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No. ICC-02/05-01/20

Date: 2 October 2020

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

Second Order on disclosure and related matters

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

PRE-TRIAL CHAMBER II of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’) (the ‘*Abd-Al-Rahman* case’), having regard to articles 54(1)(a) and (3)(a) and (e), 60(4), 61(3), (5), and (7), 67, 68(5), 69, 72, and 93(8) of the Rome Statute (the ‘Statute’), rules 63(1), 76 to 83, 87, and 121 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Second Order on disclosure and related matters’ (‘Second Order on Disclosure’).

I. Procedural History

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute¹ and decided² to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’) for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004 (‘First Warrant’).³
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the First Warrant pursuant to article 58(6) of the Statute,⁴ issuing a second warrant of arrest against Mr Abd-Al-Rahman⁵ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, between on or about 5 to 7 March 2004 (‘Second Warrant’).
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, as ordered by the Chamber,⁶ Mr

¹ Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, [ICC-02/05-56](#)).

² Decision on the Prosecution Application under Article 58(7) of the Statute, [ICC-02/05-01/07-1-Corr.](#)

³ Warrant of Arrest for Ali Kushayb, [ICC-02/05-01/07-3-Corr.](#)

⁴ Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”) by adding new crimes, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and [ICC-02/05-01/20-6-Red2](#)).

⁵ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, [ICC-02/05-01/07-74-Red](#)).

⁶ Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, 11 June 2020, [ICC-02/05-01/07-82](#).

Abd-Al-Rahman made his first appearance before the Single Judge.⁷ On this occasion, *inter alia*, (i) the suspect indicated that the language he fully understands and speaks is Arabic;⁸ and (ii) the confirmation of charges hearing was scheduled to take place on Monday, 7 December 2020.⁹

4. On 23 July 2020, the Prosecutor submitted the ‘Prosecution’s observations pursuant to the “Order seeking observations on disclosure and related matters” (ICC-02/05-01/20-14)’, (‘July 2020 Observations’)¹⁰ informing the Chamber, *inter alia*, that (i) there were approximately 37,215 items of evidence that needed to be reviewed to determine the scope of the disclosable material in the case; (ii) said documents have not been comprehensively reviewed for more than 13 years; and (ii) the review process was a slow and labour intensive exercise that would take a substantial amount of time to be completed and for which the Prosecutor was in the process of seeking sufficient staff.¹¹

5. On 17 August 2020, the Single Judge issued the ‘Order on disclosure and related matters’ (‘First Order on Disclosure’) in which the Single Judge, *inter alia*, (i) ordered that any applications for non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence shall be submitted to the Chamber no later than 11 September 2020’ (the ‘11 September 2020 deadline’);¹² and (ii) determined that, in order to ensure that the disclosure process unfolds smoothly and under satisfactory conditions, the Prosecutor shall submit, every other week (‘bi-weekly’) starting on 24 August 2020, a detailed report to keep the Chamber abreast of any progress made with regard to the evidence review, translation and disclosure process.¹³

⁷ Transcript of hearing of Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#) (‘Initial Appearance’).

⁸ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 20, lines 14 to 18.

⁹ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 22, line 23 to page 23, line 3.

¹⁰ ICC-02/05-01/20-103-Conf (a public redacted version was notified on 28 July 2020, [ICC-02/05-01/20-103-Red](#)) (‘Prosecutor Observations’).

¹¹ Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), paras 4-10.

¹² Order on disclosure and related matters, 17 August 2020, [ICC-02/05-01/20-116](#) (‘First Order on Disclosure’), para. 12(iii).

¹³ First Order on Disclosure, [ICC-02/05-01/20-116](#), para. 17.

6. On 24 August 2020, the Prosecutor submitted a report ('First Progress Report'),¹⁴ in which, *inter alia*, the Prosecutor informed the Chamber that, since 23 July 2020, the Office of the Prosecutor ('OTP') (i) had begun the review of the evidence, having reviewed 860 items (including witness statements), 421 of which were subject to confidentiality agreements for which the Prosecutor was going to request consent to lift restrictions on a rolling basis;¹⁵ (ii) the Language Services Unit (the 'LSU') had been processing nine requests for draft English to Arabic translations and/or transcriptions of witness statements, which needed to be further reviewed before disclosure;¹⁶ and (iii) intended to disclose relevant items to the Defence on a monthly basis, starting on 31 August 2020.¹⁷

7. On 7 September 2020, the Prosecutor submitted the second report ('Second Progress Report'),¹⁸ informing the Chamber that (i) since 24 August 2020, the OTP had conducted the preliminary review of a total of 1,436 items (including 15 witness statements and transcripts) – although clarifying that each item must undergo primary and secondary review and that only 25 items had been subject to secondary review – 44 of which were subject to confidentiality agreements;¹⁹ (ii) the LSU had completed 170 draft pages of Arabic to English translations and 77 draft pages of English to Arabic translation; (iii) on 31 August 2020 the OTP had disclosed 3 packages of evidence consisting of 852 items, 47 of which are incriminating evidence intended to be relied upon at the confirmation hearing and 805 items are subject to inspection as material to the preparation of the defence.²⁰

8. On 9 September 2020, the Prosecutor submitted the 'Prosecution's urgent request for an extension of time' ('Request for Extension'),²¹ requesting the Chamber to

¹⁴ Prosecution's first progress report in the evidence review, translation and disclosure process, [ICC-02/05-01/20-131](#) ('First Progress Report').

