



Original: **English**

No.: ICC-02/05-01/20
Date: 22 January 2021

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 tenth 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 tenth 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 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 witnesses. Pursuant to regulation 23bis(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 ninth progress report submitted on 8 January 2021.⁴ 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-02/05-01/20-249.

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 15 January 2021, the Prosecution disclosed three witness statements cited in the Prosecution's applications under article 58 of the Statute ("Applications"). The total number of items cited in these Applications is 278.⁷ To date, the Prosecution has disclosed 251 items out of a total of 278 items cited in these Applications, including material related to 44 witnesses. The remaining 27 items, including material related to 22 witnesses, will be disclosed in the coming weeks with or without redactions applied to the witnesses' identifying information. In total, there are 66 witnesses cited in the Applications. Not all witnesses cited in the Applications are placed on the provisional witness list for 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*⁸

5. There are currently 34,738 items (176,425 pages) registered in the Prosecution's Ringtail database. To date, the Prosecution has reviewed 17,538 items (86,712 pages). There remain 17,200 items (89,713 pages) in the collection still requiring both primary and secondary review, which include newly registered evidence. The Prosecution is prioritising the review of the material related to the witnesses whose evidence will be relied upon at the confirmation hearing and/or were cited in the Applications. In order to meet the deadlines set by the Chamber, the Prosecution has created detailed keyword searches and will prioritise the review of the items responsive to these searches.

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

⁷ Previously, the Prosecution informed the Chamber that there were a total of 283 items cited in the Applications, including the ERN range of the audio/video files collected during the Prosecution's mission to Khartoum in 2007. However, following instructions from the Chamber's legal officer sent by email on 12 November 2020, the Prosecution is of the view that five of these items are either duplicates or bear non-evidentiary value and do not warrant disclosure.

⁸ ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

*Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting*⁹

6. Since the last progress report,¹⁰ the provisional list of witnesses for the confirmation hearing remains at 105 witnesses, of which the Prosecution has already disclosed material related to 68 witnesses. The material related to the remaining 37 witnesses will be disclosed in the coming weeks, in line with the Chamber's deadline.

7. The above numbers do not include other disclosed witnesses that the Prosecution does not currently intend to rely on for the purposes of the confirmation hearing. To date, the Prosecution has disclosed an additional seven witnesses not included on its current witness list for the confirmation hearing, making a total of 75 witnesses disclosed to date.

8. Pursuant to the Single Judge's instruction, conveyed by email on 19 January 2021, the Prosecution has added in Annex 3 the dates when it first disclosed via eCourt statements and transcripts for each of the 105 witnesses on its provisional list of witnesses for confirmation. In addition, Annex 3 now includes the witness codes and disclosure dates for each of the other relevant witnesses disclosed to date which the Prosecution does not intend to rely on at the confirmation hearing.

*Number and type of all items disclosed during the relevant period*¹¹

9. Since the last progress report, primary review has been carried out on 1,409 items (10,109 pages), of which 293 items (3,472 pages) have been recommended for disclosure.

10. On 15 January 2021, the Prosecution disclosed 2,450 items (6,183 pages) to the Defence.¹² The disclosed items are in the following packages:

- Pre-Confirmation INCRIM package 16: contains 498 items (2,812 pages);

⁹ ICC-02/05-01/20-169, para. 19(iii) and p. 20, order (f)(c).

¹⁰ ICC-02/05-01/20-249, para. 7.

¹¹ ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

¹² ICC-02/05-01/20-262 + Conf-Anxs.

- Pre-Confirmation INCRIM package 17: contains 578 items (860 pages);
- Pre-Confirmation Rule 77 package 12: contains 1,360 items (2,464 pages);
- Pre-Confirmation PEXO package 2: contains 13 items (22 pages);
- Pre-Confirmation Image Update package 1: contains 1 item (25 pages).

11. INCRIM Packages 16 and 17 contain items related to five witnesses not previously disclosed to the Defence.

12. Pre-Confirmation Image Update package 1 contains the statement of Witness P-0119 that was disclosed on 7 December 2020 with additional redactions applied to the identifying information of the witness.

13. The Prosecution also informed the Single Judge that in these INCRIM packages, the majority of the disclosed items are either cited in the Applications 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 them*¹³

14. In relation to witness protection issues, in light of the ongoing challenges most recently reported in the Second Postponement Request,¹⁴ since 8 January 2021 the Protection Strategies Unit of the Office of the Prosecutor ("PSU") has provided clearance in relation to one additional witness, amounting to a total of 89 witnesses. This number includes confirmation witnesses, as well as other witnesses not included on the Prosecution's current witness list. The Prosecution continues to re-establish contact with additional relevant witnesses.

*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*¹⁵

¹³ ICC-02/05-01/20-169, para. 19(v) and p. 21, order (f)(e).

¹⁴ ICC-02/05-01/20-218-Conf, paras. 16-19; ICC-02/05-01/20-218-SECRET-Exp-Anx1.

¹⁵ ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

15. Annex 1 to this report contains an updated list of investigative steps being undertaken by the Prosecution in preparation for the confirmation hearing. As stated in the previous progress reports,¹⁶ the COVID-19 pandemic continues to impact the Prosecution's work, primarily as it relates to the collection of evidence.¹⁷

16. The Prosecution is seeking to take mitigating measures to counter the effect of the COVID-19 restrictions on its investigative activities. However, as reflected in Annex 1, with the nationwide lockdown and more stringent measures activated in other jurisdictions, the planned investigative activities continue to be negatively impacted.

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*¹⁸

17. 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*¹⁹

18. Annex 3 to this report contains a list of the witness statements and transcripts relating to the 105 witnesses 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 and translation into Arabic. With the exception of five witness statements for which translation is in progress, draft translations have been prepared in relation to all statements of witnesses who are currently placed on the provisional confirmation list of witnesses.

19. The Prosecution has taken note of the Chamber's order that it provide the draft translations that are already available to the Defence as soon as possible, and

¹⁶ ICC-02/05-01/20-200, paras. 14 and 15; ICC-02/05-01/20-207, paras. 14 and 15.

¹⁷ See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

¹⁸ ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

¹⁹ ICC-02/05-01/20-169, p. 21, order (f)(h).

for all remaining translations to be provided on a rolling basis, with revised versions to be provided in due course.²⁰ The first batch of 33 draft translations of witness statements was registered on 15 January 2021 and the Prosecution is currently preparing these statements for disclosure as soon as possible. During the reporting period, the Language Services Unit revised 10 draft translations, which were submitted for registration on 21 January 2021, and the Prosecution will begin disclosing them to the Defence in the coming weeks.

*Update on an additional issue in accordance with the Chamber's order, issued on 12 October 2020*²¹

20. Annex 4 to this report contains the latest information on this matter.

IV. CONCLUSION

21. The Prosecution continues to make every possible effort to progress the preparation of this case as quickly and effectively as possible. The Prosecution stands ready to provide the Chamber with any further information it may require.



James Stewart
Deputy Prosecutor

Dated this 22nd day of January 2021

At The Hague, The Netherlands

²⁰ ICC-02/05-01/20-238, para. 45 and p. 15.

²¹ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.