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No.: ICC-02/05-01/20
Date: 18 December 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
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 eighth 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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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Prosecution submits its eighth 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 seventh progress report submitted on 4 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-02/05-01/20-220.

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 7 December 2020, the Prosecution disclosed nine witness statements cited in the Prosecution's two applications under article 58 of the Statute. Of the items cited in these applications, a total of 41 items, including 26 witness statements, remain to be disclosed and the Prosecution intends to disclose material related to at least 5 witnesses on 23 December 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*⁷

5. There are currently 34,547 items (174,903 pages) registered in the Prosecution's Ringtail database. Since the seventh progress report, primary review has been carried out on 543 items (3,265 pages), of which 291 items (1,972 pages) have been recommended for disclosure, however secondary review of these items is ongoing.⁸ There remain 21,782 items (106,096 pages) in the collection still requiring both primary and secondary review, which include newly registered evidence.⁹

*Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting*¹⁰

6. The Prosecution refers the Chamber to paragraphs 34-39 of the Prosecution's second request to postpone the confirmation hearing and related deadlines ("Second Postponement Request"), filed on 3 December 2020, which provide an update on this same issue.¹¹

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

⁷ ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

⁸ This total number excludes items that have already been disclosed.

⁹ This number excludes materials from the UNCOI collection that were disclosed in bulk on 15 October 2020.

¹⁰ ICC-02/05-01/20-169, para. 19(iii) and p. 20, order (f)(c).

¹¹ ICC-02/05-01/20-218-Conf, paras. 34-39.

7. Since the last progress reports,¹² the tentative list of witnesses now stands at 103 witnesses,¹³ of which the Prosecution has already disclosed material related to 61 witnesses.¹⁴ The Prosecution commits to disclosing as many witness statements as possible on 23 December 2020.

Number and type of all items disclosed during the relevant period¹⁵

8. On 7 December 2020, the Prosecution disclosed to the Defence 252 items (2, 301 pages).¹⁶ This disclosure consisted of three packages - Pre-Confirmation INCRIM package 11 with 32 items (307 pages); Pre-Confirmation INCRIM package 12 with 159 items (1,714 pages); and Pre-Confirmation INCRIM package 13 with 61 items (280 pages).

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 them¹⁷

9. In relation to witness protection issues, notwithstanding the ongoing challenges most recently reported in the Second Postponement Request,¹⁸ since 4 December 2020 the Protection Strategies Unit of the Office of the Prosecutor ("PSU") has provided clearance in relation to an additional 6 witnesses, amounting to a total of 81 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 arise¹⁹

10. 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

¹² ICC-02/05-01/20-220, para. 8 and ICC-02/05-01/20-225, paras. 3 and 4.

¹³ Since last report, 4 new witnesses have been added (recently interviewed) and 1 prior witness has been re-added to list based on new assessment.

¹⁴ 18 of these witnesses were cited in the Applications.

¹⁵ ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

¹⁶ ICC-02/05-01/20-225, para. 3.

¹⁷ ICC-02/05-01/20-169, para. 19(v) and p. 21, order (f)(e).

¹⁸ ICC-02/05-01/20-218-Conf, paras 16-19; ICC-02/05-01/20-218-SECRET-Exp-Anx1.

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

in our fifth and sixth progress reports,²⁰ the COVID-19 pandemic continues to impact the Prosecution's work, primarily as it relates to the collection of additional evidence.²¹ Unfortunately, with the nationwide lockdown implemented by the Government of the Netherlands on 15 December 2020, due to last until at least the 19 January 2021, its impact on the Prosecution's investigative activities has become even more severe.

11. 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 lock down and more stringent measures activated in other jurisdictions, the planned investigative activities continue to be negatively impacted.

Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute²²

12. 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 regard²³

13. Annex 3 to this report contains a list of material upon which the Prosecution intends to rely for the purposes of the confirmation hearing. Since 4 December 2020, the Language Services Unit ("LSU") has completed the translation of documents from Arabic to English (134 pages), relating to audio visual material of Mr Al-Abd-Al-Rahman, also known as Ali Kushayb and other material related to 3 witnesses. LSU also completed the transcription and translation of audio material from Arabic to English (63 pages), these items are also reflected in the Annex.

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

²¹ See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

²² ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

²³ ICC-02/05-01/20-169, p. 21, order (f)(h).

*Update on an additional issue in accordance with the Chamber's order, issued on 12 October 2020*²⁴

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

IV. CONCLUSION

15. Unless instructed otherwise, the Prosecution will file the next progress report on 8 January 2021, given that the date for the ninth progress report falls on 1 January 2020, which is during the court recess.

16. 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 Stewart
Deputy Prosecutor

Dated this 18th day of December 2020

At The Hague, The Netherlands

²⁴ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.