



**Original: English**

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

**Date: 9 July 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 redacted version of**

**'Decision on Defence Request for Access to the Zintan Reports, 23 October 2020,  
ICC-02/05-01/20-190-Conf-Exp'**

**Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Mr Julian Nicholls

**Counsel for Mr Abd-Al-Rahman**

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 Massidda

**The Office of Public Counsel  
for the Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**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 (the ‘Court’),<sup>1</sup> in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, having regard to regulations 23 *bis* (3), 28, 42(1) and (3) of the Regulations of the Court (the ‘Regulations’), and the administrative instruction on ‘ICC Information Protection Policy’, ICC/AI/2007/001 of 19 June 2007 (the ‘AI’), issues this Decision on Defence Request for Access to the Zintan Reports.

## I. PROCEDURAL HISTORY AND SUBMISSIONS

1. The Single Judge recalls the procedural history of the case as set out in previous decisions.<sup>2</sup>
2. On 6 October 2020, the Defence submitted a request pursuant to regulation 23 *bis* (3) of the Regulations seeking the reclassification of two reports prepared following the Zintan crisis in 2012 (respectively, the ‘Request’ and the ‘Zintan Reports’).<sup>3</sup> The Defence submits, *inter alia*, that (i) the Zintan Reports are essential to determine the feasibility of a proposed Defence mission to Sudan; (ii) the Registry has denied the Defence access to the Zintan Reports on the basis that they are classified and can only be disclosed on a need to know basis; (iii) even if the ‘the need to know’ criterion applies to the Defence team – which the Defence disputes – the criterion has been satisfied; (iv) the conditions under which the Registry proposes to facilitate a possible Defence mission to Sudan are similar to those which applied in Libya; and (v) access to the Zintan Reports would inform the Defence of the conditions of the mission to Libya in 2012, the shortcomings identified, and lessons learned.
3. On 16 October 2020, pursuant to the instructions of the Chamber,<sup>4</sup> the Registry submitted its observations on the Request (the ‘Observations’).<sup>5</sup> On 20 October 2020, pursuant to the direction of the Chamber,<sup>6</sup> the Registry submitted a confidential, *ex*

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<sup>1</sup> Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

<sup>2</sup> *See, for example*, Decision on the Defence Request to provide written reasoning for two oral decisions, 18 August 2020, [ICC-02/05-01/20-118](#), paras 1-4.

<sup>3</sup> Requête en vertu de la norme 23bis-3 du Règlement de la Cour, ICC-02/05-01/20-176-Conf-Exp.

<sup>4</sup> Email from Pre-Trial Chamber II to the Registry, 6 October 2020, at 17.22.

<sup>5</sup> [REDACTED].

<sup>6</sup> Email from Pre-Trial Chamber II to the Registry sent on 19 October 2020 at 15:19.

*parte*, redacted version of the Observations, available only to the Defence and the Registry.<sup>7</sup> In regard to the nature of the Zintan Reports, the Registry submits that both reports were produced at the request of the then Registrar, with one report emanating from the Independent Oversight Mechanism (the ‘IOM Report’) and the other being a report of the Registry emanating from a consultant (the ‘Registry Report’). The Registry argues, *inter alia*, that the Request should be dismissed on the basis that (i) none of the reasons provided by the Defence warrant the reclassification of the requested documents, and the content of these documents have no bearing on whether a Defence mission to Sudan could take place; (ii) the basis for the respective classification levels of these documents still exists; (iii) whether the Request is viewed under section 11 or 17 of ICC/AI/2007/001, a need-to-know criterion applies that the Defence has not met; (iv) missions are at the initiative and request of the Defence, it is not up to the Registry to propose or send a defence team on missions, and the final decision to endorse a mission is made on the basis of a feasibility assessment by all stakeholders supporting the mission; (v) the Registry would not approve a mission without the relevant clearances; and (vi) should counsel not be reassured on the conditions and clearance procedure of the Court for going on mission, the Defence may choose whether or not to pursue such a mission.

