



Original: English

No. ICC-02/05-01/20

Date: 9 July 2021

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

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

Public redacted version of

'Decision on the Prosecution's request for evidence in the custody of the Registry (ICC-0205-01/20-9-Red2) and the Registry's request for instructions (ICC-02/05-01/07-86-US-Exp), 20 August 2020, ICC-02/05-01/20-123-Conf'

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Mr Julian Nicholls

Counsel for Mr Abd-Al-Rahman

Mr Cyril Laucci

Legal Representatives of Victims

Ms Amal Clooney
Mr Nasser Mohamed Amin Abdalla

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Ms Paolina Massidda

**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

Mr Harry Tjonk

**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,¹ having regard to article 57(3)(a) and (e) of the Rome Statute ('Statute'), issues this Decision on the 'Prosecution's request for evidence in the custody of the Registry' (the 'Prosecutor's Request' or 'Request')² and the Registry's *Information et demande d'instructions concernant les objets en possession du Greffe suite à la remise d'Ali Muhammad Ali Abd-Al-Rahman (« M. Kushayb »)* (the 'Registry's Request').³

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor's application under article 58(7) of the Statute⁴ and decided⁵ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman ('Mr Abd-Al-Rahman')⁶ 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.

2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor's application to amend the first warrant of arrest pursuant to article 58(6) of the Statute⁷ by issuing a second warrant of arrest against Mr Abd-Al-Rahman⁸ 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.

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

² Prosecution's request for evidence in the custody of the Registry, 11 June 2020, [ICC-02/05-01/07-83-US-Exp \(confidential redacted versions notified on 26 June 2020, ICC-02/05-01/20-9-Conf-Red; public redacted version notified on 9 July 2020, ICC-02/05-01/20-9-Red2\)](#).

³ *Information et demande d'instructions concernant les objets en possession du Greffe suite à la remise d'Ali Muhammad Ali Abd-Al-Rahman (« M. Kushayb »)*, 13 June 2020, [ICC-02/05-01/07-86-US-Exp](#) with one [Annex \(ICC-02/05-01/07-86-US-Exp-Anx\)](#).

⁴ 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).

⁵ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

⁶ Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

⁷ 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).

⁸ 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).

3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court.⁹

4. On 11 June 2020, the Prosecutor submitted the Request.

5. On 13 June 2020, the Registry made a filing in which it provided the Chamber with certain information and asked instructions about what it should do with some items that were handed over to it by the authorities of the Central African Republic when Mr Abd-Al-Rahman surrendered himself and was transferred to the Court.

6. On 3 July 2020, the Defence for Mr Abd-Al-Rahman filed its response to the Prosecutor's Request (the 'Defence Response').¹⁰

II. SUBMISSIONS

7. The Prosecutor requests the Chamber to order the Registry, under article 57(3)(a) of the Statute, to transmit to the Prosecutor any relevant evidence obtained by the Registry in connection with Mr Abd-Al-Rahman's surrender, arrest and transfer to the Court.¹¹ The Prosecutor identifies 14 categories of items that might be relevant to the investigation. These are:

- i. weapons (including firearms or ammunition),
- ii. communication devices (including mobile telephones, satellite telephones and Subscriber Identity Module (SIM) cards),
- iii. data storage devices (including digital cameras and computers),
- iv. photographs,
- v. diaries,
- vi. address books,
- vii. notes, memoranda, decisions, orders, reports,
- viii. minutes of meetings or conversations,

⁹ Report of the Registry on the Arrest and Surrender of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/07-85-Conf-Exp.

¹⁰ *Réponse à la Requête ICC-02/05-01/20-9-Conf-Red*, ICC-02/05-01/20-16-Conf.

¹¹ Prosecution's Request, para. 13.

- ix. military, militia or police or intelligence or judicial documents,
- x. birth certificates,
- xi. identity documents,
- xii. documents showing his military service number,
- xiii. passports and other travel documents, and
- xiv. military appointments or promotions or decrees.¹²

8. The Prosecutor also requests the Chamber to order the Registry to provide a list of items in its custody, so that the Chamber, in consultation with the Prosecutor, can make a determination of which items amongst Mr Abd-Al-Rahman's personal effects are relevant evidence that should be provided to the Prosecutor.¹³

9. In the Registry's Request, the Registry lists a number of items which appear to fall into the some of the categories indicated by the Prosecutor mentioned above. In particular, in addition to clothing, a necklace with small leather attachments, and travel gear, the following items were found among Mr Abd-Al-Rahman's possessions:

- i. three mobile phones and two SIM cards,
- ii. a file containing the arrest warrant issued the day before Mr Abd-Al-Rahman's arrest by the Central African authorities,
- iii. a passport,
- iv. 8 documents that appear to be certificates, diplomas, or identity documents in Arabic.¹⁴

10. The Registry also informs the Chamber that Mr Abd-Al-Rahman was carrying a sum of money in Sudanese currency, approximately equivalent to [REDACTED] euros.¹⁵ The Registry seeks the Chamber's instructions on what should happen with

¹² Prosecution's Request, para. 9.

