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No. ICC-02/05-01/20

Date: 21 May 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’)

Public

Decision on Defence requests and procedural challenges

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
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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The Office of Public Counsel for Victims

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), having regard to articles 4(2), 48, 57, 61(6), 67, 68, 69, 87, and 99 of the Rome Statute (the ‘Statute’), rules 14, 63, 64, 86-87, and 121-122 of the Rules of Procedure and Evidence (the ‘Rules’), regulation 30 of the Regulations of the Court, and regulations 14, 92-93, 100, and 119 of the Regulations of the Registry, issues this Decision on Defence requests and procedural challenges.

I. PROCEDURAL HISTORY

1. The Chamber recalls the general procedural history of the *Abd-Al-Rahman* case, as set out in previous decisions.¹
2. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge. At the hearing, the confirmation of charges hearing was scheduled to commence on Monday, 7 December 2020.²
3. On 5 October 2020, the Defence submitted a request to temporarily stay the proceedings (the ‘Temporary Stay of Proceedings Request’).³
4. On 16 October 2020, the Chamber rejected the Temporary Stay of Proceedings Request (the ‘Temporary Stay of Proceedings Decision’).⁴
5. On 2 November 2020, Pre-Trial Chamber II postponed the date of the commencement of the confirmation hearing to Monday, 22 February 2021.⁵

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

² Transcript of hearing, [ICC-02/05-01/20-T-001-ENG](#), p. 22, line 23 to p. 23, line 3.

³ [Requête aux fins d’arrêt ou de suspension temporaire des procédures](#), ICC-02/05-01/20-174.

⁴ [Decision on Defence Request for a Stay of Proceedings](#), ICC-02/05-01/20-186. Leave to appeal the Temporary Stay of Proceedings Decision was rejected on 9 November 2020, see [Decision on Defence Request for Leave to Appeal the ‘Decision on Defence Request for a Stay of Proceedings’](#), ICC-02/05-01/20-202.

⁵ [Decision on the Prosecutor’s request for Postponement of the confirmation Hearing and related deadlines](#), ICC-02/05-01/20-196.

6. On 14 December 2020, the Defence submitted the *Requête en vertu des Articles 4-2 et 68-1 du Statut* (the ‘Article 4(2) Request’).⁶
7. On 18 December 2020, Pre-Trial Chamber II postponed the date of the commencement of the confirmation hearing to Monday, 24 May 2021.⁷
8. On 14 January 2021, the Prosecutor filed a response to the Article 4(2) Request (the ‘Article 4(2) Response’).⁸
9. On 15 January 2021, the Registry submitted its observations on the Article 4(2) Request (the ‘Article 4(2) Observations’).⁹
10. On 18 January 2021, the Defence submitted its reply to the Article 4(2) Response and Article 4(2) Observations (the ‘Article 4(2) Reply’).¹⁰
11. On 19 January 2021, the Defence submitted a request pursuant to article 87(5) of the Statute, in which it asked the Chamber to find that the Sudanese authorities failed to cooperate with the Court in relation to three cooperation requests by the Defence (the ‘Article 87(5) Request’).¹¹
12. On 26 January 2021, the Defence submitted the *Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour* (the ‘Article 2 Request’).¹²

⁶ [Version Publique Expurgée de la Requête en vertu des Articles 4-2 et 68-1 du Statut](#), ICC-02/05-01/20-231-Red.

⁷ [Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), ICC-02/05-01/20-238.

⁸ [Prosecution’s response to “Version Publique Expurgée de la Requête en vertu des Articles 4-2 et 68-1 du Statut”](#), ICC-02/05-01/20-256.

⁹ Registry’s observations on the “*Requête en vertu des Articles 4-2 et 68-1 du Statut*” (ICC-02/05-01/20-231-Red), ICC-02/05-01/20-258-Conf.

¹⁰ [Version publique expurgée de l’Offre de Réplique aux Observations ICC-02/05-01/20-256 et ICC-02/05-01/20-258-Conf](#), ICC-02/05-01/20-261-Red.

¹¹ [Requête en vertu de l’Article 87-5-b du Statut de la Cour](#), ICC-02/05-01/20-263-

Conf-Exp (a public redacted version was filed on the same day as ICC-02/05-01/20-263-Red2, both versions were notified on 20 January 2021).

