

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-01/20

Date: 12 October 2020

PRE-TRIAL CHAMBER II

Before:

Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Confidential

Decision on the 'Prosecution's Report Relating to Items Received from the Registry
Pursuant to Decision ICC-02/05-01/20-123-Conf'

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,¹ having regard to articles 54(3)(a) and 57(3)(a) of the Rome Statute and regulation 16(2) of the Regulations of the Registry, issues this Decision on the 'Prosecution's Report Relating to Items Received from the Registry Pursuant to Decision ICC-02/05-01/20-123-Conf'.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.²
2. On 11 June 2020, the Prosecutor submitted the 'Prosecution's request for evidence in the custody of the Registry' (the 'Request for Evidence').³
3. On 13 June 2020, the Registry submitted a filing providing information and seeking instructions concerning certain items that were handed over to the Registry by the authorities of the Central African Republic when Mr Abd-Al-Rahman surrendered and was transferred to the Court.⁴
4. On 3 July 2020, the Defence filed its response to the Request for Evidence.⁵
5. On 20 August 2020, the Single Judge issued a decision on the Request for Evidence (the 'Decision') in which, *inter alia*, the Single Judge (i) issued a warrant for the seizure of certain items; (ii) ordered the Registry to hand over eight documents as well as three mobile phones and two SIM cards to the Prosecutor; and (ii) ordered that one month after receiving the items the Prosecutor shall return to the Registry, for safekeeping on behalf of Mr Abd-Al-Rahman, any items for which no relevant information was found, and seize and store in the Registry vault any items containing relevant information.⁶

¹ Decision on the designation of a Single Judge, 9 June 2020, [ICC-02/05-01/07-80](#).

² See, for example, Decision on the Defence Request to provide written reasoning for two oral decisions, 18 August 2020, [ICC-02/05-01/20-118](#), paras 1-4.

³ ICC-02/05-01/07-83-US-Exp (confidential redacted versions notified on 26 June 2020, ICC-02/05-01/20-9-Conf-Red; public redacted version notified on 9 July 2020, [ICC-02/05-01/20-9-Red2](#)).

⁴ ICC-02/05-01/20-91-US-Exp.

⁵ Réponse à la Requête ICC-02/05-01/20-9-Conf-Red, ICC-02/05-01/20-16-Conf.

⁶ Decision on the Prosecution's request for evidence in the custody of the Registry (ICC-01/05-01/20-9-Red2) and the Registry's request for instructions (ICC-01/05-01/07-86-US-Exp), ICC-02/05-01/20-123-Conf.

6. On 25 September 2020, the Prosecutor submitted a report relating to items obtained from the Registry (the 'Report').⁷

II. SUBMISSIONS

7. In the Report, the Prosecutor indicates that on 25 August 2020, pursuant to the Decision, Prosecution investigators met with representatives of the Registry and were provided with the relevant items. The items were then registered by the Information and Evidence Unit of the Prosecution, and access to them has been restricted to persons who require it for the purposes of the Darfur investigation.

8. Following its review of the material, the Prosecution sets out its preliminary findings regarding the evidential and investigative value of the material in the Report, and proposes to return the following items to the Registry to be safeguarded and preserved as evidence for the duration of the proceedings:

- Huawei phone;
- SIM cards;
- SD card; and
- Six documents: DAR-OTP-0216-0234,⁸ DAR-OTP-0216-0235,⁹ DAR-OTP-0216-0237,¹⁰ DAR-OTP-0216-0239,¹¹ DAR-OTP-0216-0241,¹² DAR-OTP-0216-0243¹³ (the 'Six Documents').

9. The Prosecution indicates that it lacked the capability to forensically extract all data from the internal memory of the other two phones, a Tecno phone and an Alcatel

⁷ Prosecution's Report Relating to Items Obtained from the Registry Pursuant to Decision ICC-02/05-01/20-123-Conf, ICC-02/05-01/20-166-Conf.

⁸ Citizen registration certification in the name of Ali Muhammad Ali Abdel-Rahman, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26

⁹ Arabic National Identification Card, in the name of Ali Muhammad Ali Abdel-Rahman Muhammadain, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26.

¹⁰ Arabic Health insurance policy card, in the name of Ali Muhammad Ali Abdel-Rahman, date of birth 1 March 1972, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26.

