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**International
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TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

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

Public

**Prosecution’s response to “Demande d’autorisation d’interjeter appel de la
décision ICC-02/05-01/20-876”, 24 February 2023,
ICC-02/05-01/20-883**

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

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I. INTRODUCTION

1. The Prosecution respectfully requests that Trial Chamber I (“Chamber”) reject the Defence’s request for leave to appeal (“Request”)¹ the Chamber’s decision admitting a video of the Accused (DAR-OTP-0216-0119) into evidence (“Decision”).²

2. The two purported issues that the Defence raises in the Request (“Issues”) fail to meet the cumulative criteria required under article 82(1)(d) of the Rome Statute,³ and thus do not justify the exceptional remedy of a grant of leave to appeal.⁴ The Issues instead fail to identify any factual or legal errors and are premised on mere disagreements with the Chamber’s assessment regarding the admissibility of the video. Therefore, the Issues do not constitute appealable issues genuinely arising from the Decision within the meaning of article 82(1)(d).

3. The Issues further fail to fulfil the remaining criteria under article 82(1)(d). While the Chamber has admitted the video into evidence,⁵ it has yet to decide what weight, if any, to afford it. It is therefore premature and speculative to raise issues regarding the Chamber’s reliance on the video. The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor do they require immediate resolution to materially advance the proceedings. Indeed, appellate review of admissibility decisions during an ongoing trial is only likely to unnecessarily prolong the proceedings. If and when the Chamber relies on the video in its final determination of the case pursuant to article 74 of the Statute, the Defence may raise the Issues as part of a final appeal under article 81.

¹ Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-876, [ICC-02/05-01/20-883](#) (“Request”), dated 24 February 2023 (notified 27 February 2023).

² Decision on the admissibility of video (DAR-OTP-0216-0119) and records of telephone calls (DAR-OTP-0216-0127, DAR-OTP-0216-0128), [ICC-02/05-01/20-876](#) (“Decision”).

³ *Prosecutor v. Said*, Decision on request for leave to appeal the decision on use of A/V, [ICC-01/14-01/21-453](#), (“*Said Decision*”), para. 6.

⁴ *Prosecutor v. Mbarushimana*, Decision on application for leave to appeal the decision on disclosure of information related to victims of sexual violence, [ICC-01/04-01/10-443](#), p. 4. *See also Prosecutor v. Ongwen*, Decision on application for leave to appeal decision to suspend or stay consideration of leave to appeal, [ICC-02/04-01/15-64](#), para. 19; *Prosecutor v. Lubanga*, Decision on requests for leave the decision on victims’ participation, [ICC-01/04-01/06-1191](#), para. 13.

⁵ [Decision](#), p. 22.

II. SUBMISSIONS

4. When considering an article 82(1)(d) request, the Chamber must determine whether: (i) the matter is an “appealable issue” that arises from the impugned decision; (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁶ These criteria are cumulative, and failure to fulfil any of them will result in dismissal of the request for leave to appeal.⁷

5. As a preliminary matter, and contrary to the Defence claims, the Chamber did not set out “new conditions”⁸ in its recent decision on a request for leave to appeal. The Chamber correctly stated that a request for leave to appeal should demonstrate an error of law, fact or procedure that it made in its discretion issuing the impugned decision.⁹ This requirement is well-established in the jurisprudence of the Court¹⁰ and does not amount to a new requirement that the party seeking leave to appeal provide a complete statement of the grounds for appeal.¹¹ Rather, it prevents superfluous challenges to decisions by Chambers that would unnecessarily delay the proceedings, as in the present Request.¹² The Defence’s arguments in this regard should be dismissed.

⁶ [Said Decision](#), para. 5. See also *Prosecutor v. Ruto & Sang*, Decision on request for leave to appeal decision on amendment of charges, [ICC-01/09-01/11-912](#), para. 16.

⁷ [Said Decision](#), para. 6.

⁸ [Request](#), para. 5.

⁹ ICC-02/05-01/20-875-Conf, para. 27.

¹⁰ See e.g. *Prosecutor v. Yekatom & Ngaïssona*, Decision on the admissibility of the appeal, [ICC-01/14-01/21-514](#) (“*Yekatom & Ngaïssona* Appeal Admissibility Decision”), para. 16.

¹¹ See e.g. *Prosecutor v. Ntaganda*, Decision on request for leave to appeal decision on postponement of trial, [ICC-01/04-02-06-604](#), para. 17.

