



Original: **English**

No.: **ICC-02/05-01/20**
Date: **18 June 2024**

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

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

**PUBLIC
with Confidential Annexes A-C**

**PUBLIC REDACTED VERSION OF
APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE
IMMEDIATE DISCLOSURE
(ICC-02/05-01/20-1149-Conf, 14 June 2024)**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”, “Mr Abd-Al-Rahman”) makes this application pursuant to Article 67(2) of the Rome Statute (“Statute”), and Rules 77 and 84 of the Rules of Procedure and Evidence (“Rules”), for an order from the Trial Chamber to the Office of the Prosecutor (“OTP”) to disclose any document, including but not limited to any investigation note, report, memo, witness statement, or screening note, or any other material that is in its possession or control related to the individual named Jaafar Abdel Hakam (also rendered as Ja’afar Abd-Al-Hakam).

II. CONFIDENTIALITY

2. In accordance with regulation 23bis(1) of the Regulations of the Court, this filing is classified as confidential since it contains sensitive information. A public redacted version will be filed immediately after.

III. PROCEDURAL HISTORY

3. On 12 October and 18 November 2021, *inter partes* exchanges took place between the Defence and the Prosecution regarding the disclosure of items that were material to the preparation of the Defence. The Defence asked the Prosecution to conduct a wide-ranging search of its evidential holdings relating to issues and persons of interest, including the name of Ja’afar Abd-al-Hakam.¹ In the course of the proceedings the Prosecution disclosed to the Defence a total of 289 documents containing the name of Ja’afar Abd-al-Hakam.²

4. On 15 May 2024, the Defence disclosed to the Prosecution a screenshot from Al Jazeera’s Facebook account quoting in turn a report from Assayha, a Sudanese newspaper, both documents dating from 2 September 2021, mentioning Ja’afar Abd-al-Hakam.³ According to this news report, Ja’afar Abd-al-Hakam had been interviewed *via* Skype with ICC officials in Khartoum, had been asked to become a Prosecution witness about the events in Darfur, but had refused to testify. The article further

¹ Annex A.

² According to publicly available information, Ja’afar Abd-al-Hakam died at the beginning of 2024: <https://www.sudanakhbar.com/1484292>

³ DAR-D31-00000323-0001, DAR-D31-00000322-0001, Annex B.

indicated that the Sudanese public prosecutor had arrested Ja'afar Abd-al-Hakam and investigated him in connection with events that allegedly took place in Tabra and Wadi Saleh in Darfur.⁴

5. The Defence had come across the Al Jazeera Facebook post in early May 2024 entirely by chance. It had been conducting Arabic-language research into Ja'afar Abd-al-Hakam in the context of other Defence preparations. The information contained in the Al Jazeera Facebook post and Assayha article is not available in English and, to the Defence's knowledge, was not reported elsewhere.

6. As soon as the Defence became aware of this information, it contacted the Prosecution seeking disclosure of any further material, such as screening notes or statements, about Ja'afar Abd-al-Hakam in its possession that had not already been disclosed. In its reply to the Defence, the Prosecution stated that: "we have no such material or information on this person to disclose", adding that "OTP contact with the individual, and whether or not we sought his cooperation and whether or not he agreed, would not be relevant nor disclosable, let alone exculpatory."⁵ The Defence notes that the Prosecution does not suggest that it has no material about Ja'afar Abd-al-Hakam in its possession, only that it has no such material for disclosure. This surprisingly ambiguous response – does the OTP have material in its possession? Or is it just that it does not want to disclose it? - calls for the filing of the present application, which primarily aims at clarifying the matter.

IV. APPLICABLE LAW

7. Article 67(2) and Rule 77 provide mandatory disclosure obligations on the Prosecutor.⁶

8. Article 67(2) of the Statute provides that:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may

⁴ Annex C. Defence and OTP emails from 15/05/2023 and 16/05/2024.

⁵ Annex C: Defence and OTP emails from 15/05/2023 and 16/05/2024.

⁶ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, [ICC-01/04-01/06-1433](#), paras. 50, 53.

affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

9. Rule 77 of the Rules states that the Prosecution shall (subject to certain restrictions) permit the Defence to:

inspect any books, documents, photographs or other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial...

V. SUBMISSIONS

(i) *Materiality of Ja'afar Abd-Al-Hakam to the Defence case*

10. According to the Document Containing the Charges ("DCC")⁷, the Decision on the Confirmation of Charges and the Corrected version of the Prosecution Trial Brief, Mr Abd-Al-Rahman allegedly cooperated with Ja'afar Abd Al Hakam who was a GoS official at the locality level, being in 2003 the Commissioner of Garsila.⁸ The alleged cooperation consisted of the mobilisation and the distribution of weapons to Militia/*Janjaweed* in Garsila and the appointment Mr Abd-Al-Rahman as the head of the Mujahidin committee by Ja'afar Abd-al-Hakam.⁹

11. At trial, the Prosecution has relied on evidence about Ja'afar Abd-al-Hakam in seeking to demonstrate that Ali Kushayb had a position of authority during the alleged events in Wadi Salih and Mukjar localities. The National Commission of Inquiry in Sudan stated in its report that a number of persons were interviewed about the events in Deleig, among them Ja'afar Abd-al-Hakam.¹⁰ No fewer than 28 Prosecution witnesses have mentioned the name of Ja'afar Abd-al-Hakam in their evidence, including about his role in the alleged crimes as the Governor of Wadi Saleh and in the appointment of Ali Kushayb to a senior leadership position over the Militia/*Janjaweed*. For example, P-0651 testified: [REDACTED]

Also, P-0643 testified as follows: [REDACTED]

⁷ ICC-02/05-01/20-325-Conf-Anx1-Corr2.

