



**Original: English**

**No. ICC-02/05-01/20  
Date: 15 November 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 requests for reconsideration, leave to appeal the confirmation decision and related matters (ICC-02/05-01/20-438-Conf, ICC-02/05-01/20-448, ICC-02/05-01/20-457, ICC-02/05-01/20-465, ICC-02/05-01/20-466-Conf)

**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 James Stewart

**Counsel for the Defence**

Mr Cyril Laucci

**Legal Representatives of Victims**

Ms Natalie von Wistinghausen  
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**

Trial Chamber I

**PRE-TRIAL CHAMBER II** ('Chamber') of the International Criminal Court ('Court'), having regard to article 82(1)(d) of the Rome Statute ('Statute'), issues this decision on requests for reconsideration, leave to appeal the confirmation decision and related matters.

1. On 9 July 2021, the Chamber issued the 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")' (the 'Confirmation Decision'), wherein it *inter alia*: (i) confirmed the charges against Mr Abd-Al-Rahman; (ii) committed Mr Abd-Al-Rahman to a Trial Chamber for trial on the charges as confirmed; (iii) suspended the time limit for filing an application for leave to appeal the Confirmation Decision until notification of its translation into Arabic; and (iv) ordered the Registrar to transmit the Confirmation Decision and the record of the proceedings to the Presidency.<sup>1</sup>

2. On 16 July 2021, the Registry transmitted to the Presidency the record of the proceedings.<sup>2</sup> On 21 July 2021, the Presidency constituted Trial Chamber I, referred the case to it, and issued an order to the Registrar to transmit to it the full record of the proceedings.<sup>3</sup> This order was implemented on 26 July 2021.<sup>4</sup>

3. On 16 July 2021, the Defence filed the '*Requête aux fins de reconsideration partielle de la Décision ICC-02/05-01/20-402*' ('Defence First Reconsideration Request'),<sup>5</sup> seeking reconsideration of the 'Decision on Defence requests and procedural challenges', issued on 21 May 2021 in preparation for the hearing on the confirmation of charges.<sup>6</sup> Neither the Prosecutor nor either of the legal representatives of the victims participating in the proceedings responded.

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<sup>1</sup> ICC-02/05-01/20-433 and ICC-02/05-01/20-433-Conf-Anx1.

<sup>2</sup> Transmission to the Presidency of the record of the proceedings including the Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al Rahman ("Ali Kushayb"), ICC-02/05-01/20-439.

<sup>3</sup> Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), ICC-02/05-01/20-440.

<sup>4</sup> Transmission to Trial Chamber I of the record of the proceedings, including the Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/20-446.

<sup>5</sup> ICC-02/05-01/20-438-Conf (public redacted version notified on the same day; ICC-02/05-01/20-438-Red).

<sup>6</sup> ICC-02/05-01/20-402.

4. On 9 August 2021, the Defence filed the '*Requête aux fins de reconsideration de la Décision ICC-02/05-01/20-433*' ('Defence Second Reconsideration Request'), seeking reconsideration of the Confirmation Decision.<sup>7</sup> On 20 August 2021, the Prosecutor<sup>8</sup> and one legal representative of victims<sup>9</sup> responded to the request; on 25 August 2021, the Defence requested leave to reply under regulation 24(5) of the Regulations of the Court (the 'Defence Request for Leave to Reply' and the 'Regulations').<sup>10</sup>

5. On 20 August 2021, the Defence requested, under regulation 37(2) of the Regulations, an extension of page limit to 25 pages for the upcoming request for leave to appeal the Confirmation Decision.<sup>11</sup> This request was granted by the Chamber in a decision communicated by email on 25 August 2021.<sup>12</sup>

6. In the same email, the Presiding Judge noted the delay in finalising the Arabic version of the Confirmation Decision and proposed that the Registry be ordered to file into the record the existing draft translation and that the time limit for a request under article 82(1)(d) of the Statute run from the date of notification of the draft translation.<sup>13</sup> The Defence accepted the proposal;<sup>14</sup> on 27 August 2021, the Registry filed the draft translation of the Confirmation Decision into Arabic in the record of the case.<sup>15</sup>

7. On 3 September 2021, the Defence filed the '*Requête aux fins d'autorisation d'interjeter appel de la Décision ICC-02/05-01/20-433*' (the 'Defence Request for Leave to Appeal'), seeking leave to appeal the Confirmation Decision in respect of ten

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<sup>7</sup> ICC-02/05-01/20-448.

<sup>8</sup> Prosecution's response to "*Requête aux fins de reconsideration de la Décision ICC-02/05-01/20-433*" (ICC-02/05-01/20-448), ICC-02/05-01/20-455.

<sup>9</sup> Victims' response to Defence '*Requête aux fins de reconsideration de la Décision ICC-02/05-01/20-433*', ICC-02/05-01/20-456-Conf (public redacted version notified on 23 August 2021; ICC-02/05-01/20-456-Red).