¹² The Prosecution observes that while requests for leave to appeal should clearly identify appealable issues within the meaning of article 82(1)(d) of the Statute, it is not permitted to merely repeat substantive submissions in the hopes of obtaining a different outcome. See e.g. *Prosecutor v. Gbagbo*, Decision on the request for leave to appeal date of the confirmation hearing, [ICC-02/11-01/11-350](#) (“*Gbagbo* Confirmation Date Decision”), para. 40 (“The Chamber considers that a mere repetition of prior arguments and an expression of disagreement with the analysis and conclusion made by the Chamber are not sufficient to identify an ‘issue’ [...]”).

The Defence does not raise an appealable issue

6. The Defence fails to raise an appealable issue under 82(1)(d) of the Statute. In the Request, the Defence identifies the two Issues for which it seeks immediate resolution by the Appeals Chamber:

- a. Whether the Chamber erred in fact and in law by concluding in paragraphs 48 and 51-52 of the Decision that article 55(2) of the Statute did not apply in the circumstances in which the video of the Accused was obtained by the Prosecution (“First Issue”); and
- b. Whether the Chamber erred in law in paragraph 47 of the Decision regarding the definition of the burden of proof on the Prosecution under article 66(2) of the Statute (“Second Issue”).¹³

7. Neither of the Issues amounts to an appealable issue within the definition of article 82(1)(d). The appealable issues raised must not be mere disagreements¹⁴ or conflicting opinions¹⁵ and must concern a subject that is essential for the determination of matters arising in the judicial cause.¹⁶ These issues may be factual, legal or a mixture of both,¹⁷ but at a minimum it is required that they identify an error that can be resolved.¹⁸

The purported First Issue fails to identify any factual error on the part of the Chamber

8. The First Issue fails to identify any factual error on the part of the Chamber. Specifically, the Defence alleges that the Chamber factually erred in concluding that

¹³ [Request](#), para. 7.

¹⁴ [Gbagbo Confirmation Date Decision](#), para. 40.

¹⁵ Situation in the Democratic Republic of the Congo, Judgment on application for extraordinary review of 31 March 2006 decision (“DRC Extraordinary Review Decision”), [ICC-01/04-168 OA3](#), para. 9.

¹⁶ *Prosecutor v. Kony et al.*, Decision on request for leave to appeal the 21 November 2008 decision, [ICC-02/04-01/05-367](#), para. 22; *Prosecutor v. Lubanga*, Decision on request for leave to appeal the intermediaries decision, [ICC-01/04-01/06-2463](#), para. 8; *Prosecutor v. Muthaura et al.*, Decision on leave to appeal summons decision, [ICC-01/09-02/11-27](#), para. 7; *Prosecutor v. Lubanga*, Judgment on appeal of the 18 January 2008 decision, [ICC-01/04-01/06-1433 OA11](#), (Dissenting Opinion of Judge Song), para. 4.

¹⁷ [DRC Extraordinary Review Decision](#), para. 9.

¹⁸ [Yekatom & Ngaiissona Appeal Admissibility Decision](#), para. 16

Prosecution investigator P-1049 did not request that P-0869 send the video of Accused.¹⁹ This argument is a mere disagreement with the Chamber's findings.

9. First, the Defence does not specify how the Chamber erred in finding that the idea of sending the video of the Accused originated with P-0869 and not Prosecution investigators.²⁰ The Chamber clearly outlined the basis for its factual determination in the Decision.²¹ It evaluated P-1049's testimony as credible and reliable²² and noted that the Defence also accepted his testimony to be "truthful, candid, frank, and honest".²³

10. The Chamber found that the idea of sending the video originated with P-0869 and not P-1048 or P-1049, and to the extent that P-1049 later asked for the video, it was the result of P-0869 first having intimated that a video was being made to be sent to the Prosecution.²⁴ In reaching this determination, the Chamber cited extensively to the arguments made by both the Prosecution and Defence.²⁵ It is thus evident from the Decision that the Chamber reached the conclusion that the Prosecution did not request the video from the Accused only upon reviewing the entire record.

11. Second, the Defence does not raise any issues regarding the factors that underpinned the Chamber's determination, nor does it identify how the Chamber erred in its assessment of these factors. Instead, the Defence asserts – without any foundation – that the record shows that P-1049 "probably" insistently solicited receipt of the video from the Accused.²⁶ This assertion is unsupported by the record and is contradicted by the Defence's own acknowledgement that P-1049's testimony was credible.²⁷

¹⁹ [Request](#), para. 8.

²⁰ [Decision](#), para. 46.

²¹ See [Decision](#), paras. 44-46.

²² [Decision](#), para. 45.

