



Original: English

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

Date: 14 June 2021

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

Public

Public Redacted Version of “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”, 8 March 2021, ICC-02/05-01/20-294-Conf

Source: Office of the Prosecutor

Document 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 the Defence

Mr Cyril Laucci

Legal Representatives of the Victims

Ms Amal Clooney

Mr Nasser Mohamed Amin Abdalla

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**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

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Chamber should reject the Defence's *Requête aux fins d'enregistrement d'un document dans le dossier de l'affaire, d'extension de délai et de reclassification* ("Request").¹ The Defence has failed to demonstrate any legitimate legal basis or forensic purpose to substantiate the Request.

II. CLASSIFICATION

2. This filing is classified as confidential in accordance with regulation 23bis(2) of the Regulations of the Court since it responds to a request filed as confidential.

III. SUBMISSIONS

3. On 2 March 2021, the Defence requested a suspension and an extension to its deadline to respond to the Prosecution's request for the authorisation of non-disclosure of witnesses identity² ("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 Sudanese authorities.

4. This Request should be rejected because it is unsubstantiated and without any legitimate legal basis. Contrary to the Defence's submissions, and as expressly stated in the Second Request, the conclusion of the MoU does not change the "current risk assessment regarding witnesses residing in Sudan"³. The confidential agreement 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. It does not provide directly for witness protection or related mechanisms that would assist the Defence in its response. These mechanisms may only be realised in the future at the operational level,

¹ [ICC-02/05-01/20-289-Conf.](#)

² [ICC-02/05-01/20-287-Conf-Red](#) ("Second Request").

³ Second Request, para. 39.

now that the Prosecution is able to begin operations on the territory of the Republic of Sudan. Therefore, the Defence currently has all the necessary information to respond to the Second Request without further extension of time.

5. Regarding the request to register the MoU in the case record, the Prosecution notes that article 54(3)(d) of the Rome Statute expressly permits the OTP to enter into confidential agreements in order to facilitate the cooperation of a State. The Prosecution cannot be compelled to breach such valid agreements, including their confidentiality clauses, on the risk of undermining not only the present MoU but also future agreements. The Defence does not enjoy an unlimited right to communication of material in the possession of the Prosecution. Equally, the Prosecution has no obligation to communicate to the Defence or file in the record a confidential agreement governing the cooperation between the OTP and the government of a State.

6. Furthermore, documents related to the cooperation between the Prosecution and national authorities are not disclosable *per se* as established in Rule 81(3) of the Rules of Procedure and Evidence and in line with article 54(3)(d) and Part IX of the Rome Statute. This stance has been previously upheld by this Court.⁴

7. This principle is particularly relevant to the present case; [REDACTED]. Moreover, the MoU governs the cooperation relationship between its two parties and is in no way applicable to third parties such as the Defence. Similarly, the Defence cannot invoke provisions of the MoU.

8. Furthermore, the Defence has failed to demonstrate any forensic purpose for the Request. It has not shown how the conclusion of the MoU affects its ability to respond to the Prosecution's Second Request nor has it demonstrated that the Prosecution is under any obligation to register the MoU in the case record. Absent a legitimate forensic purpose, the Defence has no entitlement to conduct a fishing

⁴ [ICC-01/12-01/18-859-Red](#), paras. 13, 17-18. ICC-01/12-01/18-768-Conf, para. 6. [ICC-01/05-01/13-963-Red](#), para. 13. In the *Gaddafi* case ([ICC-01/11-01-11-578](#), para. 5), Pre-Trial Chamber I rejected the Defence's request for access to the MoU and noted that the agreement expressly did not apply to the case against Mr. Gaddafi. That is not the situation in the instant case, however, for all the reasons explained in this filing, the present MoU should also not be disclosed to the Defence.

expedition through the Prosecution's files, much less to access sensitive documents or materials resulting from the Prosecution's cooperation exchanges with States.

IV. CONCLUSION

9. For all the foregoing reasons, the Request should be rejected.



Fatou Bensouda
Prosecutor

Dated this 14th day of June 2021

At The Hague, The Netherlands