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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

**Prosecution’s response to “Requête aux fins d’autorisation d’interjeter appel de la
Décision ICC-02/05-01/20-433”**

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I. INTRODUCTION

1. The Defence's request to Pre-Trial Chamber II ("Chamber") for leave to appeal¹ the "Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')"² should be dismissed because the issues raised for certification do not arise from the appealed decision, are not appealable, and/or do not meet the requirements under article 82(1)(d) of the Rome Statute.

II. SUBMISSIONS

2. Mr Abd-Al-Rahman seeks leave to appeal the Confirmation Decision in relation to ten issues which the Prosecution understands in summary as follows:

- a. Whether the Defence is entitled to receive certain documentation related to Mr Abd-Al-Rahman's arrest and surrender ("Issue 1");
- b. Whether the Prosecution has discretion to disclose evidence in its possession ("Issue 2");
- c. Whether the Prosecution can add new charges in the Document Containing the Charges ("DCC") ("Issue 3");
- d. Whether the Prosecution has to justify cumulative charges based on the same facts ("Issue 4");
- e. Whether alternate modes of liability may be charged ("Issue 5");
- f. Whether the right to adequate preparation for the Defence was improperly affected by the disclosure of evidence without explaining its relevance ("Issue 6");
- g. Whether the Chamber has a more limited role in guaranteeing article 67(1) rights at the pre-trial stage ("Issue 7");

¹ [ICC-02/05-01/20-465](#) ("Application").

² [ICC-02/05-01/20-433](#) ("Confirmation Decision").

- h. Whether the Defence was prejudiced by ‘multiple violations’ regarding the evidence submitted for the confirmation of charges (“Issue 8”);
- i. Whether evidence obtained in violation of article 55(2) was used to ground the Confirmation Decision (“Issue 9”); and
- j. Whether article 30(1) and (3) applies to all crimes in the Statute (“Issue 10”).

3. Interlocutory appeals should not be regarded as the norm and indeed should be limited to a “few, strictly defined exceptions.”³ As the Appeals Chamber has stressed, “[o]nly an ‘issue’ may form the subject-matter” of an appeal under article 82(1)(d)⁴—which, accordingly, is not a means to challenge the entirety of a decision, to express dissatisfaction with its reasoning, or to pursue abstract or academic questions. Article 82(1)(d) does not permit a party simply to seek a different decision or ‘second opinion’ in preference to that rendered at first instance.

4. None of the supposed issues raised by the Defence in the Application give rise to this exceptional remedy, and consequently may not be certified for appeal. To the contrary, as addressed below, many of the ten issues reflect mere disagreements with the Confirmation Decision, and cannot constitute appealable issues.⁵ An appealable issue is:

an ‘identifiable subject or topic requiring a decision for its resolution [...]. An issue is constituted by a subject the resolution of which is *essential* for the

³ [ICC-01/05-01/08-1169](#) (“*Bemba* List of Evidence Certification Decision”), para. 25.

⁴ [ICC-01/04-168 OA3](#) (“*DRC* Extraordinary Review Appeal Judgment”), para. 9.

⁵ [DRC Extraordinary Review Appeal Judgment](#), para. 9; [ICC-01/05-01/08-532](#) (“*Bemba* Confirmation Certification Decision”), para. 17; [ICC-02/05-02/09-267](#) (“*Abu Garda* Confirmation Certification Decision”), para. 22; [ICC-01/04-01/06-1557](#) (“*Lubanga* Disclosure Certification Decision”), para. 30; [ICC-01/04-01/07-2035](#) (“*Katanga* P-219 Certification Decision”), para. 25; [ICC-02/05-03/09-179](#) (“*Banda* Counsel Certification Decision”), para. 27; [ICC-01/13-73](#) (“*Comoros* Certification Decision”), para. 35.

determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one'.⁶

5. In addition, many of the issues are grounded on misrepresentations of the Decision,⁷ and therefore do not genuinely arise from the Confirmation Decision.

6. Nor in any event do the proposed issues meet the requirements of article 82(1)(d) of the Statute. They do not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and the intervention of the Appeals Chamber would not materially advance the proceedings. These requirements are cumulative, and the failure to satisfy any one of them must be fatal to certification of the issue in question. While the Prosecution does not concede that any of the proposed issues satisfies any of the legal conditions required under article 82(1)(d), this response will only address those aspects where the defects in the Application are most apparent, in light of its voluminous nature.

Issue 1: whether the Defence is entitled to receive certain documentation related to Mr Abd-Al-Rahman's arrest and surrender⁸

7. Issue 1 does not arise from the Confirmation Decision. By arguing that its own decision to limit the scope of the documentation requested from the Chamber cannot be allowed to prejudice the accused,⁹ the Defence mischaracterises the Confirmation Decision. The Chamber did not draw any conclusions from this independent decision, but simply noted it as a matter of fact.¹⁰ It did not rule on the documentation which was not requested by the Defence.

⁶ [Comoros Certification Decision](#), para. 33 (emphasis added); [DRC Extraordinary Review Appeal Judgment](#), para. 9.

