



Original: English

No. ICC-02/05-01/20

Date: 26 March 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')***

Public

Decision on the Defence request to have an MOU registered in the record of the case
and on reclassification of filings

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 Julian Nicholls

Counsel for the Defence

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 Massida

**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 having regard to articles 54(3)(d) and 68 of the Rome Statute, rule 81(3) of the Rules of Procedure and Evidence, and regulation 23bis of the Regulations of the Court (the ‘Regulations’) issues this Decision on the Defence request to have an MOU registered in the record of the case and on reclassification of filings.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.²
2. On 18 December 2020, the Prosecutor submitted a first request for the authorisation of the non-disclosure of witness identities (the ‘First Request’).³ The Defence submitted a response to the First Request on 1 January 2021,⁴ and a complement to this response on 15 January 2021.⁵
3. On 26 February 2021, the Prosecutor submitted a second request for the authorisation of the non-disclosure of witness identities (the ‘Second Request’).⁶ The Prosecutor indicates that on 14 February 2021, a Memorandum of Understanding (the ‘MOU’) was signed between the Office of the Prosecutor and the Government of Sudan for cooperation in relation to the investigation and prosecution of Mr Abd-Al-Rahman.⁷

¹ [Decision on the designation of a Single Judge](#), 17 March 2021, ICC-02/05-01/20-307.

² See, for example, [Decision on the Defence request and observations on reparations pursuant to article 75\(1\) of the Rome Statute](#), 18 August 2020, ICC-02/05-01/20-117, paras 1-4.

³ Prosecution’s first request for the authorisation of non-disclosure of witness identities, ICC-02/05-01/20-242-Conf-Exp. A confidential redacted version was filed on the same day (ICC-02/05-01/20-242-Conf-Red), and a lesser redacted version was filed on 12 January 2021 (ICC-02/05-01/20-242-Conf-Red2).

⁴ Réponse à la Requête ICC-02/05-01/20-242-CONF-RED, ICC-02/05-01/20-246-Conf.

⁵ Complément de Réponse à la Requête ICC-02/05-01/20-242-CONF-RED, ICC-02/05-01/20-257-Conf.

⁶ Prosecution’s second request for the authorization of non-disclosure of witness identities, ICC-02/05-01/20-287-Conf-Exp. A confidential redacted version was filed on the same day (ICC-02/05-01/20-287-Conf-Red).

⁷ Second Request, para. 38.

4. On 2 March 2021, the Defence submitted a request related to the Second Request (the ‘MOU Request’).⁸ It indicates that it is not in a position to respond to the Second Request before evaluating the impact which the MOU would have on witness protection.⁹ To that end, the Defence asks the Chamber to (i) order the Prosecutor to register the MOU in the case record; (ii) suspend the time limit to respond to the Second Request; (iii) order the Prosecutor to register a public redacted version of the Second Request; and (iv) reclassify the MOU Request as public.

5. On 4 March 2021, the Single Judge instructed the Prosecutor to respond to the MOU Request and temporarily suspended the Defence’s time limit for its response to the Second Request.¹⁰

6. On 8 March 2021, the Prosecutor filed a response to the MOU Request (the ‘Response’).¹¹ The Prosecutor indicates that (i) the MOU consists of a ‘framework for cooperation’ between the Prosecutor and the Government of Sudan, not applicable to third parties; (ii) the document ‘does not provide directly for witness protection or related mechanisms that would assist the Defence in its response’; (iii) ‘the confidentiality of the MoU was expressly agreed upon’ by the signing parties; and (iv) ‘[d]isclosure or communication of the MoU at this stage could [...] damage the fragile relationship established with Sudan after more than 14 years of non-cooperation and obstruct future cooperation and investigation activities on the ground’.¹²

7. On 12 March 2021, pursuant to the instruction of the Single Judge,¹³ the Prosecutor submitted the MOU to the Chamber for review.¹⁴

⁸ Requête aux fins d’enregistrement d’un document dans le dossier de l’affaire, d’extension de délai et de reclassification, ICC-02/05-01/20-289-Conf.