¹² [Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour](#), ICC-02/05-01/20-269.

13. On 29 January 2021, the Defence submitted the *Requête en vertu de l'Article 43-1 du Statut et de la Règle 13 du Règlement de Procédure et de Preuve* (the 'Article 43(1) Request').¹³ No response has been received from the Prosecutor.

14. On 5 February 2021, the Prosecutor filed its response to the Article 2 Request (the 'Article 2 Response').¹⁴

15. On 9 March 2021, the Chamber rejected the Article 87(5) Request, but invited the Defence to submit a request pursuant to article 57(3)(b) of the Statute (the 'Article 87(5) Decision').¹⁵

16. On 22 March 2021, the Defence submitted the *Requête aux fins d'audience* (the 'First Hearing Request').¹⁶

17. On 26 March 2021, the Defence submitted the *1ère Requête aux fins d'exclusion des moyens de preuve* (the 'First Admissibility Challenge').¹⁷ The Prosecutor did not submit a response to this request.

18. On 1 April 2021, the Prosecutor submitted its response to the *Requête aux fins d'audience* (the 'Hearing Response').¹⁸

19. On 9 April 2021, the Defence submitted the *Nouvelle Requête aux Fins de Convocation Urgente d'une Audience* (the 'Second Hearing Request').¹⁹

20. On 12 April 2021, the Registry submitted its Report on the current status of cooperation with the Republic of the Sudan (the 'Registry Status Report').²⁰

¹³ [Version publique expurgée de la Requête en vertu de l'Article 43-1 du Statut et de la Règle 13 du Règlement de Procédure et de Preuve](#), ICC-02/05-01/20-272-Red.

¹⁴ [Prosecution's response to "Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour"](#), ICC-02/05-01/20-280.

¹⁵ [Decision on the Defence request pursuant to article 87\(5\)\(b\) of the Statute](#), ICC-02/05-01/20-295.

¹⁶ [Version publique expurgée de la Requête aux fins d'audience](#), ICC-02/05-01/20-317-Red.

¹⁷ [1ère Requête aux fins d'exclusion des moyens de preuve](#), ICC-02/05-01/20-322.

¹⁸ Prosecution's Response to "*Requête aux fins d'audience*", 22 March 2021, ICC-02/05-01/20-317-Conf, ICC-02/05-01/20-330-Conf.

¹⁹ [Nouvelle Requête aux Fins de Convocation Urgente d'une Audience](#), ICC-02/05-01/20-336.

²⁰ Registry's Report on the current status of cooperation with the Republic of the Sudan, ICC-02/05-01/20-339-Conf-Exp.

21. On 13 April 2021, the Defence submitted its response to the observations of the Registry (the ‘Defence Observations’).²¹

22. On 16 April 2021, The Defence submitted the 2^{ème} *Requête aux fins d’exclusion de moyens de preuve* (the ‘Second Admissibility Challenge’).²²

23. On 23 April 2021, the Defence filed its *Observations relatives à l’audience de confirmation des charges* (the ‘Stay of Proceedings Request’).²³ The Prosecutor did not submit a response to this request.

24. On 28 April 2021, the Prosecutor submitted its reponse to the Second Admissibility Challenge.²⁴

25. On 19 May 2021, the Registry submitted an addendum to the Status Report (the ‘Addendum’).²⁵

II. SUBMISSIONS

A. The Defence’s submissions

26. Over the course of several months, the Defence has filed a series of filings, the combined effect of which is to challenge the legal and evidentiary foundations of the present proceedings. The Chamber deems it appropriate to analyse them together in order to determine whether they reveal fundamental issues or problems that may undermine the validity of the confirmation process. In particular, this decision rules on the following Defence filings (in chronological order):

- i. The Article 4(2) Request (ICC-02/05-01/20-231);
- ii. The Article 2 Request (ICC-02/05-01/20-269);
- iii. The Article 43(1) Request (ICC-02/05-01/20-272);

²¹ *Réponse aux Observations du Greffe* ICC-02/05-01/20-339-Conf-Exp, ICC-02/05-01/20-340-Conf-Exp.

²² *2^{ème} Requête aux fins d’exclusion de moyens de preuve*, ICC-02/05-01/20-349-Red.