¹¹ Arabic Driver's license in the name of Ali Muhammad Ali Abdel-Rahman, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26.

¹² Arabic National ID Card in the name of Ali Muhammad Ali Abdel-Rahman Muhammadain – place of birth: Rehed Al-Berdy, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26.

¹³ Arabic Age estimation certificate of Ali Muhammad Ali Abdel-Rahman, date of birth estimated 1 January 1949, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26.

phone, and that it is currently speaking to external experts to explore the possibility of further data extraction. For this reason, the Prosecution requests that it be allowed to retain custody of these two phones, on the understanding that it will request authorisation from the Chamber to carry out this additional extraction, once it is clear that an external entity is willing and able to assist.

10. The Prosecutor also indicates that two items¹⁴ seem to relate to Mr Abd-Al-Rahman's son and appear to be irrelevant to the case.

III. ANALYSIS

11. Recalling the instruction of the Single Judge in the Decision,¹⁵ the Single Judge directs the Prosecutor to return the Huawei phone, SIM cards, SD card, and the Six Documents to the Registry, where the material shall be safeguarded and preserved for the duration of the proceedings.

12. Regarding the two items related to Mr Abd-Al-Rahman's son,¹⁶ these shall be returned to the Registry for safekeeping on behalf of the suspect.

13. After considering the request of the Prosecutor, the Single Judge finds that the Prosecution may retain custody of the Tecno phone and the Alcatel phone while it continues to communicate with external experts regarding the potential for data extraction. The Prosecutor shall provide updates on this process and on the communications with external experts in the bi-weekly reports that the Prosecutor has been previously directed to provide to the Chamber.¹⁷ Finally, the Prosecutor shall request authorisation from the Chamber to carry out the additional extraction from the Tecno and Alcatel phones should an external entity indicate that it would be able to assist in so doing.

¹⁴ Arabic High School Certificate in the name of Yasir Al Muhammad Ali Abdel-Rahman, DAR-OTP-0216-0244, and Arabic Driver's License certificate estimation in the name of Yasir Al Muhammad Ali Abdel-Rahman, DAR-OTP-0216-0245, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26.

¹⁵ Decision on the Prosecution's request for evidence in the custody of the Registry (ICC-01/05-01/20-9-Red2) and the Registry's request for instructions (ICC-01/05-01/07-86-US-Exp), ICC-02/05-01/20-123-Conf, para. 24.

¹⁶ DAR-OTP-0216-0244 and DAR-OTP-0216-0245, *see* the Report, ICC-02/05-01/20-166-Conf, para. 26.

¹⁷ *See* Order on disclosure and related matters, 17 August 2020, [ICC-02/05-01/20-116](#), para. 17; Second Order on disclosure and related matters, 2 October 2020, [ICC-02/05-01/20-169](#), paras 19, 28, 34, and pages 20-21.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

DIRECTS the Prosecutor to return the Huawei phone, SIM cards, SD card, and documents DAR-OTP-0216-0234, DAR-OTP-0216-0235, DAR-OTP-0216-0237, DAR-OTP-0216-0239, DAR-OTP-0216-0241, and DAR-OTP-0216-0243 to the Registry to be safeguarded and preserved for the duration of the proceedings;

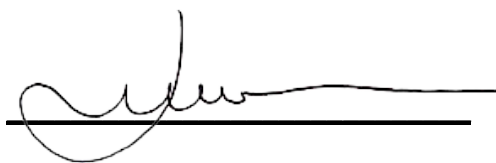
DIRECTS the Prosecutor to return items DAR-OTP-0216-0244 and DAR-OTP-0216-0245 to the Registry for safekeeping on behalf of Mr Abd-Al-Rahman;

GRANTS the Prosecutor's request to retain custody of the Techno phone and the Alcatel phone for the time being, pending conversations with experts regarding data extraction;

DIRECTS the Prosecutor to update the Chamber on the status of its conversations with experts regarding data extraction for the Tecno and Alcatel phones in its bi-weekly reports; and

DIRECTS the Prosecutor to request authorisation from the Chamber to carry out the additional extraction from the Tecno and Alcatel phones should an external entity indicate that it would be able to assist in so doing.

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

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid black horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Monday, 12 October 2020

At The Hague, The Netherlands