

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



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

Date: 19 April 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")**

**Confidential**

**Prosecution's Response to Defence's "*Demande de reclassification d'un document, de reconsidération ou d'autorisation d'interjeter appel de la Décision ICC-02/05-01/20-323*" (ICC-02/05-01/20-332-Red)**

**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 Pre-Trial Chamber II ("Chamber") should reject the Defence's *Demande de reclassification d'un document, de reconsideration ou d'autorisation d'interjeter appel de la Décision ICC-02/05-01/20-323* ("Request").<sup>1</sup> The Defence has not demonstrated an appropriate legal basis to justify its new request for reclassification or, alternatively, for reconsideration of the Chamber's "Decision on the Defence request to have an MOU registered in the record of the case and on reclassification of filings" ("Decision")<sup>2</sup>. Furthermore, the Defence's subsidiary request for leave to appeal the Decision fails to meet the test under article 82(1)(d) of the Rome Statute ("Statute"). The issues raised by the Defence do not arise from the Decision, do not constitute appealable issues within the terms of article 82(1)(d) of the Statute and, furthermore, do not significantly affect the fair conduct of proceedings.

## II. CLASSIFICATION

2. This filing is classified as confidential in accordance with regulation 23*bis*(2) of the Regulations of the Court since it refers to a document marked both confidential and *ex parte*.

## III. PROCEDURAL HISTORY

3. On 2 March 2021, the Defence filed a motion ("Motion") seeking a suspension and an extension of its deadline to respond to the Prosecution's second request for the authorisation of non-disclosure of witnesses identities<sup>3</sup> ("Second Request") as well as the registration in the case record of the confidential Memorandum of Understanding ("MoU") signed on 14 February 2021 between the Office of the Prosecutor ("OTP") and the authorities of the Republic of Sudan ("Sudan")<sup>4</sup>.

4. The Prosecution objected to the Defence's Motion on 8 March 2021<sup>5</sup>.

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<sup>1</sup> [ICC-02/05-01/20-332-Red.](#)

<sup>2</sup> [ICC-02/05-01/20-323.](#)

<sup>3</sup> ICC-02/05-01/20-287-Conf-Red ("Second Request").

<sup>4</sup> [ICC-02/05-01-20-289.](#)

<sup>5</sup> ICC-02/05-01/20-294-Conf.

5. On 12 March 2021, complying with an instruction of the Single Judge<sup>6</sup>, the Prosecution submitted a copy of the MoU to the Chamber for review<sup>7</sup>.

6. In its Decision<sup>8</sup>, the Chamber dismissed the Defence's Motion on 26 March 2021, holding that (i) the information contained in the MoU was not necessary for the Defence's response to the Second Request as it only contained the essential framework for cooperation with the Office of the Prosecutor ("OTP") and did not encompass any measure related to the protection of victims; (ii) the Prosecutor agreed with Sudanese authorities to keep the MoU confidential; (iii) the Defence did not identify any specific need for disclosure that would justify the lifting of confidentiality; and (iv) the completeness of the case file was not a sufficient argument to lift the confidentiality of the document.

7. In its Request, the Defence requests the following:

- a. Firstly, it requests the Chamber to reclassify the MoU to confidential or public, but not *ex parte*, based on Rule 23bis(3) of the Regulations;
- b. Secondly, should the Chamber reject the request for reclassification, the Defence seeks reconsideration of the Decision; and
- c. Thirdly, in the alternative and should the request for reclassification and or reconsideration be denied, the Defence seeks leave to appeal the Decision, based on three different issues which it considers impact on the fairness of the proceedings<sup>9</sup>.

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<sup>6</sup> Email from Pre-Trial Chamber II to the parties sent on 11 March 2021 at 17:28.

<sup>7</sup> ICC-02/05-01/20-298-Conf, with *ex parte* Annex A.

<sup>8</sup> [ICC-02/05-01/20-323](#), paras. 8-10.

<sup>9</sup> [ICC-02/05-01/20-332-Red](#), paras. 24-26.

#### IV. SUBMISSIONS

##### **A) The Defence's request for a new ruling on the classification of the MoU, or for reconsideration of the Chamber's Decision should be dismissed**

8. The first two Defence requests are examined together, since they are based on the same grounds.

9. The Request does not meet the test established by the Court – and as previously applied by this Chamber<sup>10</sup> – to allow for the exceptional reconsideration of a decision.