²³ *Version publique expurgée des Observations relatives à l’audience de confirmation des charges*, ICC-02/05-01/20-363-Red.

²⁴ *Prosecution’s Response to Defence’s “Version publique expurgée de la 2^{ème} Requête aux fins d’exclusion de moyens de preuve” (ICC-02/05-01/20-349-Red)*, ICC-02/05-01/20-369.

²⁵ Addendum to the “Registry’s Report on the current status of cooperation with the Republic of the Sudan” dated 12 April 2021 (ICC-02/05-01/20-339-Conf-Exp), ICC-02/05-01/20-397-Conf-Exp.

- iv. The First Hearing Request (ICC-02/05-01/20-317);
- v. The First Admissibility Challenge (ICC-02/05-01/20-322);
- vi. The Second Hearing Request (ICC-02/05-01/20-336);
- vii. The Defence Observations (ICC-02/05-01/20-340);
- viii. The Second Admissibility Challenge (ICC-02/05-01/20-349); and
- ix. The Stay of Proceedings Request (ICC-02/05-01/20-363).

27. First, the Defence claims that the Court has been operating in Sudan without a sufficient legal basis and that this has caused serious risks for the safety and security of victims, witnesses and other persons, including the Defence. In particular, according to the Defence, the Prosecutor violated article 4(2) of the Statute by carrying out investigations inside the territory of Sudan without a special agreement.²⁶ The Defence claims that this prevented the Court from implementing its obligations enshrined in article 68(1) of the Statute. In particular, the Defence expresses grave concern about the absence of a binding agreement to guarantee the necessary privileges and immunities of victims, witness and other persons at risk on account of the Court's activities in Sudan. It rejects the Registry's approach based on *ad hoc* arrangements as offering insufficient guarantees, claiming that the Registry did not learn from the Zintan crisis in Libya. In this regard, the Defence points out that its concerns about the existence of a Sudanese law criminalising cooperation with the Court have not been repudiated by either the Prosecutor or the Registry.

28. The Defence further argues that the conclusion of a Memorandum of Understanding (MOU) between the Office of the Prosecutor and the Sudanese authorities did nothing to resolve the security situation, claiming that the conclusion of an MOU for the sole benefit of the Prosecutor breaches the equality of arms.

29. In addition, the Defence argues that the withdrawal of the United Nations-African Union Hybrid Operation in Darfur (UNAMID)²⁷ has severely compromised the Defence's ability to conduct investigative mission to Sudan. The Defence submits that

²⁶ [Article 4\(2\) Request](#).

²⁷ [U.N. Security Council Resolution 2559](#) (terminating UNAMID's mandate on 31 December 2020).

Mr Abd-Al-Rahman suffers great prejudice as a result of the impossibility to carry out investigations inside Sudan, which deprives him from the ability to establish essential facts in support of his defence.

30. Finally, the Defence claims that the Prosecutor has violated a string of legal provisions and Court policies by failing to mark witness statements as confidential and argues that this has compromised their probative value.

31. Based on these allegations, the Defence requests the Chamber to:

- i. Order the immediate suspension of all activities on the territory of Sudan;
- ii. Order the immediate communication of the draft cooperation agreement currently being negotiated by the Registry;
- iii. Organise a status conference;
- iv. Declare inadmissible all evidence collected by the Prosecutor inside the territory of Sudan or from witnesses who have resided in Sudan since the date of the facts to which they testify;
- v. Declare inadmissible every witness statement that is not marked 'confidential';
- vi. Declare that the investigative mission envisaged by the Defence in preparation for the confirmation of charges hearing cannot take place;
- vii. Cancel the confirmation hearing; and
- viii. Stay the proceedings indefinitely.

B. The Prosecutor's submissions

32. Regarding the alleged lack of legal basis for the investigation, the Prosecutor submits that, because the situation in Darfur was referred to the Court by the United Nations Security Council (UNSC) pursuant to its Resolution 1593, Sudan is obliged to cooperate with the Court and a special agreement was therefore unnecessary. The Prosecutor also submits that the Defence 'overlooks that the missions were carried out with the cooperation of the Sudanese authorities', which implies that these missions have been carried out 'in accordance with article 54(2)(a) and Part 9 of the Statute'.²⁸ Finally, the Prosecutor submits that the Defence has not demonstrated which of the

²⁸ [Article 4\(2\) Response](#), para. 6.