⁷ [ICC-01/09-02/11-406](#) (“Kenya Confirmation Certification Decision”), para. 46; [ICC-01/04-01/07-1732](#) (“Katanga Site Visit Certification Decision”), paras. 15, 17-18; [ICC-01/04-01/10-487](#) (“Mbarushimana Confirmation Certification Decision”), paras. 32-33; [ICC-01/04-01/07-1088](#) (“Katanga Evidence Certification Decision”), paras. 33-35; [ICC-01/04-01/10-106](#) (“Mbarushimana Potentially Privileged Material Certification Decision”), p. 6.

⁸ [Application](#), paras. 4-8.

⁹ [Application](#), para. 6. See further [ICC-02/05-01/20-331-Red](#), paras. 5-6; [ICC-02/05-01/20-316](#).

¹⁰ [Confirmation Decision](#), para. 13.

8. Nor is the issue ‘appealable’ because it merely expresses the Defence’s disagreement with the finding in the Confirmation Decision concerning this documentation¹¹—it is so vague that it could not properly be determined by the Appeals Chamber in any event. In particular, the Application does not identify the alleged breaches in the arrest and surrender procedures which grounded the Defence request for documents, or establish their materiality, but merely repeats the same speculative claims which have already been unsuccessful. The Chamber did not exclude the possibility that disclosure could be ordered if the Defence addressed the requisite test. For similar reasons, intervention by the Appeals Chamber would not materially advance the proceedings.¹² Appellate guidance is not required in order to remedy the defects in the Defence’s own claims.

*Issue 2: whether the Prosecution has discretion to disclose evidence in its possession*¹³

9. Issue 2 represents a patent and impermissible attempt to re-litigate matters previously dismissed by the Chamber,¹⁴ including a previous request for leave to appeal the same issue.¹⁵ The Defence may not seek to circumvent the Chamber’s previous decision¹⁶ by continually re-introducing the same arguments.¹⁷

10. Furthermore, the second issue mischaracterises the Confirmation Decision, as the Chamber at no point indicated the Prosecution had discretion concerning the disclosure of evidence in its possession. Rather, it simply stated that requests for disclosure of non-potentially exculpatory material must be justified.¹⁸ The only conclusion that can be drawn from the Chamber’s statement is not that the Prosecution

¹¹ [Confirmation Decision](#), para. 14.

¹² See [DRC Extraordinary Review Appeal Judgment](#), para. 10; [ICC-02/04-01/05-316](#) (“Kony et al. Victim Participation Certification Decision”), p. 6; [ICC-01/09-02/11-211](#) (“Kenya Redactions Certification Decision”), paras. 33, 39.

¹³ [Application](#), paras. 9-11.

¹⁴ See e.g. [ICC-02/05-01/20-216](#) (“Abd-Al-Rahman Reclassification/Disclosure Decision”); [ICC-02/05-01/20-384](#) (“Abd-Al-Rahman Reclassification/Disclosure Certification Decision”).

¹⁵ See [ICC-02/05-01/20-217](#) (“Abd-Al-Rahman Reclassification/Disclosure Certification Request”).

¹⁶ See [Abd-Al-Rahman Reclassification/Disclosure Certification Decision](#).

¹⁷ See also [ICC-02/05-01/20-389](#) (“Abd-Al-Rahman Third Exclusion Request”).

¹⁸ [Confirmation Decision](#), para. 15.

may choose whether to disclose any materials, but rather that it bears the primary responsibility to review its own material for disclosure in accordance with the law – the Chamber will only interfere in this obligation once appropriate cause is shown, which did not occur in this case. The Defence merely disagrees with this well-established principle, and continues to show no error in its application in this instance.

11. As noted in the Confirmation Decision,¹⁹ the eight transcripts in question were not mentioned in the Pre-Confirmation Brief and are of marginal relevance. Consequently, the Defence fails to show that this issue significantly affects the fairness of the proceedings or the outcome of the trial, or that the immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings.²⁰ Indeed, in this respect, the Defence has itself acknowledged that it might re-submit this request to Trial Chamber I for its consideration,²¹ and as such does not require appellate intervention.²²

Issue 3: whether the Prosecution can add new charges in the DCC²³

12. The Defence fails to show that Issue 3 would significantly affect the fair and expeditious conduct of the proceedings. The implication that charges communicated “late” to the Defence can never be confirmed is not only contradicted by article 61(9) – which permits in certain circumstances the addition of new charges even *after* a confirmation decision has been issued – but misses a still more fundamental point²⁴, that it is the DCC that effectively and formally informs the accused of the charges.²⁵ In any event, what is important is the degree to which any concrete prejudice is actually caused. In this case, there was no such prejudice since the DCC was presented far in

¹⁹ [Confirmation Decision](#), para. 16.

²⁰ [ICC-01/04-01/06-2404](#) (“*Lubanga Photographs Certification Decision*”), para. 33.

²¹ [ICC-02/05-01/20-461-Corr](#) (“*Abd-Al-Rahman Corrected Observations concerning Decision #451*”), para. 41.

²² [DRC Extraordinary Review Appeal Judgment](#), paras. 14-15, 18.

²³ [Application](#), paras. 12-15.

²⁴ *Contra* [Application](#), para. 15.

