 58 of the Statute²⁰ and/or as established by the Report of the International Commission of Inquiry on Darfur to

¹⁴ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims' participation at trial, 12 March 2015, ICC-01/04-02/06-507, para. 12.

¹⁵ Prosecutor and Defence, *The Prosecutor v. Dominic Ongwen*, Joint Prosecution and Defence submission on agreed facts, 1 July 2016, ICC-02/04-01/15-487, para. 3.

¹⁶ Prosecutor and Defence, *The Prosecutor v. Bahr Idriss Abu Garda*, Defence and the Office of the Prosecutor's submission of facts contained in the Document Containing the Charges that the Parties agree to for the purposes of the confirmation hearing pursuant to Rule 69 of the Rules of Procedure, 14 October 2009, ICC-02/05-02/09-164, para. 3 ('The Parties hereby respectfully submit to the Pre-Trial Chamber, in the attached confidential annexure, sections of the DCC that they agree to, solely for the purposes of the Confirmation Hearing').

¹⁷ Prosecutor and Defence, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Joint Submission by the Office of the Prosecutor and the Defence as to Agree Facts and submissions regarding modalities for the conduct of the Confirmation hearing, 19 October 2010, ICC-02/05-03/09-80.

¹⁸ See *supra* footnotes 9-10.

¹⁹ Pre-Trial Chamber I, *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 15.

²⁰ Prosecutor's Application under Article 58(7), 27 February 2007, ICC-02/05-55-Conf-Red; 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.

the United Nations Secretary-General of 25 January 2005 recalled in United Nations Security Council Resolution S/RES/1593(2005) as well as in other relevant documents of the Security Council and the General Assembly.²¹

13. As to the time frame for reaching agreement and submitting it to the Chamber, the parties are instructed to liaise as expeditiously as feasible for these purposes and to report back to the Chamber at the earliest possible opportunity. Whilst the scope of the agreement can always be expanded at a later stage, the parties are expected to submit a first report no later than Monday, 18 January 2021.

14. The Single Judge clarifies that, whilst desirable in light of its potential usefulness in enhancing the efficiency of the confirmation proceedings, any agreement reached between the parties on relevant facts will be without prejudice to the Chamber's prerogative to order "a more complete presentation of the alleged facts", whenever such complete presentation "is required in the interests of justice, in particular the interests of the victims".²²

²¹ See for example Security Council, Resolution 2113, [S/RES/2113\(2013\)](#), 30 July 2013, p. 3 and paras 15 and 17; Security Council, Working Group on Children and Armed Conflict, [S/AC.51/2008/7](#), 5 February 2008, paras 4 and 13(d)(iii); Security Council, Resolution 1769, [S/RES/1769\(2007\)](#), 31 July 2007, p. 2; Security Council, Statement by the President of the Security Council, [S/PRST/2004/18](#), 26 May 2004, p. 1; General Assembly, Fifty-ninth session, Third Committee, Human rights questions: human rights situations and reports of special rapporteurs and representatives, [A/C.3/59/L.48](#), 8 November 2004, paras 2 and 3(b).

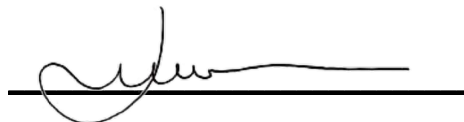
²² Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Confirmation of Charges, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 45.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

INSTRUCTS the Prosecutor and the Defence to liaise without delay with a view to reaching agreements about non-contentious issues and facts relevant to the charges, within the meaning and for the purposes of rule 69 of the Rules;

ORDERS the Prosecutor and the Defence to submit a joint report to the Chamber on the status of advancement of their discussions and the progress made no later than Monday, 18 January 2021.

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



Judge Rosario Salvatore Aitala
Single Judge

Dated this Tuesday, 8 December 2020

At The Hague, The Netherlands