⁸ ICC-02/05-01/20-433, paras. 70, 72 & 73; in the disposition of the DCC, para. 22; ICC-02/05-01/20-550-Corr, paras. 114- 142.

⁹ ICC-02/05-01/20-550-Corr, para. 142; ICC-02/05-01/20-T-026-CONF-ENG, p. 50, lines 17-19; p.52, lines 12-16, p.53, lines 7-9.

¹⁰ DAR-OTP-0116-0380, p. 0408.

(ii) *The necessity for the Trial Chamber to intervene*

12. After *inter partes* exchanges, the Defence notes that the Prosecution is careful not to state that it is not in possession of additional material related to Ja'afar Abd-al-Hakam, and particularly material related to its past interactions with him as reported in the Assayha newspaper article. Considering the prominent position of Ja'afar Abd-al-Hakam and his alleged connections with the crimes charged against Mr Abd-Al-Rahman, a full, thorough and complete disclosure of all materials relating to the OTP's direct or indirect interactions with Ja'afar Abd-al-Hakam is required, in view of its clear relevance to the Defence's case that Mr Abd-Al-Rahman cannot, and could never, have been a *Janjaweed* leader. The Defence requests the disclosure of any material in the possession or control of the Prosecution on this individual and his interactions with the Prosecution, whether direct or indirect. The Assayha article describes meetings between Ja'afar Abd-al-Hakam and the Prosecution in cooperation with the Sudanese authorities. This information is new to the Defence: no investigative notes or statements about interviews conducted by the Prosecution with Ja'afar Abd-al-Hakam have ever been disclosed. Therefore, the Defence is entitled to understand the reasons why Ja'afar Abd-al-Hakam refused to cooperate with the OTP and if there was any agreement on not considering him as a suspect. The Defence suggests that Ja'afar Abd-al-Hakam may have talked about Ali Kushayb and/or Mr Abd-Al-Rahman to the OTP and cannot exclude the possibility that his statement may contain crucial exculpatory information, such as the denial of any role played by Mr Ja'afar Abd-Al-Hakam in the appointment of Ali Kushayb as *Janjaweed* leader and/or the denial of any role played by Mr Abd-al-Rahman in the events described in the charges.

13. Subject to the statutory regime relating to restrictions on disclosure, the Prosecution has the obligation to disclose any information or material in its possession related to its knowledge about the involvement of Ja'afar Abd-al-Hakam as a witness for the ICC or a suspect for the Sudanese authorities in relation to the criminal events in the Wadi Saleh in 2003 and 2004. The term 'material' to be disclosed to the Defence

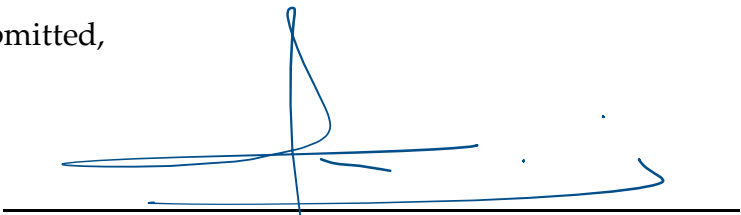
is a broad term¹¹ and refers to the three lines of defence articulated in the Defence Trial Brief.¹²

14. The Defence considers that its request is reasonable, sufficiently described and legitimate as it may affect the credibility of the Prosecution evidence already presented and submitted at trial. None of the restrictions on disclosure set out by the Rules 81 and 82 of the Rules would prevent the Prosecution from complying with its obligations. Without this material, the principle of full disclosure will be compromised and the right of Mr. Abd-Al-Rahman to present his case in the fairness of the proceedings will be jeopardised.

15. In sum, it is necessary for the Chamber to intervene, directing the Prosecution
1) to review its material and unambiguously affirm or deny the existence of any material such as investigative notes, investigative reports, screening notes, transcripts of interviews, video recordings and any other similar materials related to the information resulting from the newspaper article Assayha on Ja'afar Abd-al-Hakam, irrespective of the OTP's own assessment of their disclosability. And, in the affirmative
2) to disclose immediately to the Defence all material sought which has been described and identified above.

16. Should the present request lead to the disclosure of new material not disclosed to the Defence earlier, the Defence may seek leave for an extension of time limit to adduce such material through a last bar table motion.

Respectfully submitted,



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 18th day of June 2024 at The Hague, The Netherlands

¹¹ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, [ICC-01/04-01/06-1433](#), paras 77-78.

¹² ICC-02/05-01/20-1022-Conf-tEng.