Prosecution activities presented an impermissible risk to any person involved in them and that concluding an agreement with the Sudanese authorities would not automatically ameliorate any risks to victims and witnesses.

33. In relation to the Defence's Second Admissibility Challenge, the Prosecutor argues that the Defence submissions lack specificity and provide no concrete grounds for the requested exclusion of evidence. The Prosecutor also affirms that in relation to witnesses residing in Sudan, all necessary precautions were taken regarding their safety, as well as the integrity of their interviews, in accordance with article 68 of the Statute.

C. The Registry's submissions

34. As regards the Defence's claim that the Court lacks a legal basis for carrying out investigations inside Sudan, the Registry submits that the ICC does have a legal mandate to operate in Sudan based on UNSC Resolution 1593, which provides that 'the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to Prosecutor pursuant to this resolution'.²⁹ The Registry further argues that, even if Sudan has not signed the Agreement on the Privileges and Immunities of the International Criminal Court (the 'APIC') or any cooperation agreement with the Court, the observance of States' cooperation obligations, authorisation to its missions, provisions concerning privileges and immunities or any other subjects in their respective territories are secured by the ICC via an exchange of *notes verbales*.³⁰

35. Regarding the alleged failure on the part of the Registry to facilitate the Defence's planned investigative mission to Sudan, the Registry 'reiterates its readiness to support, in accordance with its duty under rule 20(1)(b) of the Rules, the Defence mission to Khartoum, Sudan, and does not foresee legal, security, diplomatic or logistical impediments impeding such missions if requested by the Defence'.³¹ The Registry points out, in this regard, that it is planning its own missions to Khartoum under the same arrangements as those available to the Defence and that it has not encountered any difficulties.

²⁹ Article 4(2) Observations, paras 6-12, quoting [U.N. Security Council Resolution 1593](#), para. 2

³⁰ Article 4(2) Observations, para. 14.

³¹ Registry Status Report, para. 45.

III. ANALYSIS

36. In essence, the Defence claims that the continuation of the case against Mr Abd-Al-Rahman has become impossible because victims and witnesses inside Sudan have been and continue to be insufficiently protected and because the Defence has been unable to conduct the necessary investigations in Sudan. The Defence invokes a number of different arguments to sustain its claims, which will be addressed in turn.

37. At the outset, the Chamber underlines that the confirmation proceedings has the crucial but limited function to determine, on the basis of the hearing, whether there is sufficient evidence to establish substantial grounds to believe that the person committed any of the crimes charged. The confirmation stage is not by any means an anticipation of the trial stage. The powers of the parties to raise procedural challenges and to conduct investigations must be seen in light of the above and carefully balanced with the right of the suspect to be tried without undue delay, particularly if in pre-trial detention. The Chamber has already repeatedly stated that the start of the confirmation hearing cannot be made contingent upon the progress of the parties' investigations.³² Possible obstacles to conducting certain investigations also in relation to State cooperation do not per se constitute a sufficient reason to postpone, let alone cancel, the confirmation process. Accordingly, there is no imperative for the Chamber to rule on all challenges to the admissibility of evidence,³³ which can always be raised again by either party before the Trial Chamber³⁴ and may be assessed anew.³⁵

³² Article 87(5) Decision, para. 8.

³³ Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-02/11-382-Red, paras 73-76; Pre-Trial Chamber II, *Prosecutor v. Bemba Gombo et al.*, [Decision pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 11 November 2014, ICC-01/05-01/13-749, para. 14.

³⁴ Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol](#), 13 March 2009, ICC-01/04-01/07-956, paras 33-34; Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted](#), 13 December 2007, ICC-01/04-01/06-1084, para. 8.

³⁵ Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges](#), 23 May 2007, ICC-01/04-01/06-915, para. 75; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the Confirmation of Charges](#), 26 September 2008, ICC-01/04-01/07-717, para. 71.