¹⁵ First Progress Report, [ICC-02/05-01/20-131](#), para. 3.

¹⁶ First Progress Report, [ICC-02/05-01/20-131](#), para. 4.

¹⁷ First Progress Report, [ICC-02/05-01/20-131](#), para. 5.

¹⁸ Prosecution's second progress report on the evidence review, translation and disclosure process, [ICC-02/05-01/20-146](#) ('Second Progress Report').

¹⁹ Second Progress Report, [ICC-02/05-01/20-146](#), para. 3, footnotes 3 and 4.

²⁰ Second Progress Report, [ICC-02/05-01/20-146](#), para. 5.

²¹ ICC-02/05-01/20-149-Conf-Exp (as instructed by the Chamber, a confidential redacted version, ICC-02/05-01/20-149-Conf-Red, and a public redacted version, [ICC-02/05-01/20-149-Red2](#), were notified on 10 September 2020).

vacate the 11 September 2020 deadline. As instructed by the Chamber,²² on 11 September 2020, the Defence submitted a response,²³ requesting that the Chamber reject the Request for Extension arguing that it had no legal basis, and because it was filed late without demonstrating exceptional circumstances which would make it possible and necessary to extend a deadline that had already expired.²⁴ In the alternative, the Defence requests that the Chamber order the Prosecutor (i) to disclose, without delay, the totality of the witnesses' statements intended to be relied upon at the confirmation, redacting all information that may lead to the identification of witnesses or other persons at risk; and (ii) order the Prosecutor and the VWS to conclude, without delay, the risk assessments and implementation of measures to protect witnesses and persons at risk in order to lift the redactions sufficiently in advance to the confirmation hearing.²⁵

9. On 16 September 2020, the Prosecutor submitted a request to postpone the confirmation hearing ('Postponement Request'),²⁶ requesting that the Chamber (i) postpone the date of the confirmation hearing to 1 June 2021; and (ii) set the deadline for the submissions of any applications for the authorisation of non-disclosure of witness identities and/or the non-disclosure of entire items of evidence to 1 March 2021.²⁷ On 18 September 2020, the Defence requested the Chamber, *inter alia*, to postpone the deadline for the Defence to file its response to the Postponement Request to 9 October 2020.²⁸ Having received the Prosecutor's response,²⁹ the Single

²² Order in relation to the 'Prosecution's urgent request for an extension of time', 10 September 2020, [ICC-02/05-01/20-151](#).

²³ Observations en Réponse à la Requête ICC-02/05-01/20-149-Red2 et à l'Ordonnance ICC-02/05-01/20-151, [ICC-02/05-01/20-152](#) ('Defence Response to Request for Extension').

²⁴ Defence Response to Request for Extension, [ICC-02/05-01/20-152](#), paras 6-12.

²⁵ Defence Response to Request for Extension, [ICC-02/05-01/20-152](#), paras 15-17.

²⁶ Corrected Version of "Prosecution's request to postpone the confirmation hearing", 16 September 2020, ICC-02/05-01/20-157-Conf-Exp-Corr (a confidential redacted version, ICC-02/05-01/20-157-Conf-Red-Corr, and a public redacted version, [ICC-02/05-01/20-157-Corr-Red](#), were notified on the same date) ('Postponement Request').

²⁷ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 64.

²⁸ Requête en vertu des normes 23bis-2, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red, ICC-02/05-01/20-159-Conf (filed on 17 September 2020 at 16:55 and notified on 18 September 2020).

²⁹ Prosecution's response to "Requête en vertu des normes 23bis-2, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red", ICC-02/05-01/20-160-Conf.

Judge partly granted the Defence's request ordering it to file its response to the Postponement Request by Monday, 5 October 2020, at the latest.³⁰

II. Analysis

10. At the outset, the Chamber recalls that it is its responsibility to ensure that the confirmation proceedings are conducted in a fair and impartial manner and with full respect afforded to the suspect's minimum guarantees, including (i) to be informed promptly and in detail of the nature, cause and content of the charges;³¹ (ii) to have adequate time and facilities for the preparation of the defence;³² and (iii) to be tried without undue delay.³³ Similarly, the Chamber recalls that it is an established principle of international human rights law that the detention of a suspect prior to conviction is exceptional in nature and must be strictly limited to what is necessary.³⁴ Accordingly, the Chamber shall ensure that the suspect is not detained for an unreasonable period of time prior to trial.³⁵