²⁵ [ICC-01/04-01/06-3121-Red](#), paras. 118-119; [ICC-02/11-01/11-572](#), para. 36. [ICC-01/09-02/11-584](#), para. 18.

advance of the statutory limitation of 30 days prior to the confirmation hearing.²⁶ As previously observed by another chamber, “[t]he Applicant cannot speculate in the abstract that the Decision causes a prejudice to the rights of the Accused in order to invoke that the fairness of the proceedings are affected”.²⁷

13. While the Defence may claim that the presence of “new concepts” in the DCC impeded its ability to make a “detailed response”,²⁸ this still does not bring the fairness of the proceedings into any doubt—Mr Abd-Al-Rahman was not only fully able to challenge the charges presented, but also could have sought additional relief from the Chamber if he could show a legitimate need. He also remains fully able to raise at trial any legal arguments concerning these matters, since it is the Trial Chamber which will ultimately decide such matters.

Issue 4: whether the Prosecution has to justify cumulative charges based on the same facts²⁹

14. Issue 4 merely restates the Defence view that the Prosecution is obliged in some way to explain how cumulative charges relate to one another,³⁰ even though it seems to accept that such charging is itself permissible.³¹ Despite the warning by the Chamber that its original objection was phrased in “very broad, generic and abstract terms”, and that the Defence did not demonstrate which charges would be insufficiently clear or how the Defence was prevented from preparing properly as a result,³² the Application is no more specific. Instead, impermissibly, it simply seeks to blame its own inability to articulate any prejudice on the charging practice which has been adopted—the

²⁶ The DCC was submitted on 29 March 2021, almost two months prior to the commencement of the Confirmation Hearing on 24 May 2021.

²⁷ [ICC-01/04-01/07-1958](#) (“Katanga Oral Rulings Certification Decision”), para. 20. See also [ICC-02/04-01/05-367](#) (“Kony et al. 21 November 2008 Certification Decision”), paras. 21-22.

²⁸ [Application](#), para. 14.

²⁹ [Application](#), paras. 16-19.

³⁰ [Application](#), para. 16.

³¹ [Confirmation Decision](#), para. 26. See also [ICC-02/04-01/15-422-Red](#) (“Ongwen Confirmation Decision”), paras. 32-33; [ICC-01/05-01/08-424](#) (“Bemba Confirmation Decision”), para. 202. See also [Chambers Practice Manual](#), para. 68.

³² [Confirmation Decision](#), para. 26.

epitome of a mere disagreement with the Chamber's decision, rather than an appealable issue³³

15. Similarly, the Application fails to show that Issue 4 significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial. It merely claims—without explanation—that the question has a direct impact on the charges confirmed for trial, apparently because in the Defence's view the Prosecution should justify the necessity of the different charges.³⁴ This overlooks that it is the Trial Chamber which is better placed to assess whether the facts establish materially distinct crimes, in which case it may enter cumulative convictions, or whether they do not, in which case the Trial Chamber shall only convict on the more specific crime.³⁵ As such, the Defence remains able to address this point in the fullness of time, and the immediate intervention of the Appeals Chamber is both unwarranted and would not materially advance the proceedings.³⁶

*Issue 5: whether alternate modes of liability may be charged*³⁷

16. In Issue 5, the Defence merely repeats its “abstract and unsubstantiated complaint[]” concerning the inclusion of alternate modes of liability in the DCC,³⁸ and maintains without further elaboration that this violates articles 67(1)(a) and (b) of the Statute.³⁹ Notwithstanding the reminder by the Chamber,⁴⁰ the Defence ignores that

³³ [Katanga Oral Rulings Certification Decision](#), para. 20; [ICC-01/05-01/08-2925](#) (“Bemba Defence Evidence Certification Decision”), para. 34; [ICC-01/04-01/06-2463](#) (“Lubanga Intermediaries Certification Decision”), para. 31.

³⁴ [Application](#), paras. 18-19.

³⁵ [Ongwen Confirmation Decision](#), para. 30 (“Arguments concerning the permissibility of cumulative convictions are extraneous to the question of whether this Chamber should allow the Prosecutor to charge Dominic Ongwen with more than one crime on the same set of facts, and present these charges to the Trial Chamber. The Chamber is of the view that questions of concurrence of offences are better left to the determination of the Trial Chamber. Indeed, article 61(7) of the Statute mandates the Chamber to decline to confirm charges only when the evidence does not provide substantial grounds to believe that the person committed the charged crime and not when one possible legal characterisation of the relevant facts is to be preferred over another, equally viable. When the Prosecutor meets the applicable burden of proof, the Chamber shall confirm the charges as presented”). See also [ICC-01/04-02/06-309](#) (“Ntaganda Confirmation Decision”), para. 100.

³⁶ [DRC Extraordinary Review Appeal Judgment](#), paras. 14-15, 18.

³⁷ [Application](#), paras. 20-23.

³⁸ [Confirmation Decision](#), para. 28.

³⁹ [Application](#), para. 20.

