



Original: English

No. ICC-02/05-01/20

Date: 3 May 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 alternative request for reclassification of a document or reconsideration of a decision and subsidiary request for leave to appeal a decision

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 the Defence

Mr Cyril Laucci

Legal Representatives of Victims

Ms Amal Clooney
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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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 (the ‘Chamber’) of the International Criminal Court (the ‘Court’),¹ in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, pursuant to article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this Decision on the Defence alternative requests for reclassification of a document, reconsideration of a decision or leave to appeal a decision.

I. PROCEDURAL HISTORY

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.²
2. On 26 March 2021, the Single Judge issued a decision on the Defence request to have a Memorandum of Understanding (the ‘MOU’) signed between the Office of the Prosecutor and the Government of Sudan for cooperation in relation to this case registered in the record of the case (the ‘MOU Decision’).³
3. On 6 April 2021, the Defence requested reclassification of the MOU or reconsideration of the MOU Decision. As a subsidiary request, it seeks leave to appeal the MOU Decision (the ‘Request’).⁴
4. On 19 April 2021, the Prosecutor filed a response to the Request (the ‘Response’).⁵

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

² See e.g. [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, paras 1-9.

³ [Decision on the Defence request to have an MOU registered in the record of the case and on reclassification of filings](#), ICC-02/05-01/20-323. See [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.

⁴ [Version publique expurgée de la 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 (with two confidential *ex parte* annexes, ICC-02/05-01/20-332-Conf-Exp-Anx1 and ICC-02/05-01/20-332-Conf-Exp-Anx2).

⁵ 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), ICC-02/05-01/20-353-Conf.

II. SUBMISSIONS

A. The Request

5. The Defence submits that the confidentiality of the MOU is unfounded and it prevents Counsel from having access to information essential to the fulfilment of his mandate.⁶ The Defence further avers that the MOU Decision lacks any basis for accepting the confidential nature of the MOU, resulting in a contradictory decision.⁷ Additionally, the Defence submits that a new relevant fact has occurred since the issuance of the MOU Decision which justifies its request for reconsideration: the Registry's updated information on the practicality of missions in Sudan.⁸ Accordingly, the Defence requests the Chamber to, alternatively, (i) issue a new decision reclassifying the MOU as confidential or public, pursuant to regulation 23bis(3) of the Regulations of the Court; or (ii) reconsider the MOU Decision.

6. Subsidiarily, the Defence seeks leave to appeal the MOU Decision.⁹ In this regard, the Defence raises three issues (the 'Three Issues') which it believes impact the fairness of the proceedings: (i) whether a document which is not confidential in nature may be considered as such, contrary to the requirements for marking filings as 'confidential' (the 'First Issue'); (ii) whether the confidentiality of the MOU constitutes sufficient grounds for prohibiting its communication to the Defence (the 'Second Issue'); and (iii) whether the Chamber's duties encompass preserving "Sudan's readiness to cooperate with the Court" (the 'Third Issue').¹⁰

B. The Response

7. In the Prosecutor's view, the request for reclassification of the MOU or reconsideration of the MOU Decision should be dismissed for lacking legal substantiation.¹¹ The Prosecutor further argues that the request for leave to appeal the MOU Decision fails to meet the following legal criteria: (i) '[t]he issues do not arise

⁶ [Request](#), para. 7. *See also* para. 21.

⁷ [Request](#), para. 11.

⁸ [Request](#), paras 18-20.

⁹ [Request](#), p. 16. *See also* paras 21-22.

¹⁰ [Request](#), paras 23- 26.