<sup>10</sup> Motion seeking leave to file consolidated reply to Prosecution and Legal Representative of Victims' responses to "*Requête aux fins de reconsideration de la Décision ICC-02/05-01/20-433*", ICC-02/05-01/20-457.

<sup>11</sup> *Corrigendum à la Requête en vertu de la norme 37-2 du Règlement de la Cour*, ICC-02/05-01/20-454-Corr.

<sup>12</sup> Email, 25 August 2021 at 18.20 hours.

<sup>13</sup> Email, 25 August 2021 at 18.20 hours.

<sup>14</sup> Email, 25 August 2021 at 20.29 hours.

<sup>15</sup> ICC-02/05-01/20-433-DraftARB and ICC-02/05-01/20-433-Conf-Anx1-DraftARB. The official translation was then filed by the Registry on 22 September 2021 (ICC-02/05-01/20-433-tARB).

issues.<sup>16</sup> On 9 September 2021, the Prosecutor<sup>17</sup> and the legal representatives of victims, jointly,<sup>18</sup> responded and objected to this request in its entirety.

8. On 6 September 2021, the Prosecutor filed the ‘Prosecution’s request for reconsideration or leave to appeal the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (ICC-02/05-01/20-433) and for correction/clarification of discrete findings’ (the ‘Prosecutor’s Request’).<sup>19</sup> On 10 and 15 September 2021 respectively, the legal representative of victims from the Office of Public Counsel for Victims<sup>20</sup> and the Defence<sup>21</sup> responded to the Prosecutor’s Request.

**Defence and Prosecutor’s requests for reconsideration (ICC-02/05-01/20-438-Conf, ICC-02/05-01/20-448, ICC-02/05-01/20-466-Conf)**

9. Both parties seek reconsideration of the Confirmation Decision on distinct points, while the Defence also seeks reconsideration of a previous decision taken by the Chamber in the lead-up to the hearing under article 61 of the Statute.

10. In a previous ruling in this case, the Chamber noted that, in principle, the statutory framework defined by the Statute and the other legal instruments applicable before the Court does not provide for reconsideration as a procedural remedy. Nevertheless, the Chamber also acknowledged that the Court’s well established case law permit for the possibility of reconsideration as an exceptional measure: this might be the case where, for instance, a ‘clear error of reasoning’ has been demonstrated, or when it ‘is necessary to prevent an injustice’, or if the decision rendered is ‘manifestly unsound’. The Chamber also observed that it had the duty to reconsider a decision when the very

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<sup>16</sup> ICC-02/05-01/20-465.

<sup>17</sup> Prosecution’s response to “*Requête aux fins d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-433*”, ICC-02/05-01/20-468.

<sup>18</sup> Joint Victims’ submissions on the Defence’s Request for Leave to Appeal the Decision confirming the charges (No. ICC-02/05-01/20-433), ICC-02/05-01/20-469.

<sup>19</sup> ICC-02/05-01/20-466-Conf (public redacted version notified on the same day; ICC-02/05-01/20-466-Red).

<sup>20</sup> Victims’ observations on the “Prosecution’s request for reconsideration or leave to appeal the ‘Decision on the confirmation of charges against Ali Muhammad Ali-Abd-Al-Rahman (‘Ali Kushayb’)’ (ICC-02/05-01/20-433) and for correction/clarification of discrete findings”, ICC-02/05-01/20-470-Conf.

<sup>21</sup> *Réponse à la Requête ICC-02/05-01/20-466-Red*, ICC-02/05-01/20-472 (the ‘Defence Response to the Prosecutor’s Request’).

reasons for it are compromised, especially owing to a change of circumstances leading to the said decision.<sup>22</sup>

11. The charges in the case having been confirmed, and the record of the case transmitted first to the Presidency and thereafter to Trial Chamber I for the trial, as provided for by article 61(11) of the Statute, this Chamber no longer retains general competence in the case, with the exception of the adjudication of requests for leave to appeal as per the disposition of the Confirmation Decision and without prejudice to the procedures envisaged in article 61(8) and (9) of the Statute. Accordingly, outside these limited exceptions, the Chamber is not competent to issue further decisions in the case, including decisions on requests for reconsideration. To hold otherwise would be tantamount to jeopardising the stability of the procedural system of the Court and impermissibly encroaching upon the competence of the Trial Chamber. As a consequence, the Defence First and Second Reconsideration Requests, as well as the Prosecutor's Request, to the extent that it seeks reconsideration of the Confirmation Decision, are dismissed *in limine*.