11. Key to the concrete realisation of the suspect's rights during the pre-trial stage of the proceedings is the right to be provided – within a reasonable time before the confirmation hearing – with the document containing the charges and the list of the evidence on which the Prosecutor intends to rely at the hearing.³⁶ In light of the above, the Chamber has a duty to ensure that disclosure takes place under satisfactory conditions,³⁷ i.e., in a manner which is transparent, efficient and expeditious, allowing the suspect to prepare adequately for the confirmation hearing and ultimately allowing the Pre-Trial Chamber to make an informed decision.³⁸ For the Chamber to

³⁰ Decision on the Defence's 'Requête en vertu des normes 23bis-2, 35-1 et 37-2 du Règlement de la Cour en vue de la Réponse à ICC-02/05-01/20-157-Conf-Red', 23 September 2020, [ICC-02/05-01/20-164](#).

³¹ Article 67(1)(a) of the Statute.

³² Article 67(1)(b) of the Statute.

³³ Article 67(1)(c) of the Statute.

³⁴ See Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges', 14 May 2020, [ICC-01/14-01/18-517](#), para. 26.

³⁵ Article 60(4) of the Statute.

³⁶ Article 61(3) of the Statute.

³⁷ Rule 121(2)(b) of the Rules.

³⁸ Pre-Trial Chamber I, *Prosecutor v. Bahr Idriss Abu Garda*, Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties, 30 May 2009, [ICC-02/05-02/09-18](#), paras 2, 7. See also, Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom*, Public Redacted Version of "Decision on Disclosure

adequately discharge this duty, it is essential that all relevant information be submitted to it in a complete and timely manner, so that the Chamber is able to rule on all relevant issues, including – in this case – the Prosecutor’s Request for Extension and the Postponement Request.

A. Timing and Calendar of disclosure

12. First, the Chamber stresses that the Prosecutor’s disclosure obligations under rule 121 of the Rules are independent and additional to the duty to provide the suspect, without delay upon surrender, with all evidence and supporting material submitted and examined at the time of the issuance of the warrants of arrest. The obligation to make this information available upon surrender is subject only to the adoption of protective measures pursuant to rule 87 of the Rules.³⁹

13. In addition, the Chamber notes that, as consistently emphasised in the Court’s jurisprudence, the deadlines set out in rule 121 of the Rules are only indicative of the *minimum* notice period a party may avail itself in order to comply with its disclosure obligations.⁴⁰ However, the parties should discharge their disclosure obligations *as early as possible*, in order to guarantee the fairness and expeditiousness of the proceedings.⁴¹ As the Chamber has stated elsewhere, the Prosecutor, as ‘the triggering force of the proceedings’, has the obligation to ‘conduct the review of the evidence as soon as it is collected during the investigation on an ongoing basis, so as to be ready

and Related Matters”, 23 January 2019, [ICC-01/14-01/18-64-Red](#) (*Yekatom* Decision on Disclosure’), para. 13.

³⁹ Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of Order to the Prosecutor concerning classification of documents in support of the warrant of arrest to be made available to the suspect upon surrender, 30 September 2015, [ICC-01/12-01/15-2-Red](#), para. 4; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana* Decision on the Prosecution application for protective measures for four documents and on the subsequent unsealing and reclassification of certain documents in the record of the case, 25 January 2011, [ICC-01/04-01/10-42](#); Appeals Chamber, *Prosecutor vs. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on Application for Interim Release”, 16 December 2008, [ICC-01/05-01/08-323](#), paras 1-2.

⁴⁰ *Yekatom* Decision on Disclosure, [ICC-01/14-01/18-64-Red](#), para. 13; Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2018, [ICC-01/12-01/18-31-tENG-Corr](#) (*Al Hassan* Decision on Disclosure’), para. 20; Pre-Trial Chamber II, *The Prosecutor vs. Dominic Ongwen*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, [ICC-02/04-01/15-203](#) (*Ongwen* Decision on Disclosure’), para. 17.

⁴¹ *Yekatom* Decision on Disclosure, [ICC-01/14-01/18-64-Red](#), paras 13-14.

to comply expeditiously with the disclosure obligations upon surrender of the suspect to the Court.’⁴²

14. The Chamber is conscious of the fact that the suspect surrendered long after the issuance of the First Warrant and takes note of the Prosecutor’s assertion that it is necessary to revive parts of the case that have been dormant for long.⁴³ Recognising there may be uncertainty as to when warrants will be executed and suspects will be surrendered to the Court, the Chamber recalls that the Prosecutor is expected to be trial ready at any time after applying for an arrest warrant.⁴⁴ Even if it could be argued that the Prosecutor is allowed to ‘hibernate’ cases, the Chamber notes that this justification would, in any case, only partially apply to the items of evidence related to the First Warrant that were not reviewed or reassessed when the Prosecutor requested its amendment less than three years ago and it certainly does not apply to any additional items related to the Second Warrant. In the view of the Chamber, the time required by the Prosecutor to revive parts of the case must, in any event, always be balanced against the right of the suspect to be promptly informed of the nature, cause, and content of the charges, which can only be accomplished through full and timely disclosure. It is therefore incumbent upon the OTP to maintain a proper balance between its operational constraints and the rights of the suspect.