A. Lack of an appropriate legal framework

38. In terms of the applicable legal framework, the Defence points out that the Court never concluded a special agreement pursuant to article 4(2) of the Statute and claims that there was thus no legal basis for the Court's activities in Sudan. Such legal framework does exist in this case. As noted repeatedly in the Court's jurisprudence, a Security Council referral has the effect of making part 9 of the Statute applicable to the concerned non-State Party.³⁶ This implies that concluding a special agreement pursuant to article 4(2) of the Statute is not a precondition for the Court to operate in the territory of non-State Parties that have been referred by the UNSC, provided that these activities take place following prior consultation or notification.³⁷

39. The Chamber notes that it is the responsibility of the Office of the Prosecutor to ensure that witnesses are always interviewed guaranteeing their safety. The Court in all its articulations must comply with the fundamental duties under article 68 of the Statute. The Chamber has not been made aware of any instance where witnesses or victims have actually been placed at risk on account of the Court's activities in Sudan or elsewhere. The Defence's concerns are purely speculative.

40. The adequacy of the legal basis for the action of the Court in the situation in Darfur as provided by the Security Council referral makes it per se unnecessary for the Chamber to address the Defence's concern about the possible impact of a Sudanese law criminalising cooperation with the Court on the safety and security of the Defence team or of Defence witnesses. Nevertheless, the Chamber notes that this concern overlooks the fact that article 24 of the Juba Peace Agreement, which is part of the Constitutional Charter for the Transitional Period, expressly provides that the parties,

³⁶ See, *inter alia*, Article 87(5) Decision; Appeals Chamber, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, [Judgment in the Jordan Referral re Al-Bashir Appeal](#), 6 May 2019, ICC-02/05-01/09-397, paras 140-142; Pre-Trial Chamber II, *Prosecutor v. Abdel Raheem Muhammad Hussein*, [Decision on the Prosecutor's Request for a finding of non-compliance against the republic of the Sudan](#), 26 June 2015, ICC-02/05-01/12-33, paras 12-13; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan](#), 9 March 2015, ICC-02/05-01/09-227, para. 15; Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court](#), 9 April 2014, ICC-02/05-01/09-195, para. 29; Pre-Trial Chamber I, *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, [Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan](#), 25 May 2010, ICC-02/05-01/07-57, p. 6.

³⁷ See article 99 of the Statute.

including the current government, ‘shall not interfere with the investigations and trials conducted by the ICC and shall ensure the protection and safety of all prosecutors, victims, and witnesses’.³⁸ Furthermore, the Sudanese authorities have confirmed that Sudanese law no longer criminalises cooperation with the ICC and that the law in question was repealed in July 2020.³⁹

B. Failure to apply confidentiality markings

41. In a similarly unsubstantiated argument, the Defence claims that the Prosecutor’s alleged failure to apply the correct confidentiality level markings on witness statements is cause for serious concern because, without such markings, statements can be shared with anybody, thus exposing the witnesses who gave them to all manner of risks of interference, threats and corruption. The Defence also claims that the mere existence of these purported risks deprives the witness statements of all probative value, without it being necessary to demonstrate that there were actual attempts to threaten or influence any of the witnesses.

42. While the Chamber agrees that it would be preferable for all confidential documents to be clearly marked as such in accordance with the Court’s policies on information security, it considers that the avowed risks are overstated and largely speculative. The Court’s practice over the years certainly does not suggest that the Prosecutor’s failure to expressly *mark* witness statements as confidential – as opposed to *classifying* them as such – has been a major risk factor. Indeed, all parties and participants involved in the proceedings are bound by the confidentiality level assigned by the Prosecutor as it is registered in the meta-data.⁴⁰ Moreover, confidential information may, in principle, only be disclosed in the context of an investigation under specific and strict conditions.⁴¹ Under these circumstances, the Chamber is not convinced that the Prosecutor’s failure to mark witness statements as confidential has elevated the risk that any of the witnesses in this case may have been subjected to interference, threats or corruption.

³⁸ [Juba Agreement for Peace in Sudan between the Transitional Government of Sudan and the Parties to Peace Process](#), 3 October 2020, p. 31.

³⁹ See Addendum.

⁴⁰ Regulation 14 of the Regulations of the Registry; Article 8 of the Code of Professional Conduct for counsel.

⁴¹ [Protocol on the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant](#), paras 7-8.

43. The Chamber therefore firmly rejects the suggestion that it would be necessary to declare entire categories of evidence inadmissible in bulk on the basis of speculations about possible risks of interference. This would be especially inapposite in the context of the confirmation process, which is based largely on written statements that are obviously not subject to interference on account of the absence of confidentiality markings.

