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No.: ICC-02/05-01/20
Date: 19 February 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 twelfth 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 Participation and Reparations
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I. INTRODUCTION

1. The Prosecution submits its twelfth 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 witnesses. 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 eleventh progress report submitted on 5 February 2021.⁴ In addition, pursuant to 16 February 2021 order issued by the Single Judge,⁵ the Prosecution in this report updates the Chamber on discussions relating to agreements as to the evidence. The Prosecution will address in turn each of the specific topics on which the Chamber has requested

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-02/05-01/20-278.

⁵ ICC-02/05-01/20-260. Email from the Pre-Trial Chamber II communications, 16 February 2021 17:04, “The Prosecutor is instructed to henceforth include updates about the status of discussions on agreements as to evidence in the bi-weekly progress reports.”

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 2020.⁶

*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*⁷

4. Since the last progress report,⁸ the Prosecution has disclosed items related to nine witnesses.⁹ Of these witnesses, five are on the list of witnesses for confirmation.¹⁰ Of the total of 278 items cited in the Prosecution's applications under article 58 of the Statute ("Applications"), the number of disclosed items is now at 257, including 48 witnesses. The remaining 21 items, including material related to 18 witnesses, will be disclosed in the coming weeks.

*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*¹¹

5. There are currently 34,879 items (177,096 pages) registered in the Prosecution's Ringtail database. To date, the Prosecution has reviewed 24,527 items (127,648 pages). There remain 10,352 items (49,448 pages) in the collection still requiring both primary and secondary review, which include newly registered evidence. The Prosecution continues to prioritise the review of the material related to the witnesses whose evidence will be relied upon at the confirmation hearing, were cited in the Applications, and those responsive to keyword searches.

*Estimated timeline for evidence review and disclosure of all evidence in possession or control of the Prosecutor at the time of reporting*¹²

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

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

⁸ ICC-02/05-01/20-278, para. 4.

⁹ Witnesses P-0008, P-0020, P-0039, P-0072, P-0102, P-0103, P-0558, P-0606, and P-666.

¹⁰ Witnesses P-0008, P-0020, P-0102, P-0103, and P-0558.

¹¹ ICC-02/05-01/20-169, para. 19(ii) and p. 20, order (f)(b).

¹² ICC-02/05-01/20-169, para. 19(iii) and p. 20, order (f)(c).

6. The provisional list of witnesses for the confirmation hearing now stands at 107 witnesses¹³ after the Prosecution withdrew P-0005, P-0063, P-0088, P-0128 and added P-0606, an existing witness and P-0878, P-0905 and P-0919, who were recently interviewed. Of the 107 witnesses for the confirmation hearing, the Prosecution has disclosed material related to 78 witnesses. The material related to the remaining 29 witnesses will be disclosed in the coming weeks, in line with the Chamber's deadline.

7. The above numbers do not include other disclosed witnesses that the Prosecution does not currently intend to rely on for the purposes of the confirmation hearing. To date, the Prosecution has disclosed an additional eight witnesses not included on its current witness list for the confirmation hearing, making a total of 90 witnesses disclosed to date.

8. Annex 3 to this report, tailored in accordance with the Single Judge's instructions conveyed by email on 19 January 2021,¹⁴ contains the updated information in relation to the recently disclosed witnesses.

Number and type of all items disclosed during the relevant period¹⁵

9. Since the last progress report, primary review has been carried out on 3,671 items (15,314 pages), of which 1,143 items (5,635 pages) have been recommended for disclosure but pending second review.

10. On 15 February 2021, the Prosecution disclosed to the Defence 237 items (2,402 pages).¹⁶ The disclosed items are in the following packages:

- Pre-Confirmation INCRIM package 21: contains 36 items (548 pages)
- Pre-Confirmation INCRIM package 22: contains 154 items (782 pages)
- Pre-Confirmation INCRIM package 23: contains 15 items (328 pages)

¹³ Three recently interviewed witnesses have been added: P-0878, P-0905, P-0919 and an existing witness, P-0606. This is also reflected in Annex 3 to this report.

¹⁴ ICC-02/05-01/20-265, para. 8.

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

¹⁶ ICC-02/05-01/20-284 and ICC-02/05-01/20-284-Conf-Anxs. A-D.

