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No.: ICC-02/05-01/20

Date: 19 March 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

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 fourteenth 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 fourteenth 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 thirteenth progress report submitted on 5 March 2021.⁴ Pursuant to the Single Judge’s order issued on 16 February 2021, the Prosecution also provides an update on its discussions with the

¹ ICC-02/05-01/20-116, paras. 16-17 and p. 8.

² ICC-02/05-01/20-169, para. 19 and pp. 20-21, order (f).

³ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.

⁴ ICC-02/05-01/20-292.

Defence on “agreements as to the evidence.”⁵ Pursuant to the Chamber’s decision issued on 12 October 2020,⁶ the Prosecution also provides its update in Annex 4.

*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 11 witnesses.⁹ Of these witnesses, four 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 269, including 60 witnesses. The remaining nine items, including material related to six witnesses, will be disclosed shortly.

*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 35,277 items (180,057 pages) registered in the Prosecution’s Ringtail database. To date, the Prosecution has reviewed 27,170 items (149,813 pages). There remain 8,107 items (30,244 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

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.”

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-0070, P-0112, P-0140, P-0290, P-0003, P-0004, P-0023, P-0036, P-0042, P-0045, and P-0019.

¹⁰ Witnesses P-0070, P-0112, P-0140, and P-0290.

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 111 witnesses.¹³ Of the 111 witnesses for the confirmation hearing, the Prosecution has disclosed material related to 90 witnesses. The material related to the remaining 21 witnesses will be disclosed shortly.

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. Since the last report, the Prosecution has disclosed an additional seven witnesses¹⁴ not included on its current witness list for the confirmation hearing, making a total of 113 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 2021,¹⁵ contains the updated information in relation to the recently disclosed witnesses.

Number and type of all items disclosed during the relevant period¹⁶

9. Since the last progress report, primary review has been carried out on 1,815 items (13,683 pages), of which 586 items (5,008 pages) have been recommended for disclosure but pending second review. The Prosecution intends to disclose an additional 392 items (3,834 pages) on 19 March 2021.

10. On 5 March 2021, the Prosecution disclosed to the Defence 19 items (162 pages)¹⁷ in Pre-Confirmation INCRIM package 26 that were originally collected under article 54(3)(e) restrictions that have been subsequently lifted.

11. On 9 March 2021, the Prosecution disclosed to the Defence 63 items (827 pages).¹⁸ The disclosed items are in the following packages:

- Pre-Confirmation INCRIM package 27: contains 27 Arabic translations of previously disclosed witness statements

¹³ Three witnesses have been added: P-0882, P-0912, and P-0913. This is also reflected in Annex 3 to this report.

¹⁴ Witnesses P-0003, P-0004, P-0023, P-0036, P-0042, P-0045, and P-0019.

¹⁵ ICC-02/05-01/20-265, para. 8.

¹⁶ ICC-02/05-01/20-169, para. 19(iv) and p. 20, order (f)(d).

¹⁷ ICC-02/05-01/20-286 and ICC-02/05-01/20-286-Conf-Anxs. A-C.

¹⁸ ICC-02/05-01/20-305.

- Pre-Confirmation INCRIM package 28: contains 36 items related to witness P-0032

12. On 12 March 2021, the Prosecution disclosed to the Defence 690 items (2,057 pages).¹⁹ The disclosed items are in the following packages:²⁰

- Pre-Confirmation INCRIM package 29: contains 29 items (53 pages)
- Pre-Confirmation INCRIM package 30: contains 29 items (703 pages)
- Pre-Confirmation INCRIM package 31: contains 51 items (704 pages)
- Pre-Confirmation Rule 77 package 16: contains 581 items (597 pages) related to witness P-0019

13. In addition, on 12 March 2021, the Prosecution also disclosed and re-issued the following packages:

- Pre-Confirmation Image Update package 2: containing 1 item (29 pages). This is the witness statement for P-0736. The Prosecution re-disclosed it with additional redactions applied to the name of a staff member
- Pre-Confirmation Metadata Update package 6: containing 5 items (41 pages). The Prosecution re-issued the correct name of a witness in the metadata fields (Source ID and Chain of Custody notes)
- Pre-Confirmation Metadata Update package 7: containing 5 items (25 pages). The Prosecution re-issued the metadata field ICC-02/05-01/20 Related to Witness for these items

14. On 15 March 2021, the Prosecution disclosed to the Defence 287 items (1,851 pages).²¹ The disclosed items are in the following packages:²²

¹⁹ ICC-02/05-01/20-305.

²⁰ Pre-Confirmation packages 29, 30 and 31 contain items related to Witnesses P-0003, P-0004, P-0070, P-0112 and P-0140.

²¹ ICC-02/05-01/20-305.