**Defence and Prosecutor's requests for leave to appeal the Confirmation Decision (ICC-02/05-01/20-465, ICC-02/05-01/20-466-Conf)**

12. Article 82(1)(d) of the Statute provides that either party may appeal '[a] decision that involves an issue that would affect significantly the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings'. In previous decisions, the Chamber already laid out the relevant jurisprudence under this provision.<sup>23</sup>

13. For requests for leave to appeal, article 82(1)(d) of the Statute sets the following requirements which must be met to grant such a request:

- a. The matter constitutes, singly or collectively, an 'appealable issue';*
- b. The(se) issue(s) could significantly affect:*

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<sup>22</sup> Decision on the Request for Reconsideration of Decision ICC-02/05-01/20-110 Submitted by the Defence (ICC-02/05-01/20-113), 23 September 2020, ICC-02/05-01/20-163-tENG, paras 11-12.

<sup>23</sup> See e.g. Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests, 20 May 2021, ICC-02/05-01/20-398, paras 55-61.

1. *The fair and expeditious conduct of the proceedings, or*

2. *The outcome of the trial; and*

c. *In the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.*

14. Requirements a, b and c above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal. There is no prescribed order in which the requirements must be considered.

15. Regarding the subject matter of requests for leave to appeal, the Appeals Chamber has held that

*[o]nly an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.<sup>24</sup>*

16. In order to determine whether an issue proposed for appeal is in fact constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, as opposed to a mere disagreement by a party with the impugned decision, the Chamber must examine the impact of the issue on the relevant disposition. If the proposed issue is such that, in case decided otherwise, it would have a material impact on the disposition, then it can be said to constitute an issue within the meaning of article 82(1)(d) of the Statute. Otherwise, what is at hand is merely a disagreement of a party with an aspect of the decision, which is not essential and on which appellate intervention would serve no purpose.

17. The Chamber emphasises that ‘the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial

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<sup>24</sup> *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

proceedings before the Court is not sufficient to warrant the granting of leave to appeal'.<sup>25</sup>

18. As previously stated by the Chamber,

*[m]aterially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal. Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, "will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process".*<sup>26</sup>

19. Moreover, it is important to stress that the term 'proceedings' in the second part of article 82(1)(d) of the Statute refers to the proceedings in their entirety. Accordingly, it is insufficient that an appeal would be legitimate or even necessary at some stage – as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings. Indeed, such interlocutory appeals shall be regarded as exceptional and Chambers must be vigilant in determining which issues truly require immediate determination.

#### *Defence Request for Leave to Appeal*

20. The first issue proposed for appeal by the Defence relates to the reclassification and notification to the Defence of documents relating to the surrender of Mr Abd-Al-Rahman.<sup>27</sup> A previous request was rejected by the Chamber as a preliminary matter in the Confirmation Decision,<sup>28</sup> and the Defence now seeks to bring the issue before the Appeals Chamber. The Prosecutor responds that the issue does not arise from the

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<sup>25</sup> Pre-Trial Chamber II, *Prosecutor v. Joseph Kony et al.*, 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 (unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005), para. 21.

<sup>26</sup> Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198, 12 January 2021, ICC-02/05-01/20-254, para. 7, *referring to* Pre-Trial Chamber II, *Prosecutor v. Bemba Gombo et al.*, Joint decision on the applications for leave to appeal the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2015, ICC-01/05-01/13-801, para. 17; *quoting Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 16.

<sup>27</sup> Defence Request for Leave to Appeal, paras 4-8.

<sup>28</sup> Confirmation Decision, paras 13-14.



Confirmation Decision; the legal representatives of victims similarly submit that the issue is not appealable.

21. In the Chamber's view, the Defence is attempting to re-litigate its previous request by providing further reasons which would support and require the granting of access to the documents related to the surrender of Mr Abd-Al-Rahman, for instance by stating that the requested documents could be used in the context of proceedings pursuant to article 85 of the Statute.<sup>29</sup> By doing so, the Defence is expressing nothing more than a disagreement with the Chamber's conclusion and fails to identify an appealable issue within the meaning of article 82(1)(d) of the Statute.

22. Similarly, the second issue relates to the rejection in the Confirmation Decision of a previous Defence request, seeking that the Chamber note a violation of disclosure by the Prosecutor and declare inadmissible eight transcripts of a 2007 meeting between officials of the Sudanese Government and representatives of the Office of the Prosecutor.<sup>30</sup> The Prosecutor sees the second issue as an impermissible attempt to re-litigate matters previously dismissed by the Chamber, and as a mischaracterisation of the Confirmation Decision; the legal representatives of victims submit that the Defence misrepresents the Chamber's ruling and fails to identify an appealable issue.

23. The Chamber notes that the material challenged by the Defence, albeit included in the Prosecutor's list of evidence, was not relied upon by the Prosecutor in the pre-confirmation brief. Thus, it is clear that the issue put forward by the Defence is abstract and without impact on the proceedings, and as such unsuitable for certification for appeal.