¹¹ Response, paras 1, 8-14.

from the [MOU] Decision’;¹² (ii) ‘[t]he Request does not raise any appealable issue within article 82(1)(d)’;¹³ and (iii) ‘[t]he issues do not significantly affect the fair and expeditious conduct of the proceedings’.¹⁴

III. ANALYSIS

A. Applicable law

8. The Single Judge recalls the Chamber’s ruling on the exceptional nature of reconsideration of decisions.¹⁵

9. As for requests for leave to appeal, article 82(1)(d) of the Statute sets the following requirements which must be met to grant such a request:

- a. The matter constitutes, singly or collectively, an “appealable issue”;
- b. The(se) issue(s) could significantly affect:
 1. The fair and expeditious conduct of the proceedings, or
 2. The outcome of the trial; and
- c. In the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁶

10. Requirements a, b and c above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.¹⁷ There is no prescribed order in which the requirements must be considered.

¹² Response, paras 17-19.

¹³ Response, paras 20-23.

¹⁴ Response, paras 24-27.

¹⁵ [Décision relative à la demande aux fins de réexamen de la décision ICC-02/05-01/20-110 présentée par la défense \(ICC-02/05-01/20-113\)](#), 23 September 2020, ICC-02/05-01/20-163, para. 12; *Prosecutor v. Yekatom and Ngaïssona*, Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’ (the ‘[Yekatom and Ngaïssona Leave to Appeal Decision](#)’), 24 May 2019, ICC-01/14-01/18-206, para. 20.

¹⁶ [Yekatom and Ngaïssona Leave to Appeal Decision](#), para. 10; Pre-Trial Chamber II; *Prosecutor v. Ntaganda*, [Decision on the ‘Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’](#), 4 July 2014, ICC-01/04-02/06-322, para. 9; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008 (the ‘[Lubanga Leave to Appeal Decision](#)’), 26 February 2008, ICC-01/04-01/06-1191, para. 9.

¹⁷ [Yekatom and Ngaïssona Leave to Appeal Decision](#), para. 11; Pre-Trial Chamber I, *Situation in Democratic Republic of the Congo*, [Decision On The Prosecution's Application For Leave To Appeal The Chamber's Decision Of 17 January 2006 On The Applications For Participation In The Proceedings](#)

11. Regarding the subject matter of requests for leave to appeal, the Appeals Chamber has held that

[o]nly 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 or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.¹⁸

12. The single Judge emphasises that ‘the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal’.¹⁹

13. As previously stated by the Chamber,

[m]aterially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal. Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, “will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process”.²⁰

[Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6](#), 31 March 2006, ICC-01/04-135-tEN, para. 28; [Lubanga Leave to Appeal Decision](#), para. 10.

¹⁸ *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (the ‘[DRC Leave to Appeal Judgment](#)’), 13 July 2006, ICC-01/04-168, para. 9. See also Pre-Trial Chamber II, *Prosecutor v. Joseph Kony and Vincent Otti*, [Decision on the Defence Request for leave to appeal the 21 November 2008 Decision](#), 10 February 2009, ICC-02/04-01/05-367, para. 22; Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'", 1 April 2011, ICC-01/09-02/11-27, para. 7.

¹⁹ Pre-Trial Chamber II, *Prosecutor v. Joseph Kony et al.*, [Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58](#), 19 August 2008, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21.

²⁰ [Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198](#), 12 January 2021, ICC-02/05-01/20-254, para. 7, referring to Pre-Trial Chamber II, *Prosecutor v. Bemba Gombo et al.*, Joint decision on the applications for leave to appeal the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2015, ICC-01/05-01/13-801, para. 17; quoting [DRC Leave to Appeal Judgment](#), para. 16.

14. Moreover, it is important to stress that the term ‘proceedings’ in the second part of article 82(1)(d) of the Statute refers to the proceedings in their entirety.²¹ Accordingly, it is insufficient that an appeal would be legitimate or even necessary at some stage – as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.²² Indeed, such interlocutory appeals shall be regarded as exceptional and Chambers must be vigilant in determining which issues truly require immediate determination.²³

15. Finally, the Appeals Chamber has determined that “it is for the Pre-Trial [...] to determine not only whether a decision may be appealed, but also to what extent”.²⁴

B. Assessment

1. Reclassification of the MOU or reconsideration of the MOU Decision

16. The Single Judge observes that the Defence attempts to relitigate its previous request, which was denied, by seeking a new ruling from the Chamber relating to the disclosure of the same MOU.²⁵ In this regard, the Single Judge recalls that the Chamber has already warned the Defence against its duplicating filings.²⁶ The Single Judge puts

²¹ [DRC Leave to Appeal Judgment](#), para. 17.

