

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-01/20

Date: 7 January 2021

PRE-TRIAL CHAMBER II

Before:

Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')

Confidential

Decision on the Prosecutor's Request for Authorisation for Data Extraction from one
Seized Phone

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

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

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the 'Court'),¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, issues this 'Decision on the Prosecutor's Request for Authorisation for Data Extraction from one Seized Phone'.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.²
2. On 20 August 2020, upon the request of the Prosecutor,³ the Single Judge ordered the Registry to transfer, *inter alia*, three mobile phones that had been seized from Mr Abd-Al-Rahman to the Prosecutor for inspection.⁴
3. On 25 September 2020, the Prosecutor submitted a report⁵ indicating that the Office of the Prosecutor lacked the capability to forensically extract data from the internal memory of the Tecno and Alcatel phones. The Prosecutor requested to retain custody of these two phones so that it could consult with external experts regarding data extraction.
4. On 12 October 2020, the Single Judge issued a decision⁶ (i) granting the Prosecutor's request to retain custody of the Tecno and Alcatel phones, pending conversations with experts regarding data extraction; (ii) ordering the Prosecutor to submit bi-weekly updates to the Chamber regarding its communications with external experts; and (iii) directing the Prosecutor to request authorisation from the Chamber to

¹ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

² See, for example, Decision on the Defence Request to provide written reasoning for two oral decisions, 18 August 2020, [ICC-02/05-01/20-118](#), paras 1-4.

³ Prosecution's request for evidence in the custody of the Registry, 11 June 2020, ICC-02/05-01/07-83-US-Exp. A confidential redacted version and a public redacted version are also available, see ICC-02/05-01/20-9-Conf-Red and [ICC-02/05-01/20-9-Red](#).

⁴ Decision on the Prosecution's request for evidence in the custody of the Registry (ICC-01/05-01/20-9-Red2) and the Registry's request for instructions (ICC-02/05-01/07-86-US-Exp), ICC-02/05-01/20-123-Conf.

⁵ Prosecution's Report Relating to Items Obtained from the Registry Pursuant to Decision ICC-02/05-01/20-123-Conf, ICC-02/05-01/20-166-Conf.

⁶ Decision on the 'Prosecution's Report Relating to Items Received from the Registry Pursuant to Decision ICC-02/05-01/20-123-Conf', ICC-02/05-01/20-181-Conf.

carry out the additional extraction from the Tecno and Alcatel phones should an external entity indicate that it would be able to assist.

5. Between 23 October and 18 December 2020, in its bi-weekly reports, the Office of the Prosecutor (the 'OTP') provided updates to the Chamber regarding the progress made relating to its ongoing communications with the Netherlands Forensic Institute (the 'NFI') regarding data extraction of the Tecno and Alcatel phones.⁷

6. On 23 December 2020, the Prosecutor submitted a request for authorisation to approve the NFI to take the necessary steps to extract data from the Alcatel phone (the 'Request').⁸ The OTP indicates it has liaised with the Defence regarding this issue, and that the Defence did not object to the proposed procedure, with the caveat that should the Alcatel phone be destroyed, Mr Abd-Al-Rahman should be compensated for the value of the phone. The Prosecutor agreed to this caveat.

7. On 24 December 2020, the Defence submitted an email to the Chamber⁹ indicating that it does not intend to respond to the Request, and confirming that it has no objection to the proposed analysis. The Defence reiterated the caveat as set out at paragraph 6 above.

8. In the Request, the OTP states that on 23 November 2020, it provided the NFI with the Tecno and Alcatel phones, as well as two similar reference models to practice extracting data. The Prosecutor indicates that subsequently, the NFI informed the Prosecutor that it had extracted data from the Tecno phone using a non-destructive method that maintained the integrity of the phone, and that it may be able to apply a similar method to extract data from the Alcatel phone. However, the NFI would need to physically open and examine the phone, which risks causing damage to the phone and/or loss of data. The Prosecutor did not expect that the NFI would extract data from

⁷ Prosecution's fourth progress report on the evidence review, translation and disclosure process, 23 October 2020, [ICC-02/05-01/20-191](#) (see attached Annex 4); Prosecution's fifth progress report on the evidence review, translation and disclosure process, 6 November 2020, [ICC-02/05-01/20-200](#) (see attached Annex 4); Prosecution's sixth progress report on the evidence review, translation and disclosure process, 20 November 2020, [ICC-02/05-01/20-207](#) (see attached Annex 4); Prosecution's seventh progress report on the evidence review, translation and disclosure process, 4 December 2020, [ICC-02/05-01/20-220](#) (see attached Annex 3); and Prosecution's eighth progress report on the evidence review, translation and disclosure process, 18 December 2020, [ICC-02/05-01/20-241](#), (see attached Annex 4).

⁸ Prosecution's request for authorisation of data extraction from one seized phone, ICC-02/05-01/20-243-Conf.

⁹ Email from Cyril Laucci to the Chamber sent on 24 December 2020 at 17:35.

the Tecno phone during a preliminary examination, and as such, did not have the opportunity to request the Chamber's consent in advance of the extraction.

II. Analysis

9. At the outset, the Single Judge notes the Prosecutor's explanation that the NFI proceeded with data extraction of the Tecno phone before the Prosecutor was able to seek the authorisation of the Chamber.

10. Having considered the proposed data extraction, and noting as well that the Defence does not object, the Single Judge authorises the Prosecutor to permit the NFI to proceed with the data extraction of the Alcatel phone.

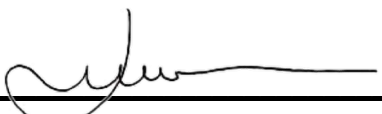
11. Following the completion of the data extraction and analysis process, the Single Judge directs the Prosecutor to return the Tecno and Alcatel phones to the Registry for safekeeping on behalf of Mr Abd-Al-Rahman for the duration of the proceedings. The Single Judge notes the Prosecutor's commitment to compensate Mr Abd-Al-Rahman in the event that the Alcatel phone is damaged during the NFI's attempt at extraction.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request; and

DIRECTS the Prosecutor to return the Tecno and Alcatel phones to the Registry for safekeeping, following the completion of the data extraction and analysis process.

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



Judge Rosario Salvatore Aitala
Single Judge

Dated this Thursday, 7 January 2021

At The Hague, The Netherlands