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No.: ICC-02/05-01/20  
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**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 fourth 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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**States Representatives**

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**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Prosecution herewith submits its fourth 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 witness list. 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 third progress report, submitted on 9 October 2020.<sup>4</sup> The Prosecution will address in turn each of the specific topics on which the Chamber has requested information. In addition, 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.<sup>5</sup>

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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-02/05-01/20-179.

<sup>5</sup> 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*<sup>6</sup>

4. In its third progress report, the Prosecution informed the Chamber that it relied on a total of 229 items of evidence in its applications pursuant to articles 58(7) and 58(6) (“Applications”), respectively, in relation to Mr Abd-Al-Rahman.<sup>7</sup> While reviewing this evidence for disclosure purposes, the Prosecution discovered that an additional 54 items were relied upon in its first Application.<sup>8</sup> This error was a result of the overlooked items being cited in the Application using a range, rather than by their individual Evidence Registration Numbers (“ERN”).<sup>9</sup> Consequently, an automated search of the document did not retrieve all ERNs in the cited range. The correct total number of documents relied upon in the Applications is 283 items.

5. The additional 54 items<sup>10</sup> are materials related to a mission by the Prosecution to Khartoum from 27 January to 7 February 2007, including approximately 22 audio-visual items comprising 20 hours of audio-visual evidence. The review of these 54 items is being prioritised in accordance with a Defence request received on 15 October 2020.<sup>11</sup> Consequently, the number of documents not related to witness materials has increased to 92 items. The Prosecution still intends to disclose 70 items by 30 October 2020.<sup>12</sup> However, the newly identified 22 audio-visual items require additional time to review. The Prosecution is exploring different options to expedite review and any needed standard redactions to facilitate disclosure as soon as possible, and aims to complete rolling disclosure by mid-November.

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

<sup>7</sup> ICC-02/05-01/20-179, para. 4.

<sup>8</sup> ICC-02/05-55-Conf-Red.

<sup>9</sup> The items are cited as follows in the first application ICC-02/05-55-Conf-Red: DAR-OTP-0122-0002 to 0005; DAR-OTP-0122-0007 to 0019; DAR-OTP-0122-0021 to 0022; DAR-OTP-0122-0024 to 0032; DAR-OTP-0122-0034 to 0035; DAR-OTP-0122-0037 to 0066. The six items cited in full ERN were already included in the total of the 229 items previously reported by the Prosecution.

<sup>10</sup> The total number of this collection is 65 items, including 5 Pre-Registration Forms (“PRF”) and 6 items which are cited in their full ERN.

<sup>11</sup> The Defence requested prioritisation of the disclosure of these items *via* email on 15 October 2020.

<sup>12</sup> ICC-02/05-01/20-179, para. 4. The Prosecution now intends to disclose 70 items, rather than 68.

6. Further, 47 documents relating to the work of the United Nations International Commission of Inquiry on Darfur (“UNCOI”) were disclosed on 15 October 2020,<sup>13</sup> consistent with the reported timeline.<sup>14</sup>

7. In relation to the 68 witness statements or screenings relating to 67 Prosecution witnesses, 4 witness statements were disclosed as planned on 15 October 2020,<sup>15</sup> and the Prosecution remains on-track to disclose an additional 9 witness statements by 30 October 2020.<sup>16</sup> The Prosecution is currently progressing its applications for the authorisation of the non-disclosure of six witnesses as detailed in its third progress report.<sup>17</sup>

8. Of the remaining 43 witnesses, an additional 7 have been cleared for disclosure by the Protection Strategies Unit of the Office of the Prosecutor (“PSU”) since the last report and will be disclosed on a rolling basis and no later than 17 November 2020.

*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>18</sup>

9. There are currently 34,070 items (171,945 pages) registered in the Prosecution’s Ringtail database. Excluding those items already disclosed, primary review has been carried out on 4,625 items (18,686 pages), of which 333 items (1,104 pages) have also been secondary reviewed. Excluding the UNCOI collection, there remain 23,379 items (113,532 pages) in the collection still requiring both primary and secondary review, which include newly registered evidence.

10. In relation to the information stored in the investigation management system referred to in paragraph 12 of the third progress report,<sup>19</sup> the Prosecution has identified approximately 3000 entries which need to be assessed for registration and

<sup>13</sup> ICC-02/05-01/20-187, para. 3; ICC-02/05-01/20-187-Conf-AnxA.

<sup>14</sup> ICC-02/05-01/20-179, para. 4.

<sup>15</sup> ICC-02/05-01/20-187, para. 3; ICC-02/05-01/20-187-Conf-AnxH.

<sup>16</sup> ICC-02/05-01/20-179, para. 5.

<sup>17</sup> ICC-02/05-01/20-179, para. 6.

<sup>18</sup> ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

<sup>19</sup> ICC-02/05-01/20-179, para.12.

disclosure. These items are of many different types, including notes on contact with witnesses, notes on leads, as well as analytical and other internal products. Of the 3000 items, about 700 entries will be prioritised for assessment because they relate to Prosecution witnesses and are potentially most relevant to the case.

*Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting*<sup>20</sup>

11. The estimated timeline for this section remains largely the same as that provided to the Chamber in the third progress report.<sup>21</sup> The tentative number for the list of witnesses remains 95.<sup>22</sup>

12. In relation to the 95 witnesses upon whom the Prosecution intends to rely at the confirmation hearing, the Prosecution has already disclosed material relating to 15 of these witnesses, and will disclose material related to a further 21 witnesses in the coming weeks.<sup>23</sup>

*Number and type of all items disclosed during the relevant period*<sup>24</sup>

13. On 15 October 2020, the Prosecution disclosed to the Defence 5,065 items from the UNCOI collection.<sup>25</sup> In addition, the Prosecution disclosed 70 items (506 pages) in Pre-Confirmation INCRIM package 3, of which 52 items are related to 4 Prosecution witnesses.<sup>26</sup>

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

<sup>21</sup> ICC-02/05-01/20-179, paras. 13-15.

<sup>22</sup> The Prosecution has removed P-0288 from its tentative list of witnesses to be relied on at confirmation but has added a newly interviewed witness to it. Therefore, the number remains unchanged. P-0288 has been removed also from Annex 3. The statement of the new witness is not yet registered in Ringtail and therefore could not be added to Annex 3.

<sup>23</sup> The total of 21 witnesses includes one additional witness recently interviewed. Of these, 9 witness statements will be disclosed by 30 October 2020 (para.7 above) and an additional 7 on a rolling basis and no later than 17 November 2020 (para.8 above).

<sup>24</sup> ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

<sup>25</sup> ICC-02/05-01/20-187, paras. 3-4.

<sup>26</sup> ICC-02/05-01/20-187, para. 5; ICC-02/05-01/20-187-Conf-AnxH. These are the same four Prosecution witnesses referred in the third progress report: *see* ICC-02/05-01/20-179, para.5.

*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>27</sup>

14. In relation to witness protection issues, despite the challenges previously reported to the Chamber,<sup>28</sup> as well as involvement by the PSU on various Prosecution missions since the third progress report, the PSU has continued to make progress since the last report and has so far provided clearance in relation to an additional 11 witnesses, amounting to a total of 50 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*<sup>29</sup>

15. Annex 1 to this report contains an updated list of investigative steps that the Prosecution plans to conduct before the confirmation hearing. Several obstacles encountered by the Prosecution in relation to these investigative activities are specifically noted in the list. These obstacles result from COVID-19 travel restrictions and other causes which continue to impact the Prosecution's ability to conduct investigative interviews and to collect additional evidence.<sup>30</sup> The Prosecution team members and witnesses are subject to quarantine restrictions in the countries where the interviews are currently taking place, which results in delaying the interview process. In addition, some of the witnesses are unable to complete planned travel to meet the Prosecution due to other logistical difficulties detailed in Annex 1. The Prosecution team is currently exploring alternative interview options and other steps to mitigate these challenges.

16. Between 17 and 20 October 2020, the Prosecution undertook a mission to Khartoum, Sudan. This mission, led by the ICC Prosecutor, included meetings with the highest officials of the Government of Sudan ("GoS") and other important stakeholders, including the Prime Minister, Minister of Foreign Affairs, Minister of

<sup>27</sup> ICC-02/05-01/20-169, para. 19(v) and p. 21, order (f)(e).

<sup>28</sup> ICC-02/05-01/20-179, para. 19.

<sup>29</sup> ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

<sup>30</sup> See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

Justice, Prosecutor General and senior military and civilian members of the Sovereignty Council.

17. The Prosecution team were given assurances of support and cooperation by the GoS representatives. Modalities of cooperation, technical visits and immediate access to Sudan by OTP investigators were discussed, among other action points, and the Prosecution will seek to ensure timely progress is made on all these items.

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*<sup>31</sup>

18. 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>32</sup>

19. Annex 3 to this report contains a list of the witness statements and transcripts that the Prosecution intends to rely upon for the purposes of the confirmation hearing. Since 9 October 2020, the Language Services Unit ("LSU") has completed the draft translations of 13 witness statements from English to Arabic (345 pages), which are highlighted in the Annex.

20. To date, the Prosecution has not received information from the Defence on specific section of statements to prioritise for translation.<sup>33</sup>

*Update on an additional issue in accordance with the Chamber's order, issued on 12 October 2020*<sup>34</sup>

21. Annex 4 to this report contains the relevant information on this matter.

<sup>31</sup> ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

<sup>32</sup> ICC-02/05-01/20-169, p. 21, order (f)(h).

<sup>33</sup> ICC-02/05-01/20-169, para. 34 and p. 20, order (e).

<sup>34</sup> ICC-02/05-01/20-181-Conf, para. 13 and p. 6.



#### IV. CONCLUSION

22. The Prosecution team continues to make every possible effort to progress the preparation of this case as quickly and effectively as possible with the resources available to it. In this report, the Prosecution has attempted to provide the Chamber with clear updates and substantial details on the requested topics. The Prosecution stands ready to provide the Chamber with any further information it may require.



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

Dated this 23<sup>rd</sup> day of October 2020

At The Hague, The Netherlands