⁴⁰ [Confirmation Decision](#), para. 29.

this matter is already settled in the constant practice of the Court.⁴¹ As such, the proposed issue constitutes no more than a disagreement with the Confirmation Decision, and does not disclose an identifiable subject or topic requiring a decision for its resolution. Requesting the Appeals Chamber to confirm whether its understanding of the issue has in fact advanced over time does not allow for the certification of the issue for appeal.⁴²

17. Nor does the Defence demonstrate that the proposed issue would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial. First, the Application fails to articulate or identify any specific error in the Chamber's conclusion that it could "[n]ot discern any prejudice deriving from the fact that the Prosecutor charged alternative forms of criminal responsibility",⁴³ but again—as for Issue 4—attempts to blame the vagueness of its submissions on the alleged burden caused by this form of charging.⁴⁴ This speculative argument inverts the logic of the article 82(1)(d) criteria, and cannot be accepted.

18. Second, the Application is wrong to assert that—for the sake of argument—a decision by the Appeals Chamber excluding the possibility of charging alternate modes of liability would necessarily result in narrowing the scope of the trial.⁴⁵ To the contrary, provided the necessary facts and circumstances are confirmed by the Chamber, there is no legal impediment to the Trial Chamber subsequently recharacterising those facts as a matter of law to include alternate modes of liability.⁴⁶

⁴¹ [Chambers Practice Manual](#), para. 67. See also [ICC-01/09-01/11-373](#) (“*Ruto and Sang* Confirmation Decision”), paras. 284-285; [ICC-02/11-01/11-656-Red](#) (“*Gbagbo* Confirmation Decision”), para. 227; [Ntaganda Confirmation Decision](#), para. 100; [ICC-02/11-02/11-186](#) (“*Blé Goudé* Confirmation Decision”), para. 133; [Ongwen Confirmation Decision](#), para. 35.

⁴² [Lubanga Disclosure Certification Decision](#), para. 25; [ICC-02/04-01/05-20](#) (“*Kony et al.* Arrest Warrant Certification Decision”), para. 21, [ICC-01/04-135-tEN](#) (“*DRC* Victim Participation Certification Decision”), para. 21; [ICC-01/04-01/06-1191](#) (“*Lubanga* Victim Participation Certification Decision”), para. 11; [Bemba List of Evidence Certification Decision](#), para. 25; [ICC-01/05-01/08-980](#) (“*Bemba* DCC Correction Certification Decision”), para. 16.

⁴³ [Confirmation Decision](#), para. 29.

⁴⁴ [Application](#), para. 21.

⁴⁵ *Contra* [Application](#), para. 23.

⁴⁶ See e.g. [ICC-02/11-01/15-369 OA7](#) (“*Gbagbo* Regulation 55 Appeal Judgment”), para. 32.

As such, the Defence fails to show that Issue 5 has any impact either on the fair and expeditious conduct of the proceedings, or its outcome.

*Issue 6: whether the right to adequate preparation for the Defence was improperly affected by the disclosure of evidence without explaining its relevance*⁴⁷

19. In claiming that the Defence right to adequate preparation was negatively impacted by unexplained Prosecution disclosure of thousands of documents, the Defence mischaracterises the Confirmation Decision. Specifically, the Chamber did not modify an earlier decision in order to permit mass disclosure of this kind,⁴⁸ but simply clarified that the Prosecution was never obliged to identify the specific relevance of each disclosed item.⁴⁹ As such, Issue 6 does not genuinely arise from the Confirmation Decision. This fatal defect is not remedied by the Defence claim that further appellate guidance on the scope of the Prosecution’s disclosure obligations would be of general utility in developing the jurisprudence of the Court.⁵⁰

20. Rather, the Defence again presents a mere disagreement with the Confirmation Decision—which has already determined that, even if the Prosecution had erred in the manner of its disclosure, this would not result in the exclusion of all evidence presented by the Prosecution, as requested by the Defence. The Chamber further confirmed that the disclosure was not in fact “inordinate” in scale, and that the Defence had shown no actual prejudice resulting in a violation of article 67(1)(b).⁵¹ Since the Defence does not challenge this assessment in any concrete way, but merely repeats its vague and unsubstantiated claim to the contrary,⁵² the Application fails to show that the fair and expeditious conduct of the proceedings was significantly affected by this issue, let alone their outcome.

⁴⁷ [Application](#), paras. 24-26.

⁴⁸ [Application](#), para. 24.

⁴⁹ [Confirmation Decision](#), para. 32 (“The Chamber never ordered the Prosecutor to provide a detailed explanation as to the relevance of each individual item of evidence”).

⁵⁰ *Contra* [Application](#), para. 25. See [Bemba DCC Correction Certification Decision](#), para. 16; [Bemba Confirmation Certification Decision](#), para. 17.

⁵¹ [Confirmation Decision](#), para. 32.

⁵² [Application](#), para. 26.

*Issue 7: whether the Chamber has a more limited role in guaranteeing article 67(1) rights at the pre-trial stage*⁵³

21. In Issue 7, the Defence claims that the Confirmation Decision failed to resolve various procedural questions which in its view affected the fairness of the proceedings,⁵⁴ and therefore assumes the Chamber to have taken the view that it has a narrower role in preserving article 67(1) rights than a Trial Chamber at trial.⁵⁵ Yet this issue does not genuinely arise from the Confirmation Decision insofar as the Chamber made no such statement.

22. Furthermore, the procedural questions which the Defence claims to have been left unresolved were in fact addressed during the pre-trial phase.⁵⁶ Specifically, all but one of the matters identified by the Defence were not only ruled upon by the Chamber in earlier decisions but also considered for potential certification for appeal.⁵⁷ While one of these requests for leave to appeal was decided in the Confirmation Decision itself, and denied,⁵⁸ the Defence cannot use this Application to seek reconsideration of this prior article 82(1)(d) decision ‘through the back door.’