C. Obstacles to Defence investigations

44. With reference to possible obstacles to the Defence investigation, the Chamber notes that according to the Registry, the Court's organ in charge of these matters, there do not appear to be major security concerns about possibly conducting investigations in Khartoum. Indeed, the departure of UNAMID does not seem to have significantly affected the Court's operations in the capital. As indicated by the Registry, the Sudanese authorities had indicated their preparedness to facilitate the Defence mission and to extend the necessary privileges and immunities. Moreover, since the Registry has confirmed that a diplomatic basis has been established in this case,⁴² the Chamber is of the view that the comparison drawn by the Defence with the Zintan case is inapposite. The Chamber further recalls that the Defence's right to investigate, including conducting missions in situ, must be properly framed in the current stage of the proceedings vis-à-vis the function of the confirmation proceedings. Should the case proceed to trial, it will be the Registry's responsibility to assess and support any requested mission in terms of diplomatic, medical, security, and logistical aspects, undertaking a clearance procedure and deploying diplomatic efforts to effect cooperation with Sudan with appropriate diplomatic, legal, and security safeguards in place.⁴³

D. Violation of equality of arms

45. The Chamber also rejects the Defence's submission that the conclusion of an MOU that only benefited the Office of the Prosecutor violated the equality of arms principle. The Chamber observes that this principle does not require the creation of a

⁴² See Status Report and Addendum.

⁴³ See Decision on Defence Request for Access to the Zintan Reports, 23 October 2020, ICC-02/05-01/20-190-Conf-Exp, para. 10. See also regulation 119(1) of the Regulations of the Registry.

situation of absolute equality⁴⁴ and must be interpreted with respect to the stage of the proceedings. What it does require is that each party has a reasonable opportunity to adequately prepare for and present its case, without being placed at a substantial disadvantage vis-à-vis the opposing party.⁴⁵ There is no indication that the MOU permitted the Prosecutor to engage in investigatory activities that the Defence was barred from. The fact that the formal legal basis for engaging in these activities may have been different is inconsequential. Accordingly, the Defence must assume responsibility for its decision not to carry out investigations, despite the Registry's best efforts to facilitate them.

E. Inability to seek cooperation from Sudan

46. In the same vein, the Chamber notes that the Defence has not accepted the Chamber's invitation to submit a request pursuant to article 57(3)(b) of the Statute to obtain the cooperation of the Sudanese authorities. The Defence argues that it would be incongruous for it to ask for cooperation from Sudan in light of its Second Admissibility Challenge. The Chamber cannot fail to note, however, that the Defence did previously make efforts to obtain cooperation from Sudan and even petitioned the Chamber to enter a finding of non-cooperation as recently as January of this year,⁴⁶ i.e. *after* the Defence had filed the Article 4(2) Request. The Chamber is therefore not persuaded by the Defence's newfound principled objection to seeking cooperation. It is of course open to the Defence to change its position, but the Chamber is under no obligation to validate self-imposed obstacles or limitations.

47. In any event, even if it had truly been impossible for the Defence to investigate in Sudan or to obtain cooperation from it, this would not automatically lead to the conclusion that it would violate Mr Abd-Al-Rahman's rights to proceed with the

⁴⁴ Trial Chamber I, *Prosecutor v. Thomas Dyilo Lubanga*, [Decision on defence's request to obtain simultaneous French transcripts](#), ICC-01/04-01/06-1091, 14 December 2007, para. 19.

⁴⁵ Pre-Trial Chamber I, *Prosecutor v. Thomas Dyilo Lubanga*, [Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation](#), 6 November 2006, ICC-01/04-01/06-672-tEN, p. 7; Pre-Trial Chamber II, *Situation in Uganda*, [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 2005, ICC-02/04-01/05-20, para. 30. *See also* ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić*, [Judgment](#), 15 July 1999, IT-94-1-A, para. 48; ICTR Appeals Chamber, *Prosecutor v. Kayishema and Ruzindana*, [Judgment \(Reasons\)](#), 1 June 2001, ICTR-95-1-A, para. 70; ECtHR, [Dombo Beheer BV v The Netherlands](#), App. No. 14448/88, 27 October 1993, Series A, No. 274, para. 33.