²² [Lubanga Leave to Appeal Decision](#), para. 12.

²³ Pre-Trial Chamber II; *Prosecutor v. Yekatom and Ngaïssona*, [Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’](#), 21 March 2019, ICC-01/14-01/18-154, para. 12; [Lubanga Leave to Appeal Decision](#), paras 12-13.

²⁴ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)’](#), 1 November 2016, ICC-02/11-01/15-744, para. 13, quoting Appeals Chamber, *Prosecutor v. Laurent Gbagbo*, “[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(1\) of the Rome Statute’](#)”, 16 December 2013, ICC-02/11-01/11-572, para. 63. See also Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the ‘Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.’](#), 23 December 2015, ICC-01/05-01/13-1533, para. 16, p. 9, n. 29.

²⁵ See [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.

²⁶ [Decision on Defence Request for a Stay of Proceedings](#), 16 October 2020, ICC-02/05-01/20-186, para. 8.

the Defence on notice that the Chamber will not tolerate such practices and rejects this part of the Request *in limine*.²⁷

17. As regards the request for reconsideration, the Single Judge cannot discern any clear error of reasoning, let alone any injustice, that would warrant taking such an exceptional step. The Defence submits that there has been a change in circumstances on account of the Registry filing updated information regarding the conditions for Defence missions in Sudan.²⁸ However, as the Defence acknowledges,²⁹ this information is not new.³⁰ It also does not affect the Chamber's assessment of the need for the Defence to have access to the MOU.

18. For the above reasons, the Single Judge dismisses the alternative requests and will consider the Request as a request for leave to appeal.

2. Request for leave to appeal

19. The Defence claims that the Three Issues require immediate resolution by the Appeals Chamber to ensure the fair conduct of the proceedings.³¹ However, the Single Judge considers that none of the issues arise from the MOU Decision.

20. Regarding the First Issue, contrary to the Defence submission, the MOU is in fact marked as 'confidential'. The First Issue is therefore inaccurate.

21. As for the Second and Third Issues, they seem to arise from a misunderstanding of or disagreement with the MOU Decision. Indeed, the Defence appears to assume that it is entitled to receive a copy of the MOU and that the Chamber needs a justification to withhold it. However, as the MOU Decision clearly stated, there is nothing in the MOU which would be of assistance to the Defence and it therefore does not fall under the Prosecutor's disclosure obligations. As a result, non-disclosure of the MOU does not need to be justified because it does not infringe the rights of the suspect.

22. Moreover, even if any or all of the Three Issues arose from the MOU Decision, appellate intervention at this stage would not materially advance the proceedings.

²⁷ Rule 171 of the Rules.

²⁸ [Request](#), paras 18-20.

²⁹ [Request](#), para. 19.

³⁰ See *e.g.* Response, para. 12.

³¹ [Request](#), paras 23-26.

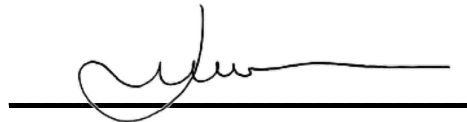
23. Accordingly, the Three Issues raised do not meet the criteria for granting leave to appeal.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request; and

INSTRUCTS the Prosecutor to file a public redacted version of the Response.

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 series of loops and a long horizontal stroke, positioned above a solid black horizontal line.

Judge Rosario Salvatore Aitala

Single Judge

Dated this Monday, 3 May 2021

At The Hague, The Netherlands