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No.: ICC-02/05-01/20

Date: 5 March 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 thirteenth 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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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Prosecution submits its thirteenth 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 2020<sup>1</sup> and 2 October 2020.<sup>2</sup> The Prosecution also provides updates on an additional issue in accordance with the Chamber’s decision, issued on 12 October 2020.<sup>3</sup>

## 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 witnesses. 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 twelfth progress report submitted on 19 February 2021.<sup>4</sup> Pursuant to the Single Judge’s order issued on 16 February 2021, the Prosecution also provides an update on its discussions with

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<sup>1</sup> ICC-02/05-01/20-116, paras. 16-17 and p. 8.

<sup>2</sup> ICC-02/05-01/20-169, para. 19 and p. 20-21, order (f).

<sup>3</sup> ICC-02/05-01/20-181-Conf, para. 13 and p. 6.

<sup>4</sup> ICC-02/05-01/20-285.

the Defence on “agreements as to the evidence”.<sup>5</sup> Pursuant to the Chamber’s decision issued on 12 October 2020,<sup>6</sup> the Prosecution also provides its update in Annex 4.

*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*<sup>7</sup>

4. Since the last progress report,<sup>8</sup> the Prosecution has disclosed items related to 12 witnesses.<sup>9</sup> Of these witnesses, seven are on the list of witnesses for confirmation.<sup>10</sup> Of the total of 278 items cited in the Prosecution’s applications under article 58 of the Statute (“Applications”), the number of disclosed items is now at 263, including 54 witnesses. The remaining 15 items, including material related to 12 witnesses, will be disclosed in the coming weeks.

*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*<sup>11</sup>

5. There are currently 35,052 items (178,223 pages) registered in the Prosecution’s Ringtail database. To date, the Prosecution has reviewed 25,730 items (138,230 pages). There remain 9,322 items (39,993 pages) in the collection still requiring both primary and secondary review, which include newly registered evidence. The Prosecution continues to prioritise the review of the material related to the witnesses whose evidence will be relied upon at the confirmation hearing, were cited in the Applications, and those responsive to keyword searches.

*Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting*<sup>12</sup>

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<sup>5</sup> ICC-02/05-01/20-260. Email from the Pre-Trial Chamber II communications, 16 February 2021 17:04, “The Prosecutor is instructed to henceforth include updates about the status of discussions on agreements as to evidence in the bi-weekly progress reports.”

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

<sup>7</sup> ICC-02/05-01/20-169, para. 19(i) and p. 20, order (f)(a).

<sup>8</sup> ICC-02/05-01/20-278, para. 4.

<sup>9</sup> Witnesses P-0032, P-0034, P-0037, P-0046, P-0053, P-0076, P-0087, P-0105, P-0118, P-0643, P-0877 and P-0892.

<sup>10</sup> Witnesses P-0034, P-0087, P-0105, P-0118, P-0643, P-0877 and P-0892.

<sup>11</sup> ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

6. The provisional list of witnesses for the confirmation hearing now stands at 108 witnesses<sup>13</sup> after the Prosecution withdrew P-0032 and added P-0883 and P-0913, who were recently interviewed. Of the 108 witnesses for the confirmation hearing, the Prosecution has disclosed material related to 86 witnesses. The material related to the remaining 22 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. Since its last report, the Prosecution has disclosed an additional five witnesses<sup>14</sup> not included on its current witness list for the confirmation hearing, making a total of 102 witnesses disclosed to date.

8. Annex 3 to this report, tailored in accordance with the Single Judge's instructions conveyed by email on 19 January 2021,<sup>15</sup> contains the updated information in relation to the recently disclosed witnesses.

*Number and type of all items disclosed during the relevant period<sup>16</sup>*

9. Since the last progress report, primary review has been carried out on 1,203 items (10,582 pages), of which 381 items (5,451 pages) have been recommended for disclosure but pending second review.

10. On 24 February 2021, the Prosecution disclosed to the Defence 263 items (1,230 pages).<sup>17</sup> The disclosed items are in the following packages:

- Pre-Confirmation INCRIM package 24: contains 84 items (429 pages)
- Pre-Confirmation INCRIM package 25: contains 42 items (457 pages)

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<sup>12</sup> ICC-02/05-01/20-169, para. 19(iii) and p. 20, order (f)(c).

<sup>13</sup> Three recently interviewed witnesses have been added: P-0878, P-0905, P-0919 and an existing witness, P-0606. This is also reflected in Annex 3 to this report.