⁹ MOU Request, paras 5-6.

¹⁰ Email sent from Pre-Trial Chamber II to the parties on 4 March 2021 at 12:37.

¹¹ Prosecution’s response to “Requête aux fins d’enregistrement d’un document dans le dossier de l’affaire, d’extension de délai et de reclassification”, 2 March 2021, ICC-02/05-01/20-289-Conf, ICC-02/05-01/20-294-Conf.

¹² Response, paras 4, 7.

¹³ Email from Pre-Trial Chamber II to the parties sent on 11 March 2021 at 17:28.

¹⁴ Prosecution Response to the Direction of the Single Judge in relation to Defence Request ICC-02/05-01/20-889-Conf, ICC-02/05-01/20-298-Conf, with a confidential, *ex parte*, annex A, available only to the Prosecutor.

II. ANALYSIS

8. Having assessed the nature and content of the MOU, the Single Judge considers that the information contained therein is not necessary for the Defence to respond to the Second Request. In particular, as noted by the Prosecutor, the MOU ‘contains no more than the essential framework for cooperation based on Part IX of the Rome Statute and the Agreement on the Privileges and Immunities of the International Criminal Court for the purpose of the OTP’s investigations’. Moreover, ‘[i]t does not provide directly for witness protection or related mechanisms that would assist the Defence in its response’.¹⁵

9. Furthermore, the Single Judge observes that the Prosecutor agreed with the Sudanese authorities to keep the MOU confidential.¹⁶ Although such agreements are not necessarily absolute, the Defence has not identified any specific need for disclosure that could justify lifting confidentiality.¹⁷ The Single Judge notes, in this regard, that ‘documents related to cooperation between the Prosecution and national authorities are not disclosable *per se*’.¹⁸ As already stated, the Defence does not require access to the MOU to respond to the Second Request, and the Single Judge does not consider that ‘*l’exhaustivité du dossier de l’affaire*’¹⁹ is a sufficient ground to lift confidentiality, especially considering that doing so might undermine Sudan’s readiness to cooperate with the Court.

10. Lastly, the Single Judge instructs the Prosecutor to file public redacted versions of the First and Second Requests and authorises the reclassification of the MOU Request as public, pursuant to regulation 23bis(3) of the Regulations.

¹⁵ Response, para. 4.

¹⁶ Response, para. 7.

¹⁷ [Al Hassan Disclosure of Correspondence Decision](#), para. 6.

¹⁸ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities (the ‘[Al Hassan Disclosure of Correspondence Decision](#)’), 5 January 2021, ICC-01/12-01/18-768-Red, para. 6. The confidential version was filed on 23 April 2020 (ICC-01/12-01/18-768-Conf). More generally, on a Chamber’s limited power on requests related to an MOU, see Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Public redacted version of Decision on requests related to the draft memorandum of understanding concerning cooperation between MINUSCA and the International Criminal Court](#), 13 September 2016, ICC-01/05-01/13-963-Red, para. 13. The confidential version was filed on 25 May 2015 (ICC-01/05-01/13-963-Conf).

¹⁹ MOU Request, para. 8.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

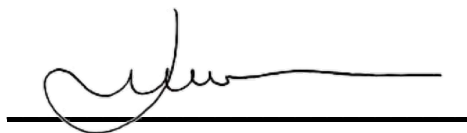
REJECTS the MOU Request;

INSTRUCTS the Prosecutor to file public redacted versions of the First Request and the Second Request;

ORDERS the Registrar to reclassify as public filing ICC-02/05-01/20-289-Conf; and

DIRECTS the Defence to file its response to the Second Request by no later than **Tuesday, 6 April 2021, at 16:00 hours.**

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

A handwritten signature in black ink, consisting of a stylized 'R' followed by a long horizontal stroke, positioned above a solid black horizontal line.

Judge Rosario Salvatore Aitala

Single Judge

Dated this Friday, 26 March 2021

At The Hague, Netherlands