²³ [Decision](#), para. 45 (citing ICC-02/05-01/20-T-109-ENG, p. 69, l. 16-18).

²⁴ [Decision](#), para. 46.

²⁵ See [Decision](#), paras. 20-27.

²⁶ [Request](#), paras. 8-10.

²⁷ ICC-02/05-01/20-T-109-ENG, p. 69, l. 16-18.

12. Third, the Prosecution and Defence debated the circumstances surrounding the receipt of the video at length over the course of two written submissions, two and a half days of oral argument and two days of witness testimony. The Defence thus has had ample opportunity to advance its factual and legal assertions regarding P-1049's communications with P-0869 and the circumstances under which the Prosecution received the video of the Accused, assertions which it merely repeats now.²⁸

The purported First Issue fails to identify any legal error on the part of the Chamber

13. The Defence also fails to identify any legal error in the First Issue. The Defence alleges that the Chamber erred in law in finding that article 55(2) of the Statute was not applicable to the receipt of the video because the Prosecution "knew or should have known" that the Accused's nickname would be contested.²⁹ The Defence incorrectly claims that, irrespective of P-0869's role, the recording of the video was conducted at the Prosecution's request which would qualify as a "questioning" within the meaning of article 55(2).³⁰ The Defence's arguments do not demonstrate any appealable issue and should be rejected.

14. First, the Defence merely disagrees with the Chamber's rejection of its argument that the Prosecution "knew or should have known" that the fact that "Ali Kushayb" is the same person as "Ali Muhammad Ali Abd-Al-Rahman" would be disputed in the case, without identifying any error in the Chamber's reasoning.³¹

15. Second, this factual finding by the Chamber did not have any significant bearing on its decision admitting the video, as is apparent from its analysis on the

²⁸ See Résumé des soumissions de la Défense aux fins d'exclusion du document DAR-OTP-0216-0119 et autres documents associés du dossier de l'affaire, [ICC-02/05-01/20-819](#) ("Defence Exclusion Request"); ICC-02/05-01/20-T-104-CONF-ENG; ICC-02/05-01/20-T-105-CONF-ENG; ICC-02/05-01/20-T-106-CONF-ENG; ICC-02/05-01/20-T-108-CONF-ENG; ICC-02/05-01/20-T-109-ENG.

²⁹ [Request](#), para. 11. The Prosecution notes that the Defence has affirmed that the Accused first raised the defence that he did not have the nickname "Ali Kushayb" at the initial appearance hearing. See e.g. [Defence Exclusion Request](#), para. 15.

³⁰ [Request](#), para. 11.

³¹ *Id.*

application of articles 55(2) and 69(7).³² The Chamber fully considered the Defence arguments and determined that “[a]rticle 55(2) of the Statute is designed to deal with situations where the suspect is questioned directly about alleged crimes under the jurisdiction of the Court”. Accordingly, the Chamber found that these circumstances did not apply to the Prosecution’s receipt of the video.³³ The Defence does not explain how the Prosecution’s alleged awareness or premonition of the Accused’s mistaken identity defence would transform its unsolicited receipt of the video through P-0869 into a “remote” interview that triggers the application of article 55(2).³⁴

16. Finally, to demonstrate the supposed legal error, the Defence again relies upon its disagreement with the Chamber’s finding that the Prosecution did not request the video, conflating this factual finding with the separate legal question regarding the applicability of article 55(2). This reliance on an unsubstantiated factual error is insufficient to demonstrate any appealable legal issue arising from the Decision. The First Issue is not an appealable issue, but rather, a mere disagreement with the Chamber’s finding.

The purported Second Issue fails to raise an appealable issue and does not arise from the Decision

17. The Second Issue neither raises an appealable issue nor arises from the Decision. In the Defence’s formulation of this issue, the Chamber allegedly erred in law when it rejected the argument that the Prosecution “knew or should have known” that the Accused would contest his link to the nickname “Ali Kushayb”.³⁵ As with the

³² See [Decision](#), paras. 48-52.

³³ [Decision](#), para. 48.

³⁴ [Request](#), para. 11.

³⁵ [Request](#), para. 12 (citing Prosecution’s Trial Brief, [ICC-02/05-01/20-550-Corr-Red2](#), paras. 89-177). The Prosecution wishes to correct one egregious misrepresentation by the Defence that the Accused is exclusively described as having participated in the acts as a Militia/*Janjaweed* leader and/or *Agid Al-Ogada* known by the alias “Ali Kushayb”. Indeed, the arrest warrant for the Accused was issued in both his legal name and nickname, and the Prosecution has adduced substantial documentary and testimonial evidence both before and during the trial demonstrating that the two names refer to the same individual. See e.g. Prosecution’s submissions on the evidence demonstrating that Ali Abd-Al-Rahman is also known as Ali Kushayb pursuant to ICC-02/05-01/20-196, [ICC-02/05-01/20-224](#).