23. The only matter identified by the Defence for the purpose of Issue 7, and that was directly addressed in the Confirmation Decision, was the Third Defence Request

⁵³ [Application](#), paras. 27-33.

⁵⁴ [Application](#), paras. 27-33.

⁵⁵ [Application](#), para. 32.

⁵⁶ See [Application](#), para. 28 (fns. 40-42, citing: [ICC-02/05-01/20-231-Red](#) (“*Abd-Al-Rahman* Articles 4(2) and 68(1) Request”); [ICC-02/05-01/20-269](#) (“*Abd-Al-Rahman* Articles 2, 67(1) and 87(6) Request”); [ICC-02/05-01/20-272-Red](#) (“*Abd-Al-Rahman* Article 43(1) Request”); [ICC-02/05-01/20-340-Red](#) (“*Abd-Al-Rahman* Response to Registrar’s Observations”); [ICC-02/05-01/20-349-Red](#) (“*Abd-Al-Rahman* Second Exclusion Request”); [ICC-02/05-01/20-322](#) (“*Abd-Al-Rahman* First Exclusion Request”); [Abd-Al-Rahman Third Exclusion Request](#); [ICC-02/05-01/20-182-Red](#) (“*Abd-Al-Rahman* Response to Request #178”); [ICC-02/05-01/20-206](#) (“*Abd-Al-Rahman* Rule 89(1) Request”)).

⁵⁷ The matters in the [Abd-Al-Rahman Response to Request #178](#) (ICC-02/05-01/20-182) were decided in [ICC-02/05-01/20-198](#), and the Defence sought leave to appeal in [ICC-02/05-01/20-201](#). The [Abd-Al-Rahman Rule 89\(1\) Request](#) (ICC-02/05-01/20-206) was decided in [ICC-02/05-01/20-259](#) and the Defence sought leave to appeal in [ICC-02/05-01/20-264](#). The matters in the [Abd-Al-Rahman Articles 4\(2\) and 68\(1\) Request](#) (ICC-02/05-01/20-231-Red), [Abd-Al-Rahman Articles 2, 67\(1\) and 87\(6\) Request](#) (ICC-02/05-01/20-269), [Abd-Al-Rahman Article 43\(1\) Request](#) (ICC-02/05-01/20-272-Red), [Abd-Al-Rahman First Exclusion Request](#) (ICC-02/05-01/20-322), [Abd-Al-Rahman Response to Registrar’s Observations](#) (ICC-02/05-01/20-340-Red) and [Abd-Al-Rahman Second Exclusion Request](#) (ICC-02/05-01/20-349-Red) were all decided in [ICC-02/05-01/20-402](#), and the Defence sought leave to appeal in [ICC-02/05-01/20-413](#). See also [Application](#), para. 28.

⁵⁸ [Confirmation Decision](#), paras. 17-18.

for Exclusion of Evidence (ICC-02/05-01/20-389)⁵⁹ – which is already the subject-matter of Issue 2 of the Application, addressed above.⁶⁰ To the extent that the only aspect of Issue 7 arising from the Confirmation Decision is already entirely encompassed by the subject-matter of Issue 2, this is impermissibly duplicative.

24. Accordingly, since the Chamber made no express statement to the effect claimed by the Defence, and all the underlying incidents have in fact already been exhaustively litigated, no appealable issue can arise out of the Confirmation Decision in these respects.

Issue 8: whether the Defence was prejudiced by ‘multiple violations’ regarding the evidence submitted for the confirmation of charges⁶¹

25. The Prosecution will separately address Issues 8(a) to (e) in the following paragraphs. At the outset, it notes that, although the Defence submits that each of these sub-issues would significantly affect the fair conduct of the proceedings, it consistently fails to address their expeditious conduct.⁶² Since these requirements are cumulative, this criterion under article 82(1)(d) of the Statute is therefore not met in relation to any of Issues 8(a) to (e).

26. Furthermore, the Defence submissions concerning Issues 8(a) to (e) depend on vague and general assertions that: i) alternate findings on these issues, individually or together, would have resulted in none or only some of the charges being confirmed, and; ii) resolution of these issues would clarify the role and purpose of the Pre-Trial Chamber, and the rights of the suspect to be heard fairly and impartially at the confirmation stage.⁶³ As further detailed below, these assertions are insufficient to satisfy the requirements of article 82(1)(d).

⁵⁹ [Abd-Al-Rahman Third Exclusion Request](#).

⁶⁰ See above paras. 9-11.

⁶¹ [Application](#), paras. 34-40.

⁶² [Application](#), para. 40.

⁶³ [Application](#), para. 40.

Issue 8(a): language of certain items of evidence⁶⁴

27. Issue 8(a) does not arise from the Confirmation Decision and does not constitute an appealable issue. The core evidence relied upon by the Prosecution for the confirmation of charges, including all statements and transcripts of witnesses on its confirmation witness list, was available in a working language of the Court.⁶⁵ In particular, all items of evidence relied upon by the Prosecution in its Pre-Confirmation Brief,⁶⁶ and submissions on the evidence demonstrating that Mr Abd-Al-Rahman is also known as “Ali Kushayb”,⁶⁷ were available in a working language. Although the Prosecution’s list of evidence did contain items that had not been translated into a working language,⁶⁸ the Defence has not shown that this caused any prejudice to the Defence or had any impact on the charges confirmed for trial.