24. The third issue identified by the Defence relates to a purported violation of article 67(1)(a) of the Statute, to the extent that some of the charges were only communicated for the first time in the document containing the charges ('DCC').<sup>31</sup> The issue was also the subject of a previous request by the Defence, brought under rule 122(3) of the Rules of Procedure and Evidence (the 'Rules') and rejected in the Confirmation Decision.<sup>32</sup> The Prosecutor takes the view that the Defence fails to show how the issue would

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<sup>29</sup> See Defence Request for Leave to Appeal, paras 7-8.

<sup>30</sup> Defence Request for Leave to Appeal, paras 9-11; Confirmation Decision, paras 15-16.

<sup>31</sup> Defence Request for Leave to Appeal, paras 12-15.

<sup>32</sup> Confirmation Decision, paras 22-23.

significantly affect the fair and expeditious conduct of the proceedings; the legal representatives of victims state that the Defence misrepresents the Chamber's ruling and fails to identify an appealable issue.

25. In the view of the Chamber, the Defence has failed to explain properly the effect that the purported tardiness of the notification of a part of the charges has had on the exercise of its rights. In circumstances where all the charges relate to a limited number of specific events referred to in the warrants of arrest, and where, by order of the Chamber, the Defence received the DCC well ahead of the time limit required by rule 121(3) of the Rules, the Chamber will not take at face value the Defence allegation that its ability to prepare has been compromised. Accordingly, the Chamber rejects the third issue presented by the Defence.

26. The fourth issue proposed for appeal revolves around the Defence's challenge to the way in which cumulative charges were articulated in the Confirmation Decision.<sup>33</sup> Both the Prosecutor and the legal representatives of victims submit that the Defence is unspecific in relation to the fourth issue and that it has failed to show how it would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

27. Some of the confirmed charges in the present case are cumulative, in the sense that they are premised at least in part on the same alleged facts. The Chamber adheres to the established view and practice that, since the evidentiary standard at the confirmation of charges stage is relatively low, a pre-trial chamber is not in a position to conclusively resolve all nuances in facts and evidence relevant to conclude which of the cumulative charges are the most appropriate; accordingly, questions of concurrence of offences are better left to the determination of the Trial Chamber.<sup>34</sup> While charges presented cumulatively are subject to the same requirements of specificity as generally incumbent on the Prosecutor, there is no basis to hold that the facts underlying the several cumulative charges must be pleaded differently or otherwise distinguished. The

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<sup>33</sup> Defence Request for Leave to Appeal, paras 16-19.

<sup>34</sup> Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, para. 30. *See also* Chambers Practice Manual, 4<sup>th</sup> edition, 29 November 2019, para. 68.

fourth issue thus being based on a fundamental misunderstanding of the Confirmation Decision, the Chamber considers that it does not arise from it.

28. The fifth issue identified by the Defence is an upfront challenge to the confirmation of alternative charges, specifically in relation to the modes of liability under article 25(3) of the Statute.<sup>35</sup> The Prosecutor considers this issue to be a repetition of a previous abstract and unsubstantiated complaint, which would ignore that the matter is settled in the constant practice of the Court. The Prosecutor also submits that, even if appeal were to be granted and the Confirmation Decision reversed on this point, the effect of a possible exclusion of alternative charges by the Appeals Chamber would remain limited, as ‘there is no legal impediment to the Trial Chamber subsequently recharacterising those facts as a matter of law to include alternate modes of liability’. The legal representatives of victims state that the Defence fails to identify an appealable issue.

29. The Chamber acknowledges that, as a matter of principle, the way in which charges are formulated and confirmed (and, more specifically, the fact that they are formulated in the alternative) may translate into an issue that may affect the fairness and the expeditiousness of the proceedings. By the same token, the Chamber also notes that the Trial Chamber can always modify the legal characterisation of facts, subject to adequate notice, and that there is indeed a consolidated practice to this effect. Accordingly, having the Appeals Chamber address this principled issue at this stage would not materially advance the proceedings.

30. The sixth issue raised by the Defence concerns the Prosecutor’s alleged violation of article 67(1)(b) of the Statute and of the instructions of the Chamber, due to the Prosecutor having disclosed ‘thousands of documents’ (*milliers de documents*) without specifying their relevance.<sup>36</sup> The Defence avers that, whereas the Chamber would have first confirmed the Prosecutor’s violation of its instruction (‘to disclose and, *a fortiori*, include in the Prosecutor List of Evidence only evidence that is truly relevant and probative to its case’)<sup>37</sup> and of article 67(1)(b) of the Statute, it would have

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<sup>35</sup> Defence Request for Leave to Appeal, paras 20-23.

<sup>36</sup> Defence Request for Leave to Appeal, paras 24-26.

