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

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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Tomoko Akane
Judge Kesia-Mbe Mindua

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB")**

Public

Prosecution's response to "*Soumission de l'inventaire des preuves de la Défense en vertu de la Règle 121-6*"

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. In its “*Soumission de l’inventaire des preuves de la Défense en vertu de la Règle 121-6*” (“Application”),¹ the Defence (1) requests that Pre-Trial Chamber II (“Chamber”) authorise it to disclose an expert report pertaining to the alias Ali Kushayb (“Expert Report”), at a later time, (“Request”); (2) informs the Chamber that it was not able to disclose the translations into a working language of the Court (“Translations”) of some Arabic documents included in its List of Evidence (“LOE”) by the set time, and will do so at a later time when they become available; and (3) notifies the Chamber that in addition to the items listed in its LOE, it may rely during the confirmation hearing on all documents disclosed by the Prosecution under any classification.

2. As set out in more details below, the Prosecution opposes the Defence’s Request to authorise the late disclosure of the Expert Report, does not oppose the disclosure of the Translations when they become ready, provided that such disclosure is effected within a reasonable time prior to the confirmation hearing, and requests the Chamber to order the Defence to itemise all the evidence it intends to rely on for the purpose of the confirmation hearing regardless of whether it emanates from the Defence or the Prosecution.

II. SUBMISSIONS

The Request is ill-founded and should be rejected

3. As stated by the Defence, the Expert Report in question is intended to assess whether the suspect has any clinical or psychological signs potentially caused by a history of alcohol addiction in order to “*étayer la réfutation de l’ alias ‘Ali Kushayb’*”.²

4. While the nexus between this expertise and the name issue is not apparent or specifically articulated in the Application, it is clear from the purpose of the report (refuting the attribution of the alias Ali Kushayb to the suspect), that the subject

¹ ICC-02/05-01/20-381.

² ICC-02/05-01/20-381, para. 5.

matter of this report is neither an article 31(1) defence, nor a novel issue that the Defence could not have anticipated sufficiently in advance of the deadline for submission of its LOE.

5. Evidently, the Defence is well aware of the attribution of this alias to the suspect from the beginning of the case. The issue was first raised during the initial appearance hearing held on 15 June 2020.³ This issue was then subject to instructions from the Chamber and detailed litigations by the parties.⁴ The Defence was therefore in a position to request and obtain the Expert Report at an early stage to allow for its disclosure by the prescribed deadline. Its failure to do so demonstrates that there is no good cause to support the Request as required by regulation 35(1) of the Regulations of the Court (“Regulations”).

6. Nor is the Defence permitted to submit this evidence at a later stage pursuant to the instructions of the Chamber as argued by the Defence.⁵ The paragraph cited by the Defence in support of its interpretation of the Chamber’s instructions⁶ concerns the possible invocation of an alibi defence or grounds for excluding criminal responsibility.⁷ It does not extend to submission of evidence in support of any other arguments the Defence wishes to raise such as this pertaining to the litigation on the alias of the suspect. The Request is therefore ill-founded and should be rejected.

The Prosecution does not object to the late disclosure of the Translations if such disclosure is effected within a reasonable time prior to the confirmation hearing.

7. The Prosecution does not oppose allowing the Defence to disclose and include into its LOE the Translations, given that the original documents were disclosed in time. However this should be done within a reasonable time prior to the confirmation hearing.

³ ICC-02/05-01/20-T-001-ENG, p.3 ,l. 19-21.

⁴ See ICC-02/05-01/20-1; ICC-02/05-01/20-4; ICC-02/05-01/20-8; ICC-02/05-01/20-196, p. 20; ICC-02/05-01/20-224; ICC-02/05-01/20-235.

⁵ Application, para. 3.

⁶ ICC-02/05-01/20-378, para. 17.

⁷ Article 31(1) of the Statute and rule 121(9) of the Rules of evidence and procedure (“Rules”).

The Defence's notice of its reliance on all evidence disclosed by the Prosecution should be denied and it should be instructed to itemise the evidence on which it intends to rely

8. By simply notifying the Chamber that it would rely on the evidence disclosed by the Prosecution⁸ without proper specification or itemisation of the evidence it intends to rely on, the Defence fails to meet its obligation as required by rule 121(6) of Rules. Pursuant to this rule, the Defence is required to provide a list of the evidence it intends to rely on regardless of whether it originates from the Prosecution or from the Defence.

9. Providing this list is necessary for the proper conduct of the proceedings as it enables the Chamber, parties and participants to focus their preparation for the confirmation hearing on a specified body of evidence as opposed to all evidence disclosed in the case.

10. The obligation under rule 121(6) of the Rules would simply be rendered redundant and its purpose would be defeated, if parties are allowed to make a general notice indicating their intention to rely on the evidence in the case record in its entirety without specification.⁹

11. When Pre-Trial Chamber A was faced with a similar issue in *Gicheru*, it considered in a recent decision that “the Defence’s obligation to indicate which evidence it intends to present also encompasses items which emanate from the Prosecutor, as held by previous chambers”,¹⁰ and ordered the Defence to “indicate any further evidence disclosed by the Prosecutor which it intends to rely on”¹¹.

12. The fact that Pre-Trial Chamber A found it necessary for the Defence to specify the items it intends to rely on in *Gicheru*, a much smaller article 70 case,

⁸ Application, para. 7.

⁹ That is precisely the case at hand, because the Defence intends to rely on 29 items which represent all of the evidence it disclosed thus far, in addition to all other evidence disclosed by the Prosecution.

¹⁰ ICC-01/09-01/20-133, para. 10 which also cites to decisions ICC-01/04-01/06-640, p. 2; and ICC-02/11-02/11-164, para. 6.


¹¹ ICC-01/09-01/20-133, p. 6.

makes it all the more imperative that in the present case the Defence is ordered to do so. Simply referring to all evidence disclosed in the case – more than 13,000 items – is of no assistance to the Chamber, parties and participants and does not serve to give a proper notice.

13. The Prosecution therefore requests that the Chamber find the general notice of the Defence insufficient and order it to indicate the specific evidentiary items on which it intends to rely for the purpose of the confirmation hearing from the evidence disclosed by the Prosecution.

III. CONCLUSION

14. For the above reasons, the Prosecution opposes the Defence's Request to authorise the late disclosure of the Expert Report, does not oppose the disclosure of the Translations when they become ready, provided that such disclosure be effected within a reasonable time prior to the confirmation hearing, and requests that the Chamber order the Defence to list all the evidence it intends to rely on for the purpose of the confirmation hearing.



Fatou Bensouda
Prosecutor

Dated this 12th day of May 2021

At The Hague, The Netherlands