28. Furthermore, the Defence had ample opportunity to make an application prior to the confirmation hearing seeking to exclude this evidence, but did not do so.⁶⁹ The Defence now attempts to raise the matter for the first time, but this is neither the proper forum nor timing for such litigation. The Confirmation Decision cannot be faulted for failing to address an objection which the Defence did not make.

29. In any event, Issue 8(a) does not meet the criteria under article 82(1)(d) of the Statute. Given the absence of any prejudice to the Defence, and any impact on the scope of the confirmed charges, Issue 8(a) would not significantly affect the fair and

⁶⁴ [Application](#), para. 35.

⁶⁵ [Statute](#), art. 50(2) (English or French).

⁶⁶ [ICC-02/05-01/20-346-AnxA-Red](#) (“Abd-Al-Rahman Prosecution Pre-Confirmation Brief”), plus annexes.

⁶⁷ [ICC-02/05-01/20-224](#) (“Abd-Al-Rahman Prosecution Submissions on Identity”).

⁶⁸ On 25 August 2021, the Prosecution provided the Defence with an approximate number of 700 items on its list of evidence that were not available in a working language, based on the metadata available in the Prosecution’s database. The Prosecution has since double-checked these items and has revised this figure to approximately 360 by excluding items that do not require translation (e.g. photographs or items containing very limited text in Arabic such as a signature), transcripts in both Arabic and English, translations of statements into Arabic from English under rule 76(3), and some items for which a translation into English was available but this was not properly reflected in the metadata.

⁶⁹ See e.g. [ICC-02/05-01/20-390](#) (“Abd-Al-Rahman Second Rule 122(3) Observations”); [ICC-02/05-01/20-388](#) (“Abd-Al-Rahman Response to Request #385”), para. 8.

expeditious conduct of the proceedings,⁷⁰ or the outcome of the trial. For the same reasons, immediate resolution by the Appeals Chamber would not materially advance the proceedings.

Issue 8(b): approach to a medical report relied upon by the Defence⁷¹

30. Issue 8(b) does not arise from the Confirmation Decision, and the Defence mischaracterises the Chamber’s finding in relation to this issue. The Chamber did not rely on “evidence suggesting that [‘Kushayb’] is meant to evoke strength and courage, as opposed to a dangerous addiction”⁷² to reject the relevance of the medical report relied upon by the Defence.⁷³ To the contrary, the Chamber had already concluded that: “As regards the meaning of ‘Kushayb’, the evidentiary basis relied upon by the Defence is limited. The few available items are not sufficient to conclude that the word would exclusively refer to alcohol consumption”.⁷⁴ Consistent with this finding, it was not necessary for the Chamber to “address in detail the contents of the medical report relied upon by the Defence for the purpose of substantiating the alleged incompatibility between Mr Abd-Al-Rahman and the consumption of alcoholic beverages.”⁷⁵

31. Furthermore, Issue 8(b) is not appealable. The Chamber relied on multiple items of evidence submitted by the Prosecutor (of an “abundant and varied nature”⁷⁶) to conclude that Mr Abd-Al-Rahman was also known by the name “Ali Kushayb” during the period of the charges.⁷⁷ Given its very limited relevance, resolution of Issue 8(b)

⁷⁰ As noted above, the Defence did not submit that the expeditious conduct of the proceedings would be significantly affected. *See above* para. 25.

⁷¹ [Application](#), para. 36.

⁷² [Confirmation Decision](#), para. 57.

⁷³ *Contra* [Application](#), para. 36.

⁷⁴ [Confirmation Decision](#), para. 57.

⁷⁵ [Confirmation Decision](#), para. 57.

⁷⁶ [Confirmation Decision](#), para. 49.

⁷⁷ [Confirmation Decision](#), paras. 48-60.

would have no material impact on this overall conclusion, and was not essential to the Chamber's decision.

32. Nor in any event does Issue 8(b) meet the criteria under article 82(1)(d) of the Statute. Given that it had no material impact on the Confirmation Decision, and no specific prejudice to the Defence has been shown, Issue 8(b) would not significantly affect the fair and expeditious conduct of the proceedings,⁷⁸ or the outcome of the trial. Indeed, the Trial Chamber is not bound by the Pre-Trial Chamber's conclusion with respect to the identity of Mr Abd-Al-Rahman, and will make its own determination based on all of the evidence submitted at trial. Immediate resolution of Issue 8(b) by the Appeals Chamber would not materially advance the proceedings.

Issue 8(c): approach to a particular item of evidence⁷⁹

33. Issue 8(c) does not constitute an appealable issue. Rather, it reflects a mere disagreement with the limited value that the Chamber attributed to this specific item of evidence submitted by the Defence.⁸⁰ Furthermore, as noted above, this evidence was just one item among many considered by the Chamber in determining whether Mr Abd-Al-Rahman was also known by the name "Ali Kushayb" during the period of the charges. Again, given its limited relevance, resolution of Issue 8(c) would not impact this overall conclusion, since it was not essential to the Chamber's decision.