4. On 22 October 2020, the Defence submitted a filing, indicating that it is available to provide additional submissions, should the Single Judge request them, to assist the Single Judge in rendering a fully informed decision (the ‘Regulation 28 Request’).<sup>8</sup>

## II. ANALYSIS

### A. The Regulation 28 Request

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<sup>7</sup> Redacted Version of the Registry’s Observations on the «Requête en vertu de la norme 23bis-3 du Règlement de la Cour» (ICC-02/05-01/20-176-Conf-Exp), ICC-02/05-01/07-185-Conf-Exp-Red.

<sup>8</sup> Offre de soumissions additionnelles en vertu de la norme 28 du Règlement de la Cour, ICC-02/05-01/20-188-Conf-Exp.

5. The Single Judge recalls that the power to request further submissions pursuant to regulation 28 of the Regulations is discretionary in nature.<sup>9</sup> Having considered the additional submissions that the Defence wishes to provide, the Single Judge finds that he would not be materially assisted by any further submissions, and rejects the Regulation 28 Request.

### **B. The Request**

6. At the outset, the Single Judge notes that the Zintan Reports were prepared eight years ago in relation to a mission to Libya that took place in the context of a different situation before the Court. Considering that the reports are not in the record of any case before Pre-Trial Chamber II and have no relation to the present case, it is not for this Chamber to decide upon a request for their reclassification.

7. Notwithstanding the above, the Single Judge considers that if either or both reports are in the record of a case before another Chamber, it would be for the appropriate Chamber to address a request for reclassification. In the event that either or both reports are not in the record of a case, the AI would apply to any potential reclassification of the document. In this regard, the Single Judge finds that the Defence team would be considered to be ‘individuals affiliated with’ the Court under the terms of the AI. Sections 11 and 17 of the AI relate, respectively, to the reclassification and disclosure of information to external parties. Section 11 provides that reclassification may only take place when there is a substantial change to the sensitivity of the information at hand, and both sections 11 and 17 require that there must be an ‘operational need’ for the reclassification or release of classified information.

8. The Single Judge notes that the Defence has linked its request for access to the Zintan Reports to its proposed mission to Sudan in November 2020, indicating, *inter alia*, that access to the reports would inform the Defence of the shortcomings of the mission to Libya and the resulting lessons learned. However, as noted by the Registry, the Zintan Reports ‘relate to a specific mission, which took place in a different country than Sudan (i.e. Libya), eight years ago, with no planning procedure in place, where no

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<sup>9</sup> See Appeals Chamber, *The Prosecutor v. Bemba et al.*, Decision on Mr Fidèle Babala Wandu’s request for leave to reply to the “Prosecution opposition to the Babala Defence’s appeal against his provisional detention”, 15 April 2014, [ICC-01/05-01/13-342](#), para. 7.

P&I had been guaranteed beforehand and where the then field security advice given to the four persons concerned were not followed at the preparation stage of the mission’.

9. While it is not for the Single Judge of this Chamber to rule upon the potential reclassification of the Zintan Reports, the Single Judge nevertheless agrees with the Registry that the operational need requirement has not been met for these reports, noting as well that, according to the Registry, there has not been a change to the sensitivity of the information contained therein. Furthermore, noting that the reports relate to a mission to Libya that took place eight years ago, it is not clear how access to these reports would impact on the plans of the Defence for a potential mission to Sudan.


10. With reference to the concerns expressed by the Defence in relation to a potential mission to Sudan, the Single Judge recalls that the Registry will assess 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. The Single Judge encourages the Defence to continue to liaise with the Registry regarding any potential missions.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Regulation 28 Request; and

**REJECTS** the Request.

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



**Judge Rosario Salvatore Aitala**  
**Single Judge**

Dated this Friday, 9 July 2021

At The Hague, The Netherlands