<sup>37</sup> Defence Request for Leave to Appeal, para. 24 referring to Confirmation Decision, para. 31.

subsequently failed to stand by its instruction ‘to provide in the bi-weekly progress reports “number and type of items identified as disclosable but not yet disclosed, *including a detailed explanation as to the relevance to the Prosecutor’s case*”’) when it declined to grant the Defence’s proposed remedy in that respect.<sup>38</sup> The Prosecutor submits that the Defence mischaracterises the Confirmation Decision and that the issue represents a mere disagreement with it, as also stated by the legal representatives of victims.

31. The sixth issue is premised on the Defence’s mischaracterisation of the Chamber’s conclusion as to the Prosecutor’s alleged violation of article 67(1)(b) of the Statute, as well as of the Chamber’s instructions to the Prosecutor regarding disclosure. The Chamber recalls that, in the Confirmation Decision, it did concur with the Defence that ‘the inclusion of a considerable volume of evidence in the Prosecutor List of Evidence not specifically relied upon in the [Pre-Trial Confirmation Brief] may potentially be prejudicial to the right of the Defence to have adequate time and facilities for its preparation’ and acknowledged that ‘the Prosecutor did not heed its instruction to disclose and, *a fortiori*, include in the Prosecutor List of Evidence only evidence that is truly relevant and probative to its case’.<sup>39</sup> However, the Chamber ultimately found no violation of article 67(1)(b) of the Statute, in particular since the Pre-Trial Confirmation Brief was filed within the prescribed deadline and ‘did not refer to an inordinate number of items of evidence’.<sup>40</sup> Thus, in the Chamber’s view, the sixth issue does not arise from the Confirmation Decision.

32. The seventh issue proposed for appeal by the Defence is a purported violation of article 67(1) of the Statute, due to the alleged ‘non-resolution’ by the Chamber of procedural questions capable of affecting the fairness of the trial.<sup>41</sup> The Defence takes issue with the fact that, in the Confirmation Decision, rather than resolving certain issues, the Chamber referred (*renvoyer*) them to the Trial Chamber. The Prosecutor responds that ‘this issue does not genuinely arise from the Confirmation Decision insofar as the Chamber made no such statement’ and that the questions identified by

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<sup>38</sup> Defence Request for Leave to Appeal, para. 24 referring to Second Order on disclosure and related matters, ICC-02/05-01/20-169 para. 19(v) et p. 21 (e).

<sup>39</sup> Confirmation Decision, para. 31.

<sup>40</sup> Confirmation Decision, para. 32.

<sup>41</sup> Defence Request for Leave to Appeal, paras 27-33.

the Defence as having been left unresolved were in fact addressed during the pre-trial phase.

33. In the view of the Chamber, this issue represents an unconvincing attempt by the Defence to present its disagreement with the way the Chamber resolved a number of requests previously presented by the Defence as a matter of procedural regularity. There was no explicit referral of matters to the Trial Chamber; instead, the Chamber resolved the various issues before it bearing in mind the limitations of the current stage of the proceedings and the competence of the Trial Chamber. Since the Trial Chamber has now been established, the competence to deal with all procedural matters requiring resolution is now vested in the Trial Chamber. Appellate intervention on this issue would not materially advance the proceedings.

34. The eighth issue relates to alleged errors in the assessment of the evidence for the purposes of the confirmation of charges and is presented as a composite of five ‘sub-issues’ (*Sous-Questions*), as follows: (a) reference by the Chamber to evidence not available in one of the working languages of the Court; (b) reference by the Chamber to facts which were, in the submission of the Defence, contested and not proven; (c) rejection of the non-contested evidence of Mr Abd-Al-Rahman’s enrolment in the police in 2005; (d) reference to evidence previously declared inadmissible; and (e) absence of specific reference to evidence considered for the confirmation of charges.<sup>42</sup> The Prosecutor submits that, overall, the Defence submissions ‘depend on vague and general assertions that [...] alternate findings on these issues, individually or together, would have resulted in none or only some of the charges being confirmed’, and, specifically, none of the sub-issues qualifies as an appealable one. The legal representatives of victims also submit that the issues raised by the Defence are not appealable.

35. In the assessment of the Chamber, a sufficient link between the points raised by the Defence, individually or in combination, and the disposition of the Confirmation Decision is not established: the Defence has not demonstrated how the confirmed charges would have been different had one or more of the matters it raises been decided

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<sup>42</sup> Defence Request for Leave to Appeal, paras 34-40.