34. Similarly, Issue 8(c) cannot meet the criteria under article 82(1)(d) of the Statute. Since the issue has no material impact on the Chamber's overall findings in the Confirmation Decision, and the Trial Chamber is not bound by the findings of the Pre-Trial Chamber on this issue, it cannot be shown that the fair and expeditious conduct of the proceedings, or the outcome of the trial, is significantly affected, or that the

⁷⁸ As noted above, the Defence did not submit that the expeditious conduct of the proceedings would be significantly affected. *See above* para. 25.

⁷⁹ [Application](#), para. 37.

⁸⁰ [Confirmation Decision](#), para. 59 (referring to item DAR-D31-0002-0007).

immediate intervention of the Appeals Chamber would materially advance the proceedings.

Issue 8(d): reliance on the evidence of P-0008 and P-0085⁸¹

35. Issue 8(d) does not constitute an appealable issue. The Defence has not shown that inclusion of the evidence of P-0008 and P-0085 had any material impact on the scope of the charges confirmed for trial. In any event, and contrary to the implication of the Defence, the Chamber's reliance on P-0008 in the Confirmation Decision⁸² was consistent with its previous decision.⁸³

36. Likewise, Issue 8(c) does not meet the criteria under article 82(1)(d) of the Statute. The Defence has not shown that the proposed issue caused any prejudice to the Defence or had any impact on the scope of the charges confirmed for trial. Therefore, Issue 8(c) would not significantly affect the fair and expeditious conduct of the proceedings,⁸⁴ or the outcome of trial, and its immediate resolution by the Appeals Chamber would not materially advance the proceedings.

Issue 8(e): adequacy of the reasoning in the Confirmation Decision⁸⁵

37. Issue 8(e) does not constitute an appealable issue. It reflects mere disagreement with the way in which the Chamber reasoned the Confirmation Decision and does not show how this was legally erroneous.⁸⁶ As correctly noted by the Chamber, the

⁸¹ [Application](#), para. 38.

⁸² [Confirmation Decision](#), para. 59.

⁸³ The Chamber indicated that it would not rely on the evidence of P-0008 *unless* the Prosecution located him prior to the confirmation hearing. See [ICC-02/05-01/20-386](#) (“*Abd-Al-Rahman* Witness Identity Decision”), paras. 26-29 and p. 15. The Prosecution did locate P-0008 prior to the confirmation hearing, and this was reported to the Chamber. See [ICC-02/05-01/20-404](#) (“*Abd-Al-Rahman* Prosecution 18th Progress Report”), para. 13; [ICC-02/05-01/20-404-Conf-Exp-Anx3](#), para. 2. *Contra* [Application](#), para. 38.

⁸⁴ As noted above, the Defence did not submit that the expeditious conduct of the proceedings would be significantly affected. See *above* para. 25.

⁸⁵ [Application](#), para. 39.

⁸⁶ See [ICC-02/05-01/20-236 OA5](#) (“*Abd-Al-Rahman* Reasoning Appeal Judgment”), para. 13 (recalling that “the Statute and the Rules [...] require that reasons be given only for certain types of judgments or decisions” and that general “reliance on article 74(5) is misplaced” for matters other than a trial judgment deciding on guilt or innocence).

confirmation hearing is not intended to be a “mini-trial” or “a trial before the trial”.⁸⁷ As held by the Appeals Chamber, consistent with its role as a “gatekeeper”, the Pre-Trial Chamber conducts a “macro-level” or “light review” when compared with the fact-finding role of the Trial Chamber⁸⁸—and consequently the degree to which a confirmation decision exhibits “sufficient clarity”⁸⁹ must be calibrated accordingly. It is for the Trial Chamber, when issuing its judgment under article 74, to provide a “full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions”,⁹⁰ which will necessarily include detailed references to specific items of evidence—and, even then, need not be exhaustive.

38. Issue 8(e) does not meet the criteria under article 82(1)(d) of the Statute. In light of its limited fact-finding role at the confirmation stage, there is no unfairness caused to the Defence by the lack of detailed references to specific items of evidence in the Confirmation Decision. Resolution of Issue 8(e) would therefore not significantly affect the fair and expeditious conduct of the proceedings.⁹¹ The Defence has not shown that Issue 8(e) would have any impact on the outcome of trial, nor that immediate resolution by the Appeals Chamber would materially advance the proceedings.

Issue 9: whether evidence obtained in violation of article 55(2) was used to ground the Confirmation Decision⁹²

39. Issue 9—which concerns video material created by Mr Abd-Al-Rahman himself—is no more than a disagreement with the Confirmation Decision. The Chamber stated in the Confirmation Decision that it was “not persuaded by the Defence’s submissions at the Confirmation Hearing to the effect that the Chamber’s reliance on them would be contrary to the rights of the suspect, in particular in light of

⁸⁷ [Confirmation Decision](#), para. 40.

⁸⁸ [ICC-01/12-01/18-1562-Red OA3](#) (“*Al Hassan* Regulation 55(2) Appeal Judgment”), para. 92.