15. Accordingly, even if it were accepted that there is a need to revive some parts of the case, the Prosecutor is not exempt from the obligation to make available immediately upon surrender all evidence and material submitted in support of the Prosecutor’s application for the warrants of arrest and, thereafter, comply expeditiously with the disclosure obligations of any additional evidence the Prosecutor intends to rely upon at the confirmation hearing. In this regard, the Chamber considers the Prosecutor’s pace in conducting the review of the evidence insufficient and inconsistent with the abovementioned obligations. The Chamber

⁴² *Yekatom* Decision on Disclosure, [ICC-01/14-01/18-64-Red](#), para. 14.

⁴³ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), paras 4, 12, 29, referring to [Chambers Practice Manual](#), 2019, paras 12-13.

⁴⁴ See [Chambers Practice Manual](#), 2019, pages 7-8; [Strategic Plan 2019-2021](#), pages 4 and 20; see also Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’, 15 May 2019, [ICC-01/14-01/18-199](#), para 32.

notes with extreme concern that, although in the July 2020 Observations the Prosecutor indicated that the amount of evidence to be reviewed for the case amounted to more than 37,000 documents,⁴⁵ more than a hundred days after the suspect's voluntary surrender and transfer to the Court the Prosecutor has apparently only fully reviewed 1,517 items of evidence.⁴⁶

16. During the same time frame, the Prosecutor has only disclosed to the Defence 852 items, all from publicly available sources.⁴⁷ While it remains within the Prosecutor's discretion to determine the strategy of the case, the Chamber notes that starting by reviewing the older and less relevant items of evidence may not be the most efficient approach. Considering the challenges it has alleged, the OTP may in its discretion consider streamlining the disclosure and confirmation process by prioritising certain charges and focusing on disclosing only the corresponding evidence.

17. The Chamber also notes that the Prosecutor repeatedly indicates that the OTP 'will continue to disclose relevant items to the Defence on a monthly basis'.⁴⁸ The Chamber sees no justification for postponing to a monthly interval an obligation that is immediate and should be complied with on a rolling basis. Particularly regarding evidence falling under article 67(2) of the Statute, the Chamber reminds the Prosecutor of the obligation to investigate incriminating and exculpatory circumstances equally and the duty to disclose such evidence *immediately* after identification, unless there are justified reasons that prevent the Prosecutor from doing so.⁴⁹ Accordingly, the Chamber instructs the Prosecutor to discharge the disclosure obligations on a rolling basis, *immediately* after identifying relevant evidence for disclosure.

⁴⁵ Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), para. 4.

⁴⁶ The Chamber has not received clear information as to the number of items already reviewed and has made that calculation based on the information provided by the Prosecutor, see: Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), para. 24, indicating that it had disclosed 632 items on 22 July 2020; First Progress Report, [ICC-02/05-01/20-131](#), para. 3, indicating that, since 23 July 2020, it had reviewed 860 items; and Second Progress Report, [ICC-02/05-01/20-146](#), para. 3 and footnote 3, indicating that had conducted primary review of 1,436 items, but only 25 of them had been subject to secondary review.

⁴⁷ Second Progress Report, [ICC-02/05-01/20-146](#), para. 5.

⁴⁸ First Progress Report, [ICC-02/05-01/20-131](#), para. 5; Second Progress Report, [ICC-02/05-01/20-146](#), para. 5; Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 32.

⁴⁹ *Yekatom* Decision on Disclosure, [ICC-01/14-01/18-64-Red](#), para. 16; *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), para. 18.

18. As previously noted, the provisional and tentative nature of the information provided by the Prosecutor has made it impossible for the Chamber to devise a calendar for disclosure.⁵⁰ The Chamber notes with concern the continuous generality and tentative nature of the information provided by the Prosecutor, who appears to still be at the very early stages of evidence collection and investigation.⁵¹

19. Therefore, in order to ensure timely disclosure in the case and that the person is not detained for an unreasonable period prior to trial, the Chamber instructs the Prosecutor to substantially improve the nature and content of the information provided to the Chamber in its bi-weekly progress reports starting again as of Friday, 9 October 2020, including therein – apart from the additional information required in the subsections below – clear updates and substantial details as to the: (i) 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; (ii) 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; (iii) estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting; (iv) number and type of all items disclosed during the relevant period; (v) 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; (vi) 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. The Chamber stresses, however, that while the Prosecutor is entitled to continue investigating at this stage of the proceedings,⁵² the start of the confirmation

⁵⁰ First Order on Disclosure, [ICC-02/05-01/20-116](#), para. 9.

⁵¹ See First Progress Report, [ICC-02/05-01/2-131](#), para. 6, stating that the Prosecutor is providing information ‘to the best of its ability given the size and complexity of the Darfur evidence collection, the changing nature of some figures and estimates due to its continuing investigation, its currently available resources and the time provided’.