differently. Specifically, so-called sub-issue 8(a) relates to an introductory statement in the Confirmation Decision to the effect that its evidentiary basis included all items on the Prosecutor's list of evidence.<sup>43</sup> The Defence mounts a principled and abstract challenge to this statement, as such unsuitable to translate into an appealable issue. So-called sub-issues 8(b), (c), and (d) are challenges to specific passages in the evidentiary analysis of the Chamber, again without explanation as to how any findings would be affected. However, a glance at the reasoning of the Confirmation Decision suffices to realise that considerations which the Defence challenges as sub-issues 8(b) and (c) form part of a much wider analysis of evidence undertaken by the Chamber for the determination of the contested matter of Mr Abd-Al-Rahman's identity and the link between the nickname 'Ali Kushayb' and Mr Abd-Al-Rahman.<sup>44</sup> Similarly, as regards the statements of Witnesses P-0008 and P-0085, which are the subject of sub-issue 8(d), the Chamber notes that Witness P-0008 is just one among 20 witnesses listed by the Chamber in the introductory paragraph to its analysis of the crimes committed in Mukjar and surrounding areas, while Witness P-0085 is just one among 19 witnesses listed by the Chamber in the introductory paragraph to its analysis of the crimes committed in Kodoom, Bindisi and surrounding areas.<sup>45</sup> Finally, in sub-issue 8(e) the Defence takes issue with the presentation of the evidentiary basis for the Chamber's findings in the Confirmation Decision, also suggesting that the Chamber may not have been able to assess in detail the evidence due to the Prosecutor's lack of explanation as to their relevance to the case. Considering that (i) the Chamber clearly illustrated its approach, including with regard to the assessment and presentation of evidence, as well as the structure of the decision; (ii) the decision states the evidence on which factual findings are based; and (iii) the analysis of the evidence at the confirmation of charges stage is limited,<sup>46</sup> it is unclear how the Confirmation Decision would have been different in substance, and particularly in its disposition, had the evidence been differently, since the Defence fails to specify findings potentially affected by the alleged

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<sup>43</sup> Confirmation Decision, para. 39.

<sup>44</sup> Confirmation Decision, paras 46-60.

<sup>45</sup> Confirmation Decision, paras 86, 97. The Chamber also observes that the Defence incorrectly claims that Witness P-0008 was not contacted by the Prosecutor in advance of the confirmation of charges hearing. The witness was contacted, and this fact was placed on the record of the case on 21 May 2021, ahead of the hearing (*see* Prosecution's eighteenth progress report on the evidence review, translation and disclosure process, ICC-02/05-01/20-404, para. 13).

<sup>46</sup> Confirmation Decision, paras 37-38.

issue and to substantiate its broad and general assertions. It follows from the above that the eighth issue does not have a material impact on the Confirmation Decision, which renders it tantamount to a mere disagreement with the Chamber's assessment of the evidence.

36. The ninth issue raised for appeal by the Defence concerns a video considered by the Chamber when addressing the issue of Mr Abd-Al-Rahman's identity and the nickname 'Ali Kushayb'.<sup>47</sup> According to the Defence, this video would have been obtained in violation of article 55(2) of the Statute and rule 112 of the Rules<sup>48</sup> and the circumstances surrounding its receipt by the Prosecutor would be such as to show that the video was not spontaneous, but rather recorded in the context of a request amounting to the questioning of a person subject to a warrant of arrest. The Prosecutor responds that the Defence merely expresses a disagreement with how the Chamber ruled on the matter and that the issue is without any identifiable impact. The legal representatives of victims also contest the Defence submissions on the importance of the video in the assessment of the facts in the Confirmation Decision.

37. The Chamber notes that it suffices to cursorily look at the relevant section of the Confirmation Decision to realise that the video, far from being fundamental and in itself determinative, was part of a much wider evidentiary analysis.<sup>49</sup> The Defence has not demonstrated that the consideration of the video is essential for the related findings of the Chamber. For this reason, the ninth issue is a mischaracterisation of the Confirmation Decision.

38. Finally, the tenth issue in the Defence Request for Leave to Appeal targets the Chamber's disposition of the Defence argument that Mr Abd-Al-Rahman '[could] not be held criminally responsible for any of the crimes charged because he acted on the mistaken perception that the victims could be lawfully attacked'.<sup>50</sup> Both the Prosecutor and the legal representatives of victims respond that the Defence misconstrues the Confirmation Decision and that the tenth issue is not appealable.

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<sup>47</sup> Confirmation Decision, para. 54.

<sup>48</sup> Defence Request for Leave to Appeal, paras 41-48.

<sup>49</sup> Confirmation Decision, paras 46-60.

<sup>50</sup> Defence Request for Leave to Appeal, paras 49-51.

39. The Chamber finds that, in articulating the tenth issue, the Defence misconstrues its reasoning: neither did the Chamber negate the applicability of article 30 of the Statute to the crimes charged, nor did it reverse the onus of proof with respect to the relevant mental elements; rather, in response to the Defence's claims of mistake of law and fact, it provided an analysis as to what the requirement of 'knowledge' concerning the notion of 'civilian' entails. Thus, the issue does not arise from the Confirmation Decision; the Defence's submissions underlying the tenth issue reflect a mere disagreement with the Chamber's assessment of the evidence and interpretation of the law. The Chamber further underlines in this respect that the Trial Chamber is not bound by the interpretation on which this Chamber relies.