⁸⁹ See [Abd-Al-Rahman Reasoning Appeal Judgment](#), para. 14 (noting that “[t]here is no prescribed formula for what is or is not sufficient, and the extent to which the duty to provide reasons applies may vary according to the nature of the decision”).

⁹⁰ [Statute](#), art. 74(5).

⁹¹ As noted above, the Defence did not submit that the expeditious conduct of the proceedings would be significantly affected. See *above* para. 25.

⁹² [Application](#), paras. 41-48.

the fact that Mr Abd-Al-Rahman would not have benefitted from legal assistance in the context of their recording and subsequent handover to the Office of the Prosecutor.”⁹³

40. However, in the present Application the Defence simply repeats the assertion that the video had been obtained in violation of article 55(2) of the Statute and rule 112.⁹⁴ The Defence presents no reasoned basis for contradicting the Chamber’s conclusion, but simply re-states previous arguments unsuccessfully raised in the Confirmation Hearing. As such, this claim does not disclose an appealable issue.

41. In any event, the Defence misrepresents and mischaracterises the Confirmation Decision⁹⁵—in fact, contrary to the Defence claims, the proposed issue is without any identifiable impact. The Defence incorrectly implies that the video material was considered by the Chamber as the “fundamental element” to establish the alias of Mr Abd-Al-Rahman as “Ali Kushayb”.⁹⁶ Yet to the contrary, the Chamber clearly specified that the videos were considered only in the context of its overall assessment of the evidence on the identity and conduct of the suspect, and were not decisive on their own.⁹⁷ In addition, the Chamber further concluded that other evidence presented by the Prosecution also makes an explicit and credible connection between the nickname and the name “Abd-Al-Rahman”, such as witness testimony and open source material, as well as the circumstances surrounding and following the suspect’s appearance before the Court.⁹⁸

42. Unsurprisingly, the Defence cannot explain how the Confirmation Decision would have been different even without video footage, since it was not the sole or essential basis for the relevant findings in relation to the identity of the accused. As

⁹³ [Confirmation Decision](#), para. 55.

⁹⁴ [Application](#), para. 46.

⁹⁵ [Kenya Confirmation Certification Decision](#), para. 46; [Katanga Site Visit Certification Decision](#), paras. 15, 17-18.

⁹⁶ [Application](#), paras. 41-42.

⁹⁷ [Confirmation Decision](#), para. 55.

⁹⁸ [Confirmation Decision](#), paras. 53-54.

such, the Application fails to show that the proposed issue significantly affected the fair and expeditious conduct of the proceedings, or the outcome of the trial, or that intervention by the Appeals Chamber would materially advance the proceedings.

*Issue 10: whether article 30(1) and (3) applies to all crimes in the Statute*⁹⁹

43. Finally, Issue 10 does not arise from the Confirmation Decision and therefore cannot be appealable. The Defence mischaracterises the Chamber’s finding in relation to this issue, by suggesting that the Chamber stated that knowledge would not be required for certain crimes.¹⁰⁰ However, contrary to the Defence submission, the Confirmation Decision merely stated the legal orthodoxy that the suspect is not required to have made a legal evaluation of the status of the victims on half of the counts¹⁰¹ and the Prosecutor is only required to show that the perpetrator was aware of the factual circumstances that establish the protected status of the persons or objects that are the subject of these crimes. Mr Abd-Al-Rahman’s alleged lack of understanding of the law of war was thus irrelevant. But the Chamber never denied the need to prove knowledge in other respects.¹⁰²

44. Nor does the Defence explain how its hypothetical concerns¹⁰³ would be essential for determination of matters arising in the judicial cause under examination.¹⁰⁴ To the extent that the Chamber did not misdirect itself in the Confirmation Decision, as explained above, the law to be applied at trial is determined by the Trial Chamber—which, as necessary, may be appealed under article 81 of the Statute. There is no basis to certify mere abstract legal questions for appeal at this stage under article 82(1)(d). Contrary to the Defence claim that Mr Abd-Al-Rahman cannot

⁹⁹ [Application](#), paras. 49-51.

¹⁰⁰ [Application](#), para. 49.

¹⁰¹ [Confirmation Decision](#), para. 76.

¹⁰² [Confirmation Decision](#), para. 76.

¹⁰³ [Application](#), para. 50.

¹⁰⁴ [Bemba Confirmation Certification Decision](#), para. 17; [ICC-01/05-01/08-75](#) (“*Bemba* Disclosure Certification Decision”), para. 11; [Kony et al. 21 November 2008 Certification Decision](#), para. 22; [ICC-01/09-01/11-301](#) (“*Ruto and Sang* Postponement Certification Decision”), para. 34; [Kenyatta Confirmation Certification Decision](#), paras. 50, 61.

be brought to trial without knowing who was responsible for the burden of proof, this was set out unequivocally in the Confirmation Decision.¹⁰⁵ For all these reasons, the issue presented here does not constitute an appealable issue, and in any event would not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, as required by article 82(1)(d). The intervention of the Appeals Chamber on this issue would not materially advance the proceedings.

III. RELIEF REQUESTED

45. For the foregoing reasons, the Pre-Trial Chamber should dismiss the Application in its entirety.



Karim A. A. Khan QC
Prosecutor

Dated this 9th day of September 2021

At The Hague, The Netherlands

¹⁰⁵ [Confirmation Decision](#), para. 78.