10. The Request does not demonstrate that the Decision rests on a clear error in reasoning<sup>11</sup>. The Single Judge, after fully analysing the wording of the MoU, found that it was not only confidential in its nature and character, but also that it expressly bore such classification. Moreover, the Single Judge considered the Defence's arguments before dismissing the Defence Motion. The Decision is therefore not manifestly unsound<sup>12</sup>.

11. In addition, the Request does not demonstrate that reconsideration is necessary to prevent an injustice<sup>13</sup>. The Single Judge expressly found that access to the MoU is not necessary for the Defence to exercise its rights<sup>14</sup>, noting that the MoU is merely an operational tool without any intrinsic evidential value. The Defence has yet again not provided any concrete reason justifying its access to the content of the document and accordingly has not met its burden.

12. Nor does the Defence provide any change in circumstances or a new compelling reason to justify its Request.<sup>15</sup> There is no change in the factual circumstances justifying a new ruling<sup>16</sup>. In this regard, the Registrar's information regarding the difficulties

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<sup>10</sup> [ICC-02/05-01/20-163](#), para. 12.

<sup>11</sup> [ICC-01/05-01/08-3343](#), para. 25. [ICC-02/04-01/15-1259](#), para. 12. [ICC-01/04-02/06-519](#), para. 12. [ICC-01/04-02/06-1049-Red](#), para. 12. [ICC-01/09-01/11-1813](#), para. 19.

<sup>12</sup> [ICC-01/04-01/06-2705](#), para. 18.

<sup>13</sup> See footnote 10 above.

<sup>14</sup> [Decision](#), para. 8.

<sup>15</sup> [ICC-01/05-01/08-3343](#), para. 30. [ICC-01/05-01/08-3204-Red](#), para. 14. [ICC-01/05-01/08-3089](#), para. 17.

<sup>16</sup> [ICC-02/04-01/15-468](#), para. 4.

surrounding the Defence's planned mission to Sudan is not new and has already raised before the Chamber<sup>17</sup>.

13. The fact that the Defence does not agree with the Decision does not make it ill-founded, manifestly unjust or wrong, and thus does not permit the exceptional remedy of reconsideration nor allow for re-litigation of the matter.

14. The Request simply constitutes a resubmission by the Defence of assertions which have already been dismissed by the Chamber and should be rejected. In this regard the Prosecution notes the Chamber's instructions to the Defence admonishing duplicative filings<sup>18</sup>.

**B) The Defence's subsidiary request for leave to appeal the Decision does not meet the legal standard**

15. The Defence's request for leave to appeal the Decision should also be dismissed. The issues identified<sup>19</sup> do not arise from the Decision, do not constitute appealable issues within the terms of article 82(1)(d) of the Statute and, furthermore, do not significantly affect the fair conduct of proceedings.

16. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d) of the Statute. The sole question is whether the issue meets the criteria set out in the provision<sup>20</sup>.

**B.1) The issues do not arise from the Decision**

17. The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which

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<sup>17</sup> [Request](#), para. 19.

<sup>18</sup> [ICC-02/05-01/20-186](#), para. 8. [ICC-01/05-01/13-1282](#), para. 8.

<sup>19</sup> [Request](#), paras. 24-26.

<sup>20</sup> [ICC-02/04-01/05-20-US-Exp](#), para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.”<sup>21</sup>

18. The identified issues, however, do not arise from the Decision, which specifically ruled on the request by the Defence to be provided with a copy of the MoU in order to respond to the Prosecution’s Second Request<sup>22</sup>. The Decision considered there was no necessity to provide the MoU to the Defence. It did not decide on the way in which the confidentiality of the document was established. Accordingly, this does not constitute an appealable issue.

19. Furthermore, the Defence’s Motion was also denied because it did not present sufficient grounds to lift confidentiality<sup>23</sup> and not because the Chamber was inclined to consider Sudan’s readiness to cooperate with the Court. Deciding on the scope of the Chamber’s functions under article 57 of the Statute, as requested by the Defence, would not invalidate the Decision, since the real issue arising from it is that the Defence did not– and still has not – provide any legal reason for why it should be granted access to the MoU.

## **B.2) The Request does not raise any appealable issue within article 82(1)(d)**

20. As presented by the Defence, the issues are “merely a question over which there is disagreement or conflicting opinion”.<sup>24</sup> That alone does not constitute an appealable issue.