⁵² Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, 29 January 2013, [ICC-01/09-02/11-614](#), para. 9; Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I

hearing cannot be made conditional upon the completion of additional investigations, nor can the date of the confirmation hearing depend on wholly uncertain political developments that may have an impact on ongoing or planned investigations. The Prosecutor shall submit the abovementioned information on a confidential or a confidential *ex parte* Prosecutor only basis, as appropriate.

B. Order and quality of disclosure

20. In the July 2020 Observations, the OTP indicated that, although not yet being in a position to assert the overall amount of evidence to be relied upon at the confirmation hearing, it had arrived at a tentative approximate number of 1,527 items.⁵³ No further information has been provided since then. By the end of August 2020, only 47 items intended to be relied upon by the Prosecutor for the purpose of the confirmation hearing ('Pre-Confirmation INCRIM package 1') had been disclosed.⁵⁴ After reviewing these items, the Chamber notes that they are all press releases and reports from international or non-governmental organisations. No information has been provided as to what the Prosecutor believes those items serve to prove.

21. The Chamber reiterates, as repeatedly stated in the Court's jurisprudence, that it is not the amount of evidence presented but its probative value and relevance to the case that is essential for the Chamber's confirmation decision.⁵⁵ Therefore, the Prosecutor should not disclose 'the greatest volume of evidence', but only that of true relevance to the case.⁵⁶ The Prosecutor is indeed expected to rely primarily on material (preferably forensic) evidence, audio/visual evidence as well as testimony based on

of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, [ICC-01/04-01/10-514](#), para. 44.

⁵³ Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), paras 20-21.

⁵⁴ Second Progress Report, [ICC-02/05-01/20-146](#), para. 5.

⁵⁵ Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 29 January 2012, [ICC-01/09-02/11-382-Red](#) ('Kenyatta Confirmation Decision') para. 81.

⁵⁶ *Yekatom* Decision on Disclosure, [ICC-01/14-01/18-64-Red](#), para. 18. See also, *Al Hassan* Decision on Disclosure, [ICC-01/12-01/18-31-tENG-Corr](#), para. 25; *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), para. 20; Pre-Trial Chamber III, *Prosecutor vs. Jean-Pierre Bemba Gombo*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 03 August 2008, [ICC-01/05-01/08-55](#) ('Bemba Decision on Disclosure'), para. 67.

first-hand and personal observations of the witnesses.⁵⁷ The Chamber further reminds the Prosecutor that hearsay evidence has extremely low probative value, all the more so when the hearsay in question is anonymous⁵⁸ and that facts of common knowledge do not require proof.⁵⁹ Lastly, the Chamber recalls the jurisprudence of the Court according to which open source reports and press articles may usefully introduce the historical context of a conflict situation, but do not necessarily per se meet the evidentiary threshold for the confirmation of charges.⁶⁰

22. Accordingly, the Chamber expects the Prosecutor to prioritise the review and disclosure of the most relevant and probative evidence, taking into account that the confirmation hearing will not automatically be postponed until the Prosecutor has had time to fully review every last item of evidence contained in its database(s), regardless of quality and/or relevance.

C. Identification of relevant parts of the evidence

23. In order to fully realise the right of the suspect to have adequate time to prepare his defence and to facilitate the Chamber's own preparation of the confirmation hearing, the relevance of the evidence disclosed should be clear, since 'disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings'.⁶¹

24. Accordingly, the Prosecutor shall indicate, for each disclosed item, which sections are deemed to contain incriminating and/or exonerating information. To that end, the

⁵⁷ Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 03 June 2013, [ICC-02/11-01/11-432](#) ('*Gbagbo* Adjournment Decision'), para. 27.

⁵⁸ *Gbagbo* Adjournment Decision, [ICC-02/11-01/11-432](#) (''), paras 28-30, referring to Appeals Chamber, *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, [ICC-01/04-01/10-514 \(OA 4\)](#), para. 40.

⁵⁹ Article 69(6) of the Statute.

⁶⁰ *Gbagbo* Adjournment Decision, [ICC-02/11-01/11-432](#), para. 35; Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', 14 May 2020, [ICC-01/14-01/18-403-Red-Corr](#), paras 159, 181, 193, 202, 211, 224, 233, 236.

⁶¹ *Al Hassan* Decision on Disclosure, [ICC-01/12-01/18-31-tENG-Corr](#), para. 25; *Bemba* Decision on Disclosure, [ICC-01/05-01/08-55](#), para. 67.

Prosecutor shall either use the highlight function in Ringtail and mark the relevant sections of documents, statements and transcripts as PEXO, INCRIM, R-77, or other or provide the relevant information by indicating page and paragraph numbers in a dedicated metadata field. For audio material, the Prosecutor is expected to indicate the relevant time intervals and highlight the relevant parts of the corresponding transcript or provide the pages/line numbers of the transcript in the metadata field. For visual evidence, if the relevance and significance is not immediately apparent from the exhibit, the Prosecutor shall include a brief note in the metadata field, explaining what is depicted and how it is relevant to the Prosecutor's case.