¹³ Prosecution's Request, para. 10.

¹⁴ Registry's Request, paras 8, 10.

¹⁵ Registry's Request, para. 8.

this sum in light of the Pre-Trial Chamber's order to freeze all of Mr Abd-Al-Rahman's assets.¹⁶

11. The Defence asks the Chamber to reject the Prosecutor's Request entirely. Its main legal argument is that the statutory basis of the Request (articles 54(1)(a) and (b), 54(3)(a) and 57(3)(a) of the Statute) is superseded by regulation 192 of the Regulations of the Registry. In particular, the Defence argues that the principles of interpretation of the Vienna Convention on the Law of Treaties dictate that general provisions cannot be interpreted in a manner that would go against more specific rules.¹⁷ The Defence also alleges that granting the Prosecutor's Request would violate the Registry's neutrality and would be contrary to Mr Abd-Al-Rahman's internationally recognized human right to enjoy his property, a right that is protected under article 21(3) of the Statute.¹⁸ Apart from (a) asking the Chamber to reject the Prosecutor's Request, the Defence also asked the Chamber to (b) reclassify the Prosecutor's Request; (c) order the Registry to formally confirm that it has not and will not communicate to the Prosecutor, other participants or the public, any information or documents received 'in confidence' from Mr Abd-Al-Rahman in the exercise of its functions without first informing Mr Abd-Al-Rahman and obtaining the prior authorisation of the Chamber or the Single Judge.

III. ANALYSIS

12. Before addressing the Prosecutor's Request, the Single Judge will rule on the Defence's objections.

13. First, in relation to the Defence's argument that article 57(3)(a) of the Statute must be interpreted in conformity with regulation 192 of the Regulations of the Registry, the Single Judge notes that the Regulations of the Registry are subordinate to the Statute in the hierarchy of norms before the Court.¹⁹ Moreover, in the view of the Single Judge, it is wrong to suggest, as the Defence seems to do, that the Regulations of the Registry can be considered as constituting an instrument made by

¹⁶ Registry's Request, para. 11.

¹⁷ Defence Response, para. 9.

¹⁸ Defence Response, para. 11.

¹⁹ Regulation 1(1) of the Regulations of the Registry.

one or more of the parties to the treaty,²⁰ which is accepted as an instrument related to the treaty in the sense of article 31(2)(b) of the Vienna Convention on the Law of Treaties. It also does not constitute a relevant rule of international law applicable in the relations between the parties to a treaty, in the sense of article 31(3)(c) of said Convention. The Regulations of the Registry are a document prepared by the Registry in consultation with the Prosecutor and approved by the Presidency, in order to regulate the operation of the Registry.²¹

14. Moreover, regulation 192 of the Regulations of the Registry deals with how the personal belongings of suspects should be handled by the ICC Detention Centre. The suggestion that such a technical rule could trump the Court's general investigatory powers under the Statute lacks any merit.

15. Second, the Defence's invocation of Mr Abd-Al-Rahman's right to enjoy his property is misplaced. The Prosecutor does not ask the Chamber to transfer the property rights of the items that the Prosecutor wishes to inspect and investigate. The Prosecutor merely wishes to verify whether or not the items contain relevant information for the purposes of this criminal investigation. If, upon examining the items, the Prosecutor concludes that an item does not contain such information, it will be returned to Mr Abd-Al-Rahman personally or stored by the Detention Centre.

16. The Defence objections are therefore rejected. The Single Judge further observes that the Defence's attempt to portray the Prosecutor's Request as somehow out of the ordinary because the items are in the Registry's custody is entirely misplaced. The Prosecutor's Request is a regular application for a search and seizure warrant pursuant to article 57(3)(a) of the Statute and the Single Judge has treated the Request accordingly. The fact that the items are already in the Court's custody does not fundamentally change anything.

17. In assessing the Prosecutor's Request, the Single Judge must consider whether the Prosecutor has provided relevant and sufficient reasons to justify issuing a search

²⁰ The Single Judge notes that, in accordance with article 2(1)(g) of the Vienna Convention on the Law of the Treaties, a 'party' means: 'a State which has consented to be bound by the treaty and for which the treaty is in force'.

²¹ Rule 14(1) of the Rules of Procedure and Evidence.

warrant. In particular, there must be reasonable grounds to believe that the requested search would produce evidence that is necessary for the investigation. Moreover, it must be shown that the search is necessary in the circumstances and proportionate to the pursuance of a legitimate aim.²² For that purpose, the search warrant may be accompanied by certain limitations, so that the interference is not unlimited and potentially disproportionate.

