

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-01/20

Date: 2 October 2020

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

EX PARTE, only available to the Prosecutor, the Defence, and the Registry

Decision on the Defence's Request for the Reclassification of Annexes to the 'Report of the Registry on the Arrest and Surrender of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")'

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

Mr Julian Nicholls

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,¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')* (the '*Abd-Al-Rahman* case'), having regard to regulations 23bis(3) and 24(5) of the Regulations of the Court (the '*Regulations*'), and regulations 14 and 24 of the Regulations of the Registry, issues this Decision on the Defence's Request for the Reclassification of Annexes to the 'Report of the Registry on the Arrest and Surrender of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")'.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.²
2. On 10 September 2020, the Defence submitted a Request³ for the reclassification of Annexes associated with the 'Report of the Registry on the Arrest and Surrender of Mr Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")'⁴ (respectively, the 'Request', the 'Annexes', and the 'Report').
3. On 15 September 2020, pursuant to a direction from the Chamber,⁵ the Registry submitted its observations on the Request (the 'Observations').⁶
4. On 16 September 2020, the Defence submitted a request for leave to reply to the Observations (the 'Request for Leave to Reply').⁷

II. SUBMISSIONS

5. The Defence requests that Annexes I to XV of the Report be reclassified as confidential, *ex parte*, available to the Registry and the Defence. The Defence notes

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 Requête en vertu de la norme 23bis-3 du Règlement de la Court (Reclassification des annexes I à XV au document ICC-02/05-01/20-90-CONF-EXP), ICC-02/05-01/20-150-Conf-Exp.

⁴ ICC-02/05-01/20-90-Conf-Exp, 12 June 2020.

⁵ Email from Pre-Trial Chamber II to the Registry, 10 September 2020, at 16.45.

⁶ Registry's Observations on the Requête en vertu de la norme 23bis-3 du Règlement de la Court (Reclassification des annexes I à XV au document ICC-02/05-01/20-90-CONF-EXP) (ICC-02/05-01/20-150-Conf-Exp), ICC-02/05-01/20-155-Conf-Exp.

⁷ Requête en vertu de la norme 24-5 (Réplique à ICC-02/05-01/20-155-CONF-EXP), ICC-02/05-01/20-156-Conf-Exp.

that, while the Registry stated in its Report that the Annexes would become available in due course, to date, the Defence has not received any explanation regarding the delay in reclassification. Per the description in the Report, the Annexes relate to the surrender, arrest, and transfer of Mr Abd-Al-Rahman in June 2020, and accordingly, the Defence submits, the documents are of paramount importance to the Defence. The Defence argues that it cannot determine the legality of the arrest and detention of the suspect without access to these Annexes.

6. In its Observations, the Registry indicates that it does not oppose the reclassification of Annexes XI and XIII as confidential, *ex parte*, available to the Defence and the Prosecutor. The Registry further submits as follows: Annex VII may be reclassified as confidential, *ex parte*, available to the Registry and the Defence, with redactions to the contact information of the person who signed the document; Annex X may be reclassified as confidential, *ex parte*, only available to the Registry and the Prosecutor, and may be provided to the Defence with redactions to information related to the operational arrangements of the Court; Annex XV may be reclassified as confidential with proposals for redactions to make it available to either the Prosecutor or the Defence.

7. As to Annexes I, II, VIII, IX, and XII, the Registry is of the view that reclassification of these documents should be considered at a later stage. Since these Annexes contain the names of officials of CAR authorities, the Registry has been enquiring with CAR authorities as to whether they would agree to share this information with parties and participants. However, if the Chamber decides to reclassify these Annexes, the Registry suggests that redactions be applied to the identifying information of CAR officials, at a minimum.

8. In regard to Annexes III to VI and XIV, the Registry submits that the current level of classification should be maintained, as they relate to the operational arrangements of the Registry.

9. In the Request to Reply, the Defence submits that it could not have reasonably anticipated that the Registry would object to its request for reclassification, given that the Registry previously indicated in the Report that it would make the Annexes available to the Defence in due course. The Defence seeks leave to reply to explain

why, in its view, the Registry's position is incompatible with a duty of respect to the Defence, and the Registry's obligation to remain neutral.

III. ANALYSIS

i. Request for Leave to Reply

10. The Single Judge recalls that regulation 24(5) of the Regulations provides that 'participants may only reply to a response with leave of the Chamber'. Noting that the Observations do not constitute a 'response' within the meaning of regulation 24(5) of the Regulations, the Defence may not seek leave to reply under this regulation. The Single Judge further notes that, even if regulation 24(5) of the Regulation were applicable, the Single Judge considers that there is sufficient information before him upon which to base the decision. On this basis, the Request for Leave to Reply is rejected.

ii. Request

11. Turning to the Request, in regard to Annexes III to VI and XIV, the Single Judge finds that the reasoning provided by the Registry is sufficient to maintain the existing classification of the documents.⁸

12. As to the remaining Annexes at issue, as they relate to the arrest and detention of Mr Abd-Al-Rahman, the Single Judge finds that such documents may be relevant to the preparation of the Defence, and thus shall be reclassified as confidential *ex parte*, available to the Defence and/or the Prosecutor, subject to the terms set out below:

- (i) Annexes I, II, VIII, IX, and XII shall be provided on a confidential *ex-parte* basis, available to the Registry, Prosecutor, and Defence only, with redactions to be applied by the Registry to the identifying information of CAR officials;
- (ii) Annexes XI and XIII shall be reclassified as confidential *ex-parte*, available to the Registry, Prosecutor, and Defence, without redactions;

⁸ For a similar approach, see Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaissona*, Decision on Motion for Review and Reclassification of Ex Parte Filings, 16 September 2019, ICC-01/14-01/18-348, para. 19; and Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on Reclassification of Documents, 4 April 2012, ICC-01/11-01/11-99, para. 14.

- (iii) Annex VII shall be reclassified as confidential *ex-parte* only available to the Registry and the Defence, with the proposed redactions as set out in Annex I to the Observations;
- (iv) Annex X shall be reclassified as confidential *ex-parte*, available to the Registry and the Defence, with the proposed redactions as set out in Annex II to the Observations. An unredacted version of the document shall be reclassified as confidential *ex-parte* only available to the Prosecutor and the Registry; and
- (v) Annex XV shall be reclassified as *ex-parte*, only available to the Registry and the Prosecutor, with the proposed redactions as set out in Annex III to the Observations, and shall be reclassified as confidential *ex-parte*, only available to the Registry and the Defence, with the proposed redactions as set out in Annex IV to the Observations.

iii. *Classification of this Decision*

13. Noting that the present decision includes a determination to reclassify certain Annexes, thereby making them available to the Defence as well as the Prosecutor, the present decision is filed on a confidential, *ex-parte* basis available to the Prosecutor, the Defence, and the Registry.

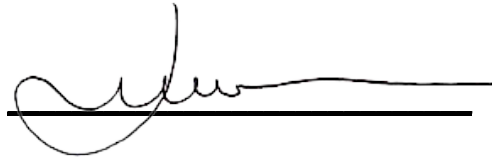
FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence Request for Leave to Reply;

GRANTS IN PART the Request to reclassify certain Annexes to the ‘Report of the Registry on the Arrest and Surrender of Mr Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)’ to the Prosecutor and the Defence, as set out at paragraph 12 of the present decision; and

DETERMINES that Annexes III to VI and XIV to the Report shall maintain their current classification

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, positioned above a solid black horizontal line.

Judge Rosario Salvatore Aitala

Single Judge

Dated this Friday, 2 October 2020

At The Hague, The Netherlands