D. Communication to the Chamber

25. As envisaged in rule 121(2)(c) of the Rules, all evidence disclosed between the parties shall be communicated to the Chamber. The Chamber stresses that the communication to the Chamber of the totality of the evidence disclosed between the parties, regardless of whether they intend to rely on or present such evidence during the confirmation hearing, is critical for the purpose of allowing the Chamber to ensure that disclosure takes place under satisfactory conditions.⁶² Communication is facilitated or implemented through the Registry by making the evidence available to the Chamber.⁶³ Given the potentially large number of items to be disclosed in the case, and the Prosecutor's own commitment,⁶⁴ in order to facilitate the Chamber's filtering function,⁶⁵ the Chamber orders the Prosecutor to submit to the Chamber without delay, after receipt of disclosure packages by the Defence, a disclosure notification filing to the Chamber.

E. Documents affected by agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute

26. The Prosecutor should disclose, without undue delay, all evidence pursuant to article 67(2) of the Statute and rule 77 of the Rules that is protected by the conditions

⁶² *Yekatom* Decision on Disclosure, [ICC-01/14-01/18-64-Red](#), para. 12; *Al Hassan* Decision on Disclosure, [ICC-01/12/-01/18-31-tENG-Corr](#), paras 14-16.

⁶³ First Order on Disclosure, [ICC-02/05-01/20-116](#), para. 11.

⁶⁴ Second Progress Report, [ICC-02/05-01/20-146](#), footnote 6.

⁶⁵ *Al Hassan* Decision on Disclosure, [ICC-01/12/-01/18-31-tENG-Corr](#), para. 15.

in articles 54(3)(e), 72, and 93(8) of the Statute.⁶⁶ In the July 2020 Observations, the Prosecutor informed the Chamber that approximately 3,754 items ‘of material in the Prosecution’s collection’ were affected by agreements in accordance with paragraph 53(3)(e), 72 and 93 of the Statute.⁶⁷ Assuming that this reference is to the Darfur databases,⁶⁸ this would imply that more than 10% of the evidence related to the case is subject to agreements of this kind. The Prosecutor indicated at that time that the OTP ‘had already sent a lifting request pertaining to the first batch’,⁶⁹ but gave no information as to the number and type of items involved, the information provider, or the exact date when the requests were sent. In the First and Second Report the Prosecutor indicated the number of documents identified and stated that the Prosecution ‘will send requests’ to lift redactions.⁷⁰

27. The Chamber notes that such limited information makes it difficult for the Chamber to exercise its duty to ensure that disclosure takes place under satisfactory conditions. As the Chamber retains control over the disclosure process,⁷¹ it is not enough to be informed that unspecified steps will be taken at an unknown date in the future. The Chamber must be provided with sufficiently detailed information that would allow it to exercise its functions in case any problems arise.

28. In light of the above, and given the large number of items that the Prosecutor has already identified as being affected by confidentiality agreements,⁷² the Chamber

⁶⁶ *Yekatom* Decision on Disclosure, [ICC-01/14-01/18-64-Red](#), para. 22; *Al Hassan* Decision on Disclosure, [ICC-01/12-01/18-31-tENG-Corr](#), para. 53; *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), para. 43. See also Appeals Chamber, *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference of 10 June 2008, 21 October 2008, [ICC-01/04-01/06-1486](#) (OA13).

⁶⁷ Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), para. 39.

⁶⁸ Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), para. 4.

⁶⁹ Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), para. 39.

⁷⁰ First Progress Report, [ICC-02/05-01/20-131](#), para. 3; Second Progress Report, [ICC-02/05-01/20-146](#), para. 3; Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 56.

⁷¹ Pre-Trial Chamber II, *Prosecutor vs. Bosco Ntaganda*, Order Regarding the ‘Prosecution’s Information of the Status of Disclosure’, 15 January 2014, [ICC-01/04-02/06-210](#) (*Ntaganda* Order of Information of Disclosure), para. 9.

⁷² The Chamber notes that, according to the information provided by the Prosecutor, having only fully reviewed 1,517 items of evidence, identified 465 items as ‘to be requested to be lifted’. This would therefore amount to more than 30% of the evidence identified as disclosable in the case, and that calculation does not even consider – because numbers have not been given – the first batch for which the Prosecutor indicated that had already requested the confidentiality agreements to be lifted.

orders the Prosecutor to include in its bi-weekly reports, a confidential *ex parte* annex, available to the Prosecutor only, indicating (i) the number and type of documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute; (ii) the information providers; (iii) the dates when requests for consent to lift restrictions on disclosure were submitted to the information providers; and (iv) any additional relevant information regarding the progress of the process of seeking consent. In case the Prosecutor envisages any difficulty in obtaining consent to lift restrictions, the Prosecutor should, without delay, provide to the Chamber, on a confidential *ex parte* basis, the relevant documents together with specific countermeasures, including, where applicable, stipulated facts conceded by the Prosecutor or a chart detailing alternative evidence to be provided to the Defence and explaining in what manner that alternative evidence would be equivalent to the relevant documents that cannot be disclosed.⁷³