⁴⁶ *See*, Article 87(5) Request, in particular Annexes A, B, and C.

confirmation of charges hearing. As already adumbrated above,⁴⁷ even though the Defence has the right to present evidence at the confirmation hearing,⁴⁸ there is no corresponding right to have finalised all investigative steps the Defence might want to undertake. This is because the confirmation process is focused on assessing whether the Prosecutor's evidence is sufficient to warrant committing the case to a full trial.⁴⁹ It is not designed to be a mini-trial and the Defence is not expected to set out a complete defence.⁵⁰ Accordingly, the start of the confirmation hearing cannot be made contingent upon the progress of the Defence investigations.⁵¹ Should the charges be confirmed, the Defence will have ample opportunity to conduct investigations before the presentation of its case before the Trial Chamber.

F. Other matters

48. In light of the above, the Chamber considers that there is no need to convene a status conference to discuss the issues raised by the Defence.

49. The Chamber also rejects the Defence's request to strike part of the Registry Status Report. Contrary to what is contended by the Defence, the Chamber did instruct the Registry to make submissions on all the topics included in the Registry Status

⁴⁷ See para. 37 above.

⁴⁸ Article 61(6)(c) of the Statute.

⁴⁹ Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, [Decision on the Confirmation of Charges](#), 8 February 2010, ICC-02/05-02/09-243-Red, paras 35-43; Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer and Saleh Mohammed Jerbo Jamus*, [Corrigendum of the "Decision on the Confirmation of Charges"](#), 7 March 2011 (registered on 8 March 2011), ICC-02/05-03/09-121-Corr-Red, paras 29-42.

⁵⁰ Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, [Second Decision on issues relating to Disclosure](#), 15 July 2009 (registered on 17 July 2009), ICC-02/05-02/09-35, para. 10; Appeals Chamber, *Prosecutor v. Germain Katanga*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"](#), 13 May 2008, ICC-01/04-01/07-475, para. 68; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67\(2\) of the Statute and Rule 77 of the Rules](#), 25 April 2008, ICC-01/04-01/07-428-Corr, para. 6.

⁵¹ Article 87(5) Decision, para. 8.

Report and specifically invited the Registry to make additional submissions in relation to the Article 4(2) Request, the Article 2 Request, and the Article 43(1) Request.⁵²

50. The Chamber further notes that the Registry was under no obligation to provide the Defence with a copy of the draft cooperation agreement with Sudan or to otherwise seek the views of the Defence about its negotiations with the Sudanese authorities.

⁵² The relevant part of the Chamber's email instructions of 1 April 2021 at 09:53 reads as follows:

The Registry is instructed to file a full and detailed report on the current status of cooperation with the Sudan. In its report, the Registry must at least address the following issues:

- Are there still any legal, diplomatic or other impediments to the Defence conducting a mission to the Sudan? If so, when does the Registry expect these impediments to be resolved?
- What are the privileges and immunities protecting the Defence inside Sudan?
- Is it currently safe for the Defence to travel to the Sudan? Who will ensure physical security for members of the Defence team?
- Are there any logistical obstacles that would prevent the Defence from traveling to and inside of the Sudan?
- Are there any geographic restrictions in terms of where the Defence is allowed to travel inside the Sudan?
- Any other issues that might obstruct the Defence investigations.

The Registry is also invited to make additional submissions in relation to any of the following filings:

- Requête en vertu des Articles 4-2 et 68-1 du Statut, 14 December 2020, (#231-Conf-Exp)
- Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour, 26 January 2021, (#269)
- Requête en vertu de l'Article 43-1 du Statut et de la Règle 13 du Règlement de Procédure et de Preuve, 29 January 2021, (#272-Conf-Exp)

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the First and Second Hearing Requests;

REJECTS the Article 4(2) Request;

REJECTS the Article 2 Request;

REJECTS the Article 43(1) Request;

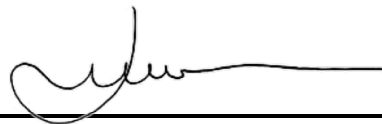
REJECTS the First Admissibility Challenge;

REJECTS the Second Admissibility Challenge;

REJECTS the Stay of Proceedings Request; and

REJECTS the Defence request to strike part of the Registry Status Report.

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



Judge Rosario Salvatore Aitala

Presiding Judge



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Friday, 21 May 2021

At The Hague, The Netherlands