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

Date: 8 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 ninth 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 ninth 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 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 eighth progress report submitted on 18 December 2020.⁴ 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-02/05-01/20-241.

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 23 December 2020, the Prosecution disclosed three witness statements cited in the Prosecution's two applications under article 58 of the Statute ("Applications"). Previously, the Prosecution informed the Chamber that there were a total of 283 items cited in these Applications, including the ERN range of the audio/video files collected during the Prosecution's mission to Khartoum in 2007.⁷ 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.

5. Therefore, the total number of items cited in these Applications is now 278. To date, the Prosecution has disclosed 245 items, including material related to 41 witnesses. The remaining 35 items, including material related to 24 witnesses, will be disclosed in the coming weeks with or without redactions applied to the witnesses' identifying information.

*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

6. There are currently 34,620 items (175,182 pages) registered in the Prosecution's Ringtail database. To date, the Prosecution has reviewed 16,171 items (77,001 pages). There remain 18,449 items (98,181 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 new deadlines set by the Chamber, the Prosecution has created

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

⁷ ICC-02/05-01/20-191, para. 4.

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

detailed keyword searches and will prioritise the review of the items responsive to these searches.

Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting⁹

7. Since the last progress report,¹⁰ the tentative list of witnesses now stands at 105 witnesses,¹¹ of which the Prosecution has already disclosed material related to 64 witnesses.¹² The material related to the remaining 41 witnesses will be disclosed in the coming weeks, in line with the Chamber's deadline.

Number and type of all items disclosed during the relevant period¹³

8. Since the last progress report, primary review has been carried out on 3,650 items (8,035 pages), of which 2,710 items (5,204 pages) have been recommended for disclosure.

9. On 23 December 2020, the Prosecution disclosed 396 items (1,423 pages) to the Defence. The disclosed items are in the following packages:

- Pre-Confirmation INCRIM package 14: contains 372 items (594 pages);
- Pre-Confirmation INCRIM package 15: contains 24 items (829 pages).

10. INCRIM Package 14 contains items related to six witnesses not previously disclosed to the Defence and also items that are translations of materials previously disclosed.

11. INCRIM Package 15 contains items related to witness DAR-OTP-P-0131 that were disclosed on 7 December 2020, with redactions applied to the identifying information of the witness. The Prosecution re-disclosed these items with those redactions lifted.

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

¹⁰ ICC-02/05-01/20-241, para. 7

¹¹ Since the last report, two new witnesses have been added (recently interviewed).

¹² 18 of these witnesses were cited in the Applications.

¹³ ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

12. The Prosecution also informed the Chamber that in these INCRIM packages, all 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*¹⁴

13. In relation to witness protection issues, notwithstanding the ongoing challenges most recently reported in the Second Postponement Request,¹⁵ since 18 December 2020 the Protection Strategies Unit of the Office of the Prosecutor ("PSU") has provided clearance in relation to an additional 7 witnesses, amounting to a total of 88 witnesses. 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*¹⁶

14. 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 our previous progress reports,¹⁷ the COVID-19 pandemic continues to impact the Prosecution's work, primarily as it relates to the collection of additional evidence.¹⁸

15. 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.

¹⁴ ICC-02/05-01/20-169, para. 19(v) and p. 21, order (f)(e).

¹⁵ ICC-02/05-01/20-218-Conf, paras 16-19; ICC-02/05-01/20-218-SECRET-Exp-Anx1.

¹⁶ ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

¹⁷ ICC-02/05-01/20-200, paras.14 and 15 and ICC-02/05-01/20-207, paras. 14 and 15.

¹⁸ See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*¹⁹

16. 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*²⁰

17. 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. Draft translations have been prepared in relation to all witness statements, with the exception of eight statements for which translation is in progress. Revised transcripts have been completed for all audio-recorded interviews and, where required, draft translations have also been prepared in relation to those transcripts (that is, when the interview was conducted only in English, or in English and Fur).

18. 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 for all remaining translations to be provided on a rolling basis, with revised versions to be provided in due course.²¹ The Prosecution has been liaising with the Language Services Unit in relation to the registration of these draft translations, and will begin disclosing them to the Defence as soon as possible.

*Update on an additional issue in accordance with the Chamber's order, issued on 12 October 2020*²²

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

¹⁹ ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

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

²¹ ICC-02/05-01/20-238, para. 45 and p. 15.

²² ICC-02/05-01/20-181-Conf, para. 13 and p. 6.

IV. CONCLUSION

20. 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 K. Stewart.

James Stewart
Deputy Prosecutor

Dated this 8th day of January 2021

At The Hague, The Netherlands