F. Translation

29. Regarding issues of translation, the Chamber recalls that, as consistently held by the Court's jurisprudence, the suspect does not have an unfettered right to obtain written translations of all items of evidence or official documents in the procedure.⁷⁴ Mr Abd-Al-Rahman is entitled to know in detail the nature, cause and content of the charges against him, including having translations of those documents which are necessary to meet the requirements of fairness. At the same time, he is entitled to be tried without undue delay and if *all* documents, beyond what is actually necessary to guarantee fairness, had to be translated, the expeditiousness of the proceedings would be seriously jeopardised due to the substantial time that translation requires.⁷⁵

30. The Chamber notes that Mr Abd-Al-Rahman fully understands and speaks Arabic.⁷⁶ The suspect is assisted by counsel,⁷⁷ who is fluent in both working

⁷³ *Ntaganda* Order of Information of Disclosure, [ICC-01/04-02/06-210](#), para. 11.

⁷⁴ *See, inter alia*, *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), para. 31; Pre-Trial Chamber III, *Prosecutor vs. Jean-Pierre Bemba Gombo*, Decision on the Defence's Request Related to Language Issues in the Proceedings, 4 December 2008, [ICC-02/05-01/08-307](#), paras

⁷⁵ *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), para. 32.

⁷⁶ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 20, lines 14 to 18.

⁷⁷ Notification of the Appointment of Mr Cyril Laucci as Counsel for Mr Ali Muhammad Al Abd-Al-Rahman, 19 June 2020, ICC-02/05-01/20-3.

languages of the Court.⁷⁸ The Chamber notes that the combination of having the assistance of a competent defence counsel, fluent in either of the working languages of the Court, together with having the core documents translated into the language that the suspect fully understands and speaks, satisfies the requirements of fairness, at this stage of the proceedings.⁷⁹ The core documents that need to be translated into the language the suspect fully understands and speaks, include (i) the Prosecutor's applications for a warrant of arrest and the Chamber's decisions thereon; (ii) the Document Containing the Charges and the List of Evidence, as well as any amendments thereto; and (iii) the relevant portions of the witness statements that are core to the preparation of the defence.⁸⁰

31. In the July 2020 Observations, the Prosecutor indicated that (i) the original language of the witness statements was English, while transcripts of recorded interviews were in English and Arabic; (ii) Arabic draft translations were available for 1,198 pages; (iii) complete English to Arabic translations were still pending for 2,007 pages; and (iv) the time needed to complete this work was approximately ten months, providing the LSU would have resources not available at the time,⁸¹ or lately.⁸² The Prosecutor did not mention the need to prepare any Arabic to English translations. In the First Progress Report, the Prosecutor simply indicated that the LSU 'has been processing nine requests for draft English to Arabic translations'.⁸³ In the Second Progress Report, the Prosecutor simply indicated that the LSU had completed 170 *draft* pages of Arabic to English translations and 77 *draft* pages of English to Arabic translations.⁸⁴

⁷⁸ Initial Appearance, [ICC-02/05-01/20-T-001-ENG](#), page 21, line 24 to page 22 line 3.

⁷⁹ *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), para. 33.

⁸⁰ *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), paras 32-35. See also Pre Trial Chamber II, *Prosecutor vs. Bosco Ntaganda*, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties, 17 May 2013, [ICC-01/04-02/06-64](#), paras 21-22 and Decision on the «Demande de la Défense aux fins de traduction en kinyarwanda de certains des principaux éléments de preuve», 24 September 2013, [ICC-01/04-02/06-115](#) ('*Ntaganda* Decision on Translation'), para. 12.

⁸¹ Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), paras 31-33.

⁸² Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 51, footnote 68.

⁸³ First Progress Report, [ICC-02/05-01/20-131](#), para. 4.

⁸⁴ Second Progress Report, [ICC-02/05-01/20-146](#), para. 4.

32. According to the information provided at the time of the Postponement Request,⁸⁵ apparently no advances were registered in translations.⁸⁶ However, the Prosecutor noted that the LSU's estimates did not include the translation of any new statements or translation of other material referring, for the first time, to 293 items (2,307 pages) of Arabic material requiring translation which, 'clearly', would require additional resources.⁸⁷ However, the Prosecutor made a commitment to complete translations if the hearing is postponed, although noting in a footnote that this 'assumes that translations would not be required sooner than 30 days prior to a confirmation hearing'.⁸⁸

33. The Chamber reiterates the need for the Prosecutor to discharge the disclosure obligations as soon as practicable and as early as possible and notes with concern the limited advances regarding translations since the suspect's surrender. In addition, the Prosecutor's commitment does not seem to be supported by solid expectations of concrete resources and starts from the wrong assumption that the disclosure obligations could be postponed until the very last moment, which this Chamber would certainly not allow. Further the vague, limited, and contradictory information provided so far by the Prosecutor does not allow the Chamber to properly exercise its functions and execute any real assessment of the translation requirements and the concrete advances made by the Prosecutor in that regard.