18. In this instance the Prosecutor did not specifically motivate the Request. Instead, the Prosecutor proposes that the Chamber order the Registry to provide a list of items in their custody, so that the Chamber, in consultation with the Prosecutor, can make a determination of which items amongst Mr Abd-Al-Rahman's personal effects are relevant evidence that should be provided to the Prosecutor.²³

19. However, having examined the list of items provided by the Registry, the Single Judge is of the view that, exceptionally and in light of the straightforward nature of the items in question, there is no need for a more specific motivation of the request in this specific instance.

20. Indeed, it is readily apparent how the 8 documents could be relevant to the Prosecutor's investigation, as they may provide information about the suspect's status and personal background. The Single Judge also considers that the Prosecutor's examination of said documents will not unduly infringe upon Mr Abd-Al-Rahman's rights, as these are not documents that contain private information.

21. The Single Judge considers that there is no need for the Prosecutor to physically examine the Mr Abd-Al-Rahman's passport and arrest warrant as they do not appear to constitute evidence in this case. It will suffice that the Registry provides the Prosecutor with (scanned) copies of said documents.

²² See, e.g., Pre-Trial Chamber I, Prosecutor v. Lubanga Dyilo, Decision on the confirmation of charges, 29 January 2007, [ICC-01/04-01/06-803-tEN](#), paras 74-75; Appeals Chamber, *Prosecutor v. Bemba Gombo et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII, 08 March 2018, [ICC-01/05-01/13-2275-Red](#), paras 331-332.

²³ Prosecution's Request, para. 10.

22. With regard to the mobile phones and SIM cards, the Single Judge notes that it is unclear whether these items were already in Mr Abd-Al-Rahman's possession at the time that is most relevant to the alleged crimes. Nevertheless, there is a reasonable possibility that the Prosecutor may find relevant information on these items that post-dates the alleged crimes but pertains to them directly or indirectly. They may equally contain information that may be relevant to assess Mr Abd-Al-Rahman's relation to certain individuals, including suspects, potential suspects and witnesses.

23. The Single Judge is satisfied that the legitimate aim of the investigation to obtain the abovementioned potentially relevant information outweighs the intrusion of Mr Abd-Al-Rahman's privacy. Nevertheless, the Prosecutor is instructed to limit the number of people who will have access to Mr Abd-Al-Rahman's personal information that is not relevant to the investigation.

24. One month after receiving Mr Abd-Al-Rahman's documents, mobile phones and SIM cards, the Prosecutor shall report to the Chamber whether any relevant information was found and indicate the nature thereof. The Prosecutor shall also explain which measures have been taken to limit access to Mr Abd-Al-Rahman's private information. If no relevant information was found, the items shall be returned to the Registry for safekeeping on behalf of Mr Abd-Al-Rahman. If relevant information is found, the items will be seized and stored in the Registry vault.²⁴

25. Finally, the Single Judge has considered the Registry's query about the destiny of the funds Mr Abd-Al-Rahman was carrying when he surrendered to the Court. In light of the Pre-Trial Chamber's Decision on Cooperation Requests for Identification, Tracing, and Freezing or Seizure of Property and Assets,²⁵ the Single Judge orders the Registry to freeze the money. In principle, the funds shall remain frozen until the end of the criminal proceedings against Mr Abd-Al-Rahman. However, the Registrar may decide to release all or part of the funds for the purpose of contributing to Mr Abd-Al-Rahman's legal costs if it will be established that Mr Abd-Al-Rahman is not totally indigent. Mr Abd-Al-Rahman may also request permission from the Registrar to use part or all of the funds to meet demonstrable familial obligations, with the Chamber's

²⁴ Regulation 15 of the Regulations of the Registry.

²⁵ ICC-02/05-01/07-25-US.

previous permission. Finally, if Mr Abd-Al-Rahman so wishes, he may request permission from the Chamber to release the funds to donate them to the Trust Fund for Victims.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

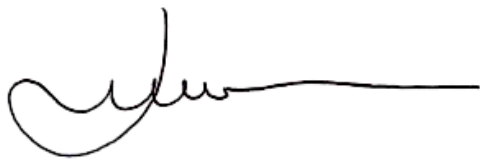
ISSUES a Warrant for the Seizure of the items mentioned in paragraph 9 of the present Decision;

ORDERS the Registry to hand over the 8 documents as well as the mobile phones and SIM cards to the Prosecutor and to provide the Prosecutor with (scanned) copies of Mr Abd-Al-Rahman's passport and the CAR arrest warrant;

ORDERS the Prosecutor to comply with the instructions contained in paragraph 24 of the present Decision; and

ORDERS the Registry to freeze the money that was in Mr Abd-Al-Rahman's possession when he surrendered to the Court subject to the conditions stated in paragraph 25 of the present Decision.

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

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Friday, 9 July 2021

At The Hague, The Netherlands