40. In light of the above, none of the issues put forward by the Defence can be certified for appeal under article 82(1)(d) of the Statute.

*Prosecutor's Request for leave to appeal the Confirmation Decision*

41. As a preliminary matter, the Defence submits that the Prosecutor's Request should be dismissed *in limine* because the suspension of the time limit to file an application for leave to appeal the Confirmation Decision until the notification of its translation into Arabic would only have been granted to the benefit of the Defence.<sup>51</sup> The Chamber observes that the disposition of the Confirmation Decision does not contain any such limitation;<sup>52</sup> accordingly, the argument of the Defence must be rejected.

42. Both issues articulated by the Prosecutor for the purposes of article 82(1)(d) of the Statute relate to the charges of murder as a crime against humanity and as a war crime in relation to the Kodoom/Bindisi and Deleig incidents as confirmed by the Chamber. More specifically, the Prosecutor seeks leave to appeal the Confirmation Decision on the following issues: (i) '[w]hether the Pre-Trial Chamber erred in law when it confirmed charges of murder in relation to the Kodoom/Bindisi and the Deleig incidents only with respect to persons specifically named and/or identified in the respective annexes to the DCC, but not in relation to unnamed/unidentified victims as alleged in the DCC and supported by the available evidence'; and/or (ii) '[w]hether the

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<sup>51</sup> Defence Response to the Prosecutor's Request, paras 8-11.

<sup>52</sup> Confirmation Decision, p. 71.



Pre-Trial Chamber erred in fact when it found that only 51 persons were killed in relation to the Kodoom/Bindisi incident, and only 34 persons in relation to the Deleig incident, rather than at least 100 persons in relation to each incident, as alleged in the DCC'.<sup>53</sup> The Defence does not respond on the substance of the Prosecutor's Request, whereas the legal representative of victims from the Office of Public Counsel for Victims considers that a clarification from the Chamber would be useful.

43. The Prosecutor essentially takes issue with the fact that the Chamber (i) has limited the number of victims in connection with the charges of murder as a crime against humanity and as a war crime relating to the Kodoom/Bindisi and Deleig incidents to an exhaustive 'list of persons killed' (as annexed to the Confirmation Decision); and (ii) would have ignored evidence that, in the Prosecutor's view, would support the allegation that 'at least 100 persons' were murdered in connection with each of those incidents.

44. The Prosecutor's Request is tantamount to an expression of dissatisfaction with the Chamber's factual findings and its assessment of the evidence against the applicable standard at the pre-trial stage, as laid out in the Confirmation Decision. Since the proposed issues for appeal stem from the Prosecutor's mere disagreement with the outcome of the Confirmation Decision, the Chamber does not consider either of the issues on which the Prosecutor seeks appeal as an appealable issue within the meaning and for the purposes of article 82(1)(d) of the Statute.

45. Accordingly, also the Prosecutor's Request for leave to appeal the Confirmation Decision is to be rejected.

46. In the above paragraphs, the Chamber has analysed the issues identified for appeal by the Defence and the Prosecutor in light of the requirements of article 82(1)(d) of the Statute. However, regardless of and beyond the nuances of the technical requirements as established in practice, the Chamber finds it appropriate to stress that there is a need to consider, more broadly, the relationship between a decision on the confirmation of the charges and the remedy enshrined in article 82(1)(d) of the Statute. Issues relating to the core question of confirmation of charges, which hinges on the fact-finding to the evidentiary standard applicable and on the legal qualification of the

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<sup>53</sup> Prosecutor's Request, paras 2-3, 5.

facts thus found, may by their very nature *never* be able to affect the fair and expeditious conduct of proceedings or the outcome of the trial, for the fundamental reason that the core reasoning of the decision on the confirmation of charges is not interlocutory to the trial.

47. As previously held by the Chamber in another case, the interlocutory nature of the decision for which leave to appeal is sought remains the condition *sine qua non* for article 82(1)(d) of the Statute to be applicable. The Chamber also recalls that the Appeals Chamber has held that appeals under article 82(1)(d) of the Statute are limited to ‘interlocutory or intermediate decisions of either the Pre-Trial or Trial Chamber’, i.e. decisions intervening between the commencement and the end of criminal proceedings and adjudicating a specific issue without constituting a final decision. Furthermore, interlocutory appeals constitute an exceptional remedy of a ‘restrictive character’: far from conferring an unrestricted prerogative to directly challenge before the Appeals Chamber any and all decisions rendered during the proceedings at the time of their issuance, the provision circumscribes this prerogative to only those decisions that, should they be found flawed only in the context of an appeal against the final judgement, would adversely and seriously impact the proceedings and possibly affect their outcome. When adjudicating a request for leave to appeal submitted under that provision, the competent Chamber must therefore consider whether the prompt reference of an issue to the Appeals Chamber will be the appropriate means for ‘ensuring that the proceedings follow the right course’ and for ‘[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines’. Only if construed in that sense may article 82(1)(d) of the Statute fulfil its key role as ‘safeguard for the integrity of the proceedings’.<sup>54</sup>

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<sup>54</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the request for leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’, 1 October 2020, ICC-01/05-01/08-3697, paras 12, 14. *See also* Appeals Chamber, *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 11; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734, paras 12-14.