First Issue, the Defence merely disagrees with the Chamber's factual, not legal, finding. The Defence further argues that the Chamber's failure to recognise that the Prosecution should have been aware of the Accused's disavowal of his nickname indicates that the Chamber has excused the Prosecution from its burden of proof under article 66(2) of the Statute.³⁶ These arguments all fail to identify any appealable issue.

18. First, the general question regarding the Prosecution's burden of proof is not an issue arising from the Decision.³⁷ At no point in the Decision does the Chamber state that the Prosecution is exempt from its burden to prove that the Accused is also known as "Ali Kushayb", much less make a legal finding from which an error could be identified. The Chamber simply states that, for the purposes of determining the admissibility of the video, "at no stage, during or before the events in question" was the Prosecution aware nor could it have been aware that the alias "Ali Kushayb" would be disputed.³⁸ The Defence fails to articulate how any alleged legal error arises from the Decision, which only concerns discrete items of evidence.

19. Second, as stated above in relation to the First Issue, this factual finding by the Chamber had no significant bearing on its decision admitting the video. Moreover, the Defence does not explain how the Prosecution's alleged awareness of the Accused's defence that he was not "Ali Kushayb" would trigger the application of article 55(2). The Second Issue is not an appealable issue and should be rejected.

The purported Issues do not significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial

³⁶ [Request](#), para. 12.

³⁷ *Yekatom & Ngaißsona*, Decision on request for leave to appeal decision on restrictions on contacts and communications, [ICC-01/14-01/18-525](#) ("Yekatom & Ngaißsona Communications Decision"), para. 20 ("It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings (*citation omitted*).").

³⁸ [Decision](#), para. 47.

20. In addition to not raising appealable issues, neither of the Defence's Issues meets the additional requirements of article 82(1)(d) of the Statute.

21. The Defence argues that the fair conduct of the proceedings would be impacted by a resolution of the Issues, citing broadly to the right against self-incrimination, the right to counsel and the right to be presumed innocent.³⁹ However, the Defence fails to link any violation of these rights to the Chamber's decision to admit the video in the particular circumstances of the Accused's trial,⁴⁰ including any potential prejudice.⁴¹

22. Likewise, the Defence does not demonstrate how the Issues affect the expeditious conduct of the proceedings. The video, having been admitted, will be considered by the Chamber at the end of the trial holistically with all other evidence on the record relating to the Accused's assertion that he was not known as "Ali Kushayb". It is only at that stage that the Chamber will assess what weight, if any, to give to the video as part of its final decision under article 74 of the Statute.

23. Unless and until the Chamber assigns weight to the video, any argument about the impact of the Decision on the proceedings is hypothetical and speculative. The Defence cannot merely speculate in the abstract that a decision causes prejudice to the rights of the Accused in order to seriously question the fairness of the proceedings.⁴² Indeed, appellate litigation regarding decisions on the admissibility of evidence made

³⁹ [Request](#), para. 14. The Defence again repeats the same arguments, even going so far as to copy entire passages from its oral arguments.

⁴⁰ *Prosecutor v. Kenyatta*, Decision on request for leave to appeal redactions requests ("Kenyatta Redactions Decision"), [ICC-01/09-02/11-211](#), paras. 33 and 39.

⁴¹ *Prosecutor v. Bemba*, Decision on request for leave to appeal issues related to conclusion of presentation of evidence, [ICC-01/05-01/08-2925](#), para. 34; *Prosecutor v. Kenyatta et al.*, Decision on leave to appeal disclosure decision, [ICC-01/09-02/11-88](#), paras. 25, 23-27.