<sup>14</sup> Witnesses P-0032, P-0037, P-0046, P-0053 and P-0076.

<sup>15</sup> ICC-02/05-01/20-265, para. 8.

<sup>16</sup> ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

<sup>17</sup> ICC-02/05-01/20-286 and ICC-02/05-01/20-286-Conf-Anxs. A-C.

- Pre-Confirmation Rule 77 package 15: contains 137 items (344 pages)

11. In these packages, the disclosed items belong to witnesses whose identities cannot be disclosed at this stage. The Prosecution applied the redactions to the information that might reveal the witnesses' identities as instructed by the Chamber.<sup>18</sup> On 26 February, the Prosecution has filed its second application for the authorisation of non-disclosure of the identifying information of 18 witnesses.<sup>19</sup> 12 of these witnesses were disclosed on 24 February.

*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*<sup>20</sup>

12. In relation to witness protection issues, since 19 February 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 104 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.

*Updates on the status of discussions on agreements as to evidence*

13. Pursuant to the Order of the Single Judge on 16 February 2021<sup>21</sup>, the Prosecution reports that since its last report<sup>22</sup> and as set out in the Joint Prosecution and Defence submission on agreed facts which will be filed today, the Prosecution and the Defence have agreed a list of 17 facts relating to the contextual elements of war crimes.

14. On 28 February 2021, the Prosecution submitted to the Defence a list of nine proposed facts ("proposed facts") relating to the contextual elements of crimes

<sup>18</sup> ICC-02/05-01/20-196, para. 34.

<sup>19</sup> ICC-02/05-01/20-287-Conf-Red.

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

<sup>21</sup> ICC-02/05-01/20-260. Email from the Pre-Trial Chamber II communications, 16 February 2021 17:04, "The Prosecutor is instructed to henceforth include updates about the status of discussions on agreements as to evidence in the bi-weekly progress reports."

<sup>22</sup> ICC-02/05-01/20-285.

against humanity. On 3 March 2021, the Defence submitted a response wherein it agreed in principle to six facts without any amendments. The Defence suggested an amendment to one proposed fact and rejected two others. The Prosecution is currently reviewing the Defence's suggested amendment. The Prosecution has also identified additional facts relating to the contextual elements of crimes against humanity which may be suitable for agreement. An updated list will be provided to the Defence in due course.

15. The Prosecution continues to assess the potential to agree facts in other areas with a view to ensuring the efficient and expeditious disposal of proceedings. Should any be identified it will submit these to the Defence and update the Chamber.

*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*<sup>23</sup>

16. 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,<sup>24</sup> the COVID-19 pandemic continues to negatively impact the Prosecution's work, primarily in relation to the collection of evidence.<sup>25</sup>

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*<sup>26</sup>

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*<sup>27</sup>

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<sup>23</sup> ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

<sup>24</sup> ICC-02/05-01/20-200, paras. 14 and 15; ICC-02/05-01/20-207, paras. 14 and 15; ICC-02/05-01/20-265, paras. 15-16 and ICC-02/05-01/20-278, para. 13.

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

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

<sup>27</sup> ICC-02/05-01/20-169, p. 21, order (f)(h).

18. Annex 3 to this report contains a list of the witness statements and transcripts relating to the 108 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.

19. During the reporting period, the Language Services Unit (“LSU”) completed two draft translations for Witnesses P-0892 and P-0919. Of the 108 witness statements listed in Annex 3, draft translations are pending only for four witnesses,<sup>28</sup> as they were recently interviewed and placed on the provisional confirmation list of witnesses. With respect to Witness P-0905, significant progress has been made in producing a draft translation.

20. Since the last report, LSU has revised six draft translations for Witnesses P-0012, P-0070, P-0082, P-0086, P-0108 and P-0114. The Prosecution is preparing the next batch of Arabic translations of witness statements for disclosure in the coming week.

*Update on an additional issue in accordance with the Chamber’s order, issued on 12 October 2020*<sup>29</sup>

21. Annex 4 to this report contains the latest 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.

<sup>28</sup> Witnesses P-0878, P-0883, P-0905 and P-0913.

<sup>29</sup> ICC-02/05-01/20-181-Conf, para. 13 and p. 6.





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**James Stewart**  
**Deputy Prosecutor**

Dated this 5<sup>th</sup> day of March 2021

At The Hague, The Netherlands