21. The Single Judge expressly ruled on whether there was sufficient justification to lift the confidentiality of the MoU. Contrary to the Defence’s submissions, the Single Judge’s assessment was not made solely on the basis that the MoU is confidential. Rather, he decided, after analysing its content, that access to the MoU by the Defence was irrelevant based on the reasons given by the Defence.

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<sup>21</sup> [ICC-01/04-168 OA3](#), para. 9; [ICC-02/04-01/05-367](#), para.22; [ICC-02/05-02/09-267](#), p. 6; [ICC-01/04-01/06-2463](#), para. 8; [ICC-01/09-02/11-27](#), para. 7.

<sup>22</sup> [Decision](#), para. 8.

<sup>23</sup> [Decision](#), para. 9.

<sup>24</sup> [ICC-01/04-168 OA3](#), para. 9; [ICC-01/05-01/08-532](#), para. 17; [ICC-02/05-02/09-267](#), para. 22; [ICC-01/04-01/06-1557](#), para. 30; [ICC-02/05-03/09-179](#), para. 27.

22. Since the issues presented in the Request merely disagree with the Chamber's decision, they fall outside the scope of article 82(1)(d) of the Statute.

23. Finally, since the Defence has not had access to the MoU, its submissions on the issue regarding the content and confidentiality of the MoU are merely hypothetical and speculative and accordingly do not constitute issues which should be certified for appeal<sup>25</sup>. The same reasoning applies to the issue related to the Chamber's functions under article 57 of the Statute. An abstract consideration of the Pre-Trial Chamber's functions is also merely speculative and would not have any practical impact on the proceeding.

**B.3) The issues do not significantly affect the fair and expeditious conduct of the proceedings**

24. Contrary to the Defence's submissions, the fair conduct of the proceedings and, in particular, the principle of equality of arms, is not put at risk by the Decision.

25. The Chamber reviewed the content of the MoU and correctly found that it "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".<sup>26</sup>

26. The conclusion of the MoU does not adversely affect the Defence's work. As mentioned in the Request, the Registry has informed the Defence it can enter into arrangements with Sudanese authorities to enable its desired mission to Sudan. Also, any evidence eventually collected by the Prosecution as a consequence of the signed MoU will be subject to the same legal standard as any other evidence submitted in this case. The fairness of proceedings is therefore in no way impaired by the mere conclusion of the MoU.

27. Finally, the Defence does not, at any point, articulate concretely how the conclusion of the MoU impacts its rights.<sup>27</sup> An applicant cannot speculate in the

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<sup>25</sup> [ICC-01/05-01/08-75](#), para.11; [ICC-02/04-01/05-367](#), para.22; [ICC-01/04-01/07-2035](#), para.26.

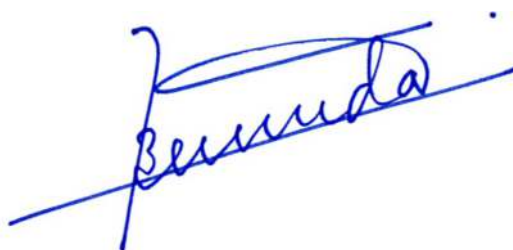
<sup>26</sup> [Decision](#), para. 8.

<sup>27</sup> [ICC-01/05-01/08-2925-Red](#), para 34.

abstract that a decision causes prejudice to the rights of the accused in order to question the fairness of the proceedings<sup>28</sup>. A general complaint as framed by the Defence does not suffice to meet the fairness requirement in article 82(1)(d).<sup>29</sup>

## V. RELIEF SOUGHT

28. For the foregoing reasons, the Prosecution requests the Pre-Trial Chamber to reject the Defence's Request.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 19<sup>th</sup> day of April 2021

At The Hague, The Netherlands

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<sup>28</sup> See [ICC-01/04-168 OA3](#), para. 10; [ICC-01/09-02/11-211](#) para. 33 and 39; [ICC-01/04-01/06-2109](#), para.22; [ICC-01/09-02/11-275](#), paras. 28-29; [ICC-01/09-01/11-301](#), para. 30; [ICC-01/09-02/11-406](#), paras.50, 61.

<sup>29</sup> [ICC-01/04-01/06-2463](#), para. 31; [ICC-01/09-01/11-301](#), para.34.