- Pre-Confirmation Rule 77 package 14: contains 32 items (744 pages)

11. INCRIM Package 21, contains items that belong to 4 witnesses whose identities cannot be disclosed at this stage. INCRIM Package 22, contains items that belong to the witnesses whose evidence will be relied upon at the confirmation hearing. INCRIM Package 23, contains 15 Arabic translations of witness statements previously disclosed in original language. Rule 77 package, contains items that are material to preparation of the Defence or are intended for use by the Prosecution at the confirmation hearing or at trial, in particular 24 transcripts belonging to witness, P-0102.

*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*¹⁷

12. In relation to witness protection issues, since 5 February 2021, the Protection Strategies Unit of the Office of the Prosecutor ("PSU") has provided clearance in relation to ten additional witness, amounting to a total of 103 witnesses. This number includes confirmation witnesses, as well as other witnesses not included on the Prosecution's current witness list. The Prosecution continues to re-establish contact with additional relevant witnesses.

*Updates on the status of discussions on agreements as to evidence*¹⁸

13. Pursuant to the Order of the Single Judge on 16 February 2021, for a status update on discussions between the Prosecution and the Defence concerning agreements as to evidence, the Prosecution reports that since the First Joint submission to the Chamber on issue,¹⁹ the Prosecution submitted to the Defence a list

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

¹⁸ ICC-02/05-01/20-260. Email from the Pre-Trial Chamber II communications, 16 February 2021 17:04, "The Prosecutor is instructed to henceforth include updates about the status of discussions on agreements as to evidence in the bi-weekly progress reports."

¹⁹ ICC-02/05-01/20-260.

of 24 proposed facts (“proposed facts”) relating to the contextual elements of war crimes, on 29 January 2021 for its consideration.²⁰

14. On 5 February 2021, the Defence submitted its response to the Prosecution’s proposed facts. The Defence agreed to number of proposed facts but for the remainder, it either suggested changes, requested further input, or rejected some.²¹ The Defence’s response is currently under review and consideration. A further response will be provided to the Defence by 28 February 2021.

15. Additionally, the Prosecution continues to identify potential issues for agreement in relation to the contextual elements of crimes against humanity and other areas, and will aim to submit an additional list of proposed facts to the Defence by 28 February 2021.

*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*²²

16. 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 the previous progress reports,²³ the COVID-19 pandemic continues to negatively impact the Prosecution’s work, primarily in relation to the collection of evidence.²⁴

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*²⁵

17. 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.

²⁰ ICC-02/05-01/20-260, para. 6.

²¹ Email from the Defence, 05 February 2021 16:06.

²² ICC-02/05-01/20-169, para. 19(vi) and p. 21, order (f)(f).

²³ ICC-02/05-01/20-200, paras. 14 and 15; ICC-02/05-01/20-207, paras. 14 and 15; ICC-02/05-01/20-265, paras. 15-16 and ICC-02/05-01/20-278, para. 13.

²⁴ See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

²⁵ ICC-02/05-01/20-169, paras. 26-28 and p. 21, order (f)(g).

*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*²⁶

18. Annex 3 to this report contains a list of the witness statements and transcripts relating to the 107 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. An additional column titled “Disclosure Date of Translation” has been added to Annex 3 to reflect the status of the disclosure of the draft statements.

19. During the reporting period, the Language Services Unit (“LSU”) completed two draft translations for witnesses, P-0606 and P-0877. Of the 107 witness statements listed in Annex 3, draft translations are pending only for four witnesses,²⁷ as they were recently interviewed and placed on the provisional confirmation list of witnesses.

20. Lastly, on 15 February 2021, the Prosecution disclosed 15 draft Arabic translations of witness statements related to 15 witnesses.²⁸ Since the last report, LSU has revised two draft translations for witnesses, P-0060 and P-0065. The Prosecution is preparing the next batch of draft Arabic translations of witness statements for disclosure in the coming weeks.

*Update on an additional issue in accordance with the Chamber’s order, issued on 12 October 2020*²⁹

21. Annex 4 to this report contains the latest information on this matter.

²⁶ ICC-02/05-01/20-169, p. 21, order (f)(h).

²⁷ Witnesses P-0892, P-0878, P-0905 and P-0919.

²⁸ ICC-02/05-01/20-284, para. 4 and ICC-02/05-01/20-284-Conf-AnxC.

²⁹ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.

IV. CONCLUSION

22. 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.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

James Stewart
Deputy Prosecutor

Dated this 19th day of February 2021

At The Hague, The Netherlands