⁴² See [DRC Extraordinary Review Decision](#), para. 10; *Prosecutor v. Kony et al.*, Decision on leave to appeal victim participation decision, [ICC-02/04-01/05-316](#), p. 6; [Kenyatta Redactions Decision](#), paras. 33 and 39; *Prosecutor v. Kenyatta et al.*, Decision on leave to appeal *viva voce* witness decision, [ICC-01/09-02/11-275](#), para. 28; *Prosecutor v. Lubanga*, Decision on leave to appeal victim participation decision, [ICC-01/04-01/06-2109](#), para. 22; *Prosecutor v. Bemba*, Decision on leave to appeal additional evidence decision, [ICC-01/05-01/08-680](#), para. 36; *Prosecutor v. Ruto & Sang*, Decision on leave to appeal confirmation postponement decision, [ICC-01/09-01/11-301](#), para. 30.

during the trial will ultimately undermine fairness and expeditiousness by unnecessarily prolonging the proceedings.⁴³

24. The Defence similarly fails to demonstrate how the Issues affect the outcome of the trial. As already noted, while the video has been admitted into evidence, the Chamber has yet to decide what weight, if any, it will attribute to the video. The Defence fails to acknowledge that the video is but one piece of evidence amidst a wide range of evidence used by the Prosecution to prove that the Accused was also known as “Ali Kushayb”.⁴⁴ The Defence, which has not yet begun the presentation of its case, is on notice of this evidence, in particular the video of the Accused, and will be able to plan its strategy accordingly.

The purported Issues do not require immediate resolution by the Appeals Chamber to materially advance the proceedings

25. An immediate resolution of the Issues by the Appeals Chamber will also not materially advance the proceedings. For an issue to be appealable under article 82(1)(d) of the Statute, it is not sufficient that an appeal might be legitimate or even necessary at a future stage.⁴⁵ Instead, the issue must require *immediate* resolution in that only having the issue decided in the final appeal would risk the invalidation of large parts of, or the entire, proceedings.⁴⁶ Therefore, an article 82(1)(d) request must be assessed to materially advance the proceedings.

26. The Defence argues that immediate resolution of the Issues will provide necessary clarity and certainty during the presentation of its evidence and will aid the Chamber in understanding to what extent it can or should rely on the video in a future ruling.⁴⁷ In this respect, the Defence misunderstands the Chamber’s stated intention

⁴³ [DRC Extraordinary Review Decision](#), para. 11 (“The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial (*citation omitted*).”).

⁴⁴ *See above* fn. 35.

⁴⁵ [Yekatom & Ngaiissona Communications Decision](#), para. 20.

⁴⁶ *Prosecutor v. Barasa*, Decision on request for leave to appeal, [ICC-01/09-01/13-41](#), para. 7.

⁴⁷ [Request](#), para. 16 (*citing* [Decision](#), paras. 15-16).

in ruling on admissibility at this stage of the proceedings. It is clear from the Decision that the Chamber's intention was just to provide clarity and certainty to the parties on admissibility of the video,⁴⁸ rather than reach a final determination on its relative weight or impact.

27. The admission of the video of the Accused is a discrete evidentiary matter, and the Chamber will assign it the appropriate weight in full consideration of the entire record, including the Defence case.⁴⁹ Should the Chamber ultimately rely on the video in its article 74 determination, the Defence will still be able to raise the Issues as part of a final appeal pursuant to article 81.⁵⁰

III. CONCLUSION

28. For the foregoing reasons, the Prosecution respectfully requests that the Chamber reject the Request.



Karim A. A. Khan KC
Prosecutor

Dated this 3rd day of March 2023
At The Hague, The Netherlands

⁴⁸ [Decision](#), para. 16 (citing *Prosecutor v. Al Hassan*, Decision on requests related to submission of evidence of Mr Al Hassan's statements, [ICC-01/12-01/18-1475-Red](#), para. 25).

⁴⁹ *Prosecutor v. Lubanga*, Decision on request for leave to appeal the 4 March 2020 decision, [ICC-01/04-01/06-2404](#), para. 33 ("This was a discrete decision concerning the admissibility of three photographs which in turn concern a relatively confined area of evidence in the case. In those circumstances therefore, an interlocutory appeal will not materially advance the proceedings at this stage of the trial, in the sense of ensuring that the proceedings follow the right course.").

⁵⁰ The Trial Chamber in *Al Hassan* found, when rejecting leave to appeal issues related to article 69(7), that "the Defence retains the possibility to raise the issues as part of an appeal pursuant to Article 81 at the end of the trial, and therefore on the basis of the Chamber's holistic evaluation of the evidence submitted in trial pursuant to Article 74 of the Statute. The Chamber is unpersuaded, [...] that resolution of the issues by the Appeals Chamber at this stage may materially advance the proceedings." *Prosecutor v. Al Hassan*, Decision on requests for leave to appeal decisions on submission into evidence of Al Hassan's statements, [ICC-01/12-01/18-1542](#), para. 26. See also *Prosecutor v. Bemba et al.*, Decision on appeal to exclude documents, [ICC-01/05-01/13-1898](#), para. 17.