34. In light of the above, the Prosecutor is hereby instructed to include in the bi-weekly progress reports, starting on Friday, 9 October 2020, a 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 that regard. In addition, the Prosecutor should disclose to the Defence, as soon as practicable and on a rolling basis, all witness statements the Prosecutor intends to rely upon for the purposes of the confirmation hearing in its

⁸⁵ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 50.

⁸⁶ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 50, footnotes 66-67.

⁸⁷ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), paras 52-53.

⁸⁸ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 54 and footnote 69.

original language,⁸⁹ together with all transcripts and translations so far completed. As soon as the disclosure of witness statements commences to take place, on a rolling basis, the Defence is expected to review the statements with no translation into Arabic and identify the specific portions which require translation, as being ‘core to the preparation of the defence’.⁹⁰ The Defence of Mr Abd-Al-Rahman is therefore instructed to liaise with the Prosecutor on the amount of pages to be translated into Arabic and the estimated time required for the translation of each statement. The Prosecutor should include this information in the bi-weekly progress reports to the Chamber, allowing the Chamber to resolve any disagreements in conformity with its statutory powers to ensure the fairness of the proceedings with full respect for the rights of the suspect.

G. Postponement Request

35. In its Postponement Request, the Prosecutor argues that, following a comprehensive assessment of the relevant factors, it became apparent that the Prosecution would not be able to adequately discharge its statutory duties in order to be ready to proceed with a confirmation hearing on 7 December 2020.⁹¹ The Chamber will rule on the Request – together with the Request for Extension – in due course, once the Defence has submitted its response and the Prosecutor has provided the improved and updated information pursuant to the instructions included in this order. Nevertheless, the Chamber stresses that, in order to guarantee the fairness and expeditiousness of the proceedings and the rights of the suspect, the Chamber would only entertain the possibility of postponing the hearing once the OTP has demonstrated that it is seriously committed to discharging its disclosure obligations *as early as possible*, in a transparent, efficient and expeditious manner.

⁸⁹ According to the information provided by the Prosecutor the original language of all witness statements the Prosecutor intends to rely on is English, see Prosecutor Observations, [ICC-02/05-01/20-103-Red](#), para. 31.

⁹⁰ For a similar approach see *Ongwen* Decision on Disclosure, [ICC-02/04-01/15-203](#), paras 35-36; and *Ntaganda* Decision on Translation, [ICC-01/04-02/06-115](#), para. 12.

⁹¹ Postponement Request, [ICC-02/05-01/20-157-Corr-Red](#), para. 3.

FOR THESE REASONS, THE CHAMBER HEREBY

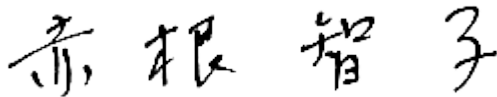
- a) **ORDERS** the Prosecutor to discharge the disclosure obligations on a rolling basis, as soon as practicable after identifying relevant evidence for disclosure;
- b) **ORDERS** the Prosecutor to indicate, for each disclosed item, which sections are deemed to contain incriminating and/or exonerating information, as indicated in paragraph 24 above;
- c) **ORDERS** the Prosecutor to submit to the Chamber, without delay after receipt of disclosure packages by the Defence, a disclosure notification filing;
- d) **ORDERS** the Prosecutor to disclose to the Defence, as soon as practicable and on a rolling basis, all witness statements the Prosecutor intends to rely upon at the confirmation hearing in its original language, together with all transcripts and translations so far completed;
- e) **ORDERS** the Defence to review the statements with no translation into Arabic and liaise with the Prosecutor for the purposes indicated in paragraph 34 above; and
- f) **ORDERS** the Prosecutor to substantially improve the nature and content of the information provided to the Chamber in its bi-weekly progress reports, as of Friday, 9 October 2020, including therein, as instructed in paragraphs 19, 28, and 34 above, on a confidential or a confidential *ex parte* Prosecutor only basis, as appropriate, the following information:
 - a. 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;
 - b. 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;
 - c. estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting;
 - d. number and type of all items disclosed during the relevant period;

- e. 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;
- f. 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;
- g. concerning documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute: (i) number and type of documents identified; (ii) information providers; (iii) dates when requests for consent to lift restrictions on disclosure were submitted to the information providers; and (iv) any additional relevant information regarding the progress of the process of seeking consent; and
- h. 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.

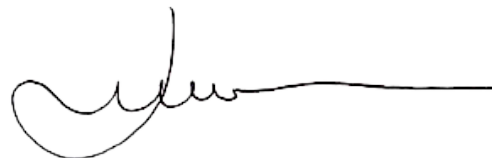
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Friday, 2 October 2020

At The Hague, The Netherlands