²² Pre-Confirmation INCRIM packages 32 and 33 and Pre-Confirmation Rule 77 package 17 contain items related to witnesses whose evidence was cited in the Applications under article 58 of the Statute and/or will be relied upon at the confirmation hearing.

- Pre-Confirmation INCRIM package 32: contains 60 items (814 pages)
- Pre-Confirmation INCRIM package 33: contains 94 items (193 pages)
- Pre-Confirmation Rule 77 package 17: contains 133 items (844 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 them*²³

15. In relation to witness protection issues, since 5 March 2021, the Protection Strategies Unit of the Office of the Prosecutor ("PSU") has provided clearance in relation to 16 additional witnesses,²⁴ amounting to a total of 120 witnesses.²⁵ 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

16. Pursuant to the Order of the Single Judge on 16 February 2021,²⁶ as previously reported to the Chamber, the Prosecution and the Defence filed a Joint Prosecution and Defence submission on agreed facts on 4 March 2021, including a list of 17 facts related to the contextual elements of war crimes.²⁷ The Prosecution is in the process of formulating additional facts for the contextual elements of war crimes, and it will provide an updated list of proposed facts to the Defence as soon as practicable.

17. As previously reported to the Chamber, on 28 February 2021, the Prosecution submitted to the Defence a list of nine facts related to the contextual elements of crimes against humanity. On 3 March 2021, the Defence submitted a response wherein it agreed in principle to six facts without any amendments. The Defence

²³ ICC-02/05-01/20-169, para. 19(v) and pp. 20-21, order (f)(e).

²⁴ Witnesses P-0039, P-0078, P-0090, P-0130, P-0307, P-0470, P-0479, P-0550, P-0553, P-0793, P-0843, P-0882, P-0905, P-0912, P-0919, and P-0018.

²⁵ This total number now includes Witness P-0018.

²⁶ 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."

²⁷ ICC-02/05-01/20-291.

suggested an amendment to one proposed fact and rejected two others, and the Prosecution has agreed to these changes as of 19 March 2021.

18. The Prosecution is in the process of formulating additional agreed facts related to the contextual elements of crimes against humanity that it will send to the Defence as soon as practicable. The Prosecution and the Defence will then prepare a joint submission on the agreed facts related to the contextual elements of crimes against humanity.

19. In addition, on 18 March 2021, the Prosecution sent a proposed map of the region of West Darfur State relevant to the case to the Defence for agreement, and it is currently awaiting a response.

20. The Prosecution continues to assess the potential to agree facts in other areas with a view to ensuring the efficient and expeditious disposal of proceedings. Should the Prosecution identify any additional facts that are suitable for agreement, it will submit these to the Defence and update the Chamber accordingly.

*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*²⁸

21. 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,²⁹ the COVID-19 pandemic continues to negatively impact the Prosecution's work, primarily in relation to the collection of evidence.³⁰

*Documents subject to agreements pursuant to articles 54(3)(e), 72, and 93(8) of the Statute*³¹

22. 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.

²⁸ ICC-02/05-01/20-169, para. 19(vi) and pp. 20-21, order (f)(f).

²⁹ 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.

³⁰ See ICC-02/05-01/20-157-Conf-Exp-Corr, paras. 25-26.

³¹ ICC-02/05-01/20-169, paras. 26-28 and pp. 20-21, 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*³²

23. Annex 3 to this report contains a list of the witness statements and transcripts relating to the 111 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.

24. During the reporting period, the Language Services Unit ("LSU") completed two draft translations for Witnesses P-0883 and P-0913. Of the 111 witness statements listed in Annex 3, draft translations are pending for four witnesses, as they were recently interviewed and placed on the provisional confirmation list of witnesses.³³ With respect to Witness P-0905, draft transcripts in English and Arabic were registered on 17 March 2021.

25. On 9 March 2021, the Prosecution disclosed 27 Arabic translations of witness statements and transcripts. On 12 March 2021, Arabic translations for six of the 10 transcripts related to Witness P-0112 were disclosed, and the Arabic translations for the remaining four transcripts will be disclosed shortly. Since the last report, LSU has revised four draft translations for Witnesses P-0083, P-0085, P-0091, and P-0123. The Prosecution is preparing the next batch of Arabic translations of witness statements for disclosure shortly.

*Update on an additional issue in accordance with the Chamber's order, issued on 12 October 2020*³⁴

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

IV. CONCLUSION

³² ICC-02/05-01/20-169, pp. 20-21, order (f)(h).

³³ Witnesses P-0883, P-0918, P-0912, and P-0882.

³⁴ ICC-02/05-01/20-181-Conf, para. 13 and p. 6.

27. The Prosecution continues to make every possible effort to progress the preparation of this case as quickly and effectively as possible.

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

James Stewart
Deputy Prosecutor

Dated this 19th day of March 2021

At The Hague, The Netherlands