48. In its interpretation and application of article 82(1)(d) of the Statute, the Chamber is also attentive to internationally recognised human rights, in line with article 21(3) of the Statute. As observed by the Appeals Chamber, internationally recognised human rights require a right of appeal only against ‘final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict’.<sup>55</sup> This is a right ensured under article 81 of the Statute. As a consequence, the limitation of appeals under article 82(1)(d) of the Statute to interlocutory appeals is not incompatible with internationally recognised human rights.

49. In the view of the Chamber, several reasons militate in favour of the conclusion that the decision on the confirmation of charges (more specifically, the factual and legal findings entered into by the Pre-Trial Chamber to determine whether the charges brought by the Prosecutor are proven to the relevant standard) is final and not interlocutory. First, the confirmation of charges stage is self-contained. Whereas it is obviously a condition for subsequent stages of criminal proceedings to take place, and is thus logically referred to as *pre-trial* or preliminary, the question whether there exist substantial grounds to believe that a crime within the jurisdiction of the Court is committed is not preliminary to the trial judgment. The evidentiary analysis and conclusions of the Pre-Trial Chamber do not bind the Trial Chamber and may in fact be seen as irrelevant to the trial. The Trial Chamber is bound by the charges as confirmed, but not by the analysis made by the Pre-Trial Chamber in reaching its conclusion as to whether charges should or not be confirmed, or to what extent.<sup>56</sup> Moreover, a trial judgment cannot be appealed under article 81 of the Statute on the ground that the Pre-Trial Chamber incorrectly applied the evidentiary standard at the stage of the confirmation of charges.

50. The proposition that decisions confirming charges are not appealable under article 82(1)(d) of the Statute is also supported by the systematic interpretation of the Statute. On the one hand, appeals under article 82 do not have suspensive effect unless the Appeals Chamber so orders. On the other hand, article 61(11) provides that, once

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<sup>55</sup> Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 38.

<sup>56</sup> Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the Defence Request for leave to appeal the decision on the confirmation of charges, 29 April 2016, ICC-02/04-01/15-428, para. 26.

the charges have been confirmed, the Presidency shall constitute a Trial Chamber which shall be responsible for the conduct of subsequent proceedings. It is manifest and beyond controversy that the principle of expeditiousness informs article 64, which regulates specifically the competences of the Trial Chamber upon assignment of the case; the proposition that the Trial Chamber possesses a power to stay proceedings for the duration of the pendency of any request for leave to appeal against such decision, and, if leave is granted, until the resolution by the Appeals Chamber of any request for suspensive effect, would seem hard to reconcile with that principle. By the same token, any preparatory measures adopted by the Trial Chamber notwithstanding a request for leave to appeal that may be granted, and pending determination of that appeal by the Appeals Chamber, would run the risk to be set aside, in the event that the Appeals Chamber were to find merit in the appeal and therefore invalidate one or more elements of the decision on the confirmation of the charges; a conclusion also hard to reconcile with the same principle. The idea that the Statute would have this design weakness seems difficult to defend. For this reason, the Chamber considers that the absence of specific regulation of the effects of an appeal on the decision on the confirmation of charges is an interpretative argument militating for the conclusion that decisions on the confirmation of charges are not appealable under article 82(1)(d) of the Statute.

*Request for clarification/correction*

51. Finally, in relation to the Prosecutor's Request for clarification and correction of the Confirmation Decision, the Chamber notes that, as pointed out in the Prosecutor's Request, there appear to be some inconsistencies between the main text of the Confirmation Decision and the section setting out the charges, as regards the number of victims and geographical scope of the charges as appearing in certain counts. A typographical error was also correctly detected by the Prosecutor in the annex to the Confirmation Decision. Accordingly, the request for correction is granted; corrigenda of the Confirmation Decision and its annex will be issued in due course.

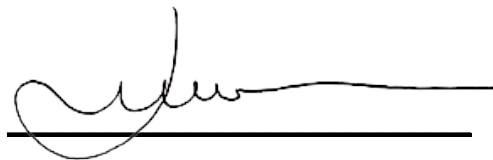
**FOR THESE REASONS, THE CHAMBER HEREBY**

**DISMISSES** *in limine* the Defence First and Second Reconsideration Requests and the Prosecutor's Request for reconsideration of the Confirmation Decision;

**REJECTS** the Defence Request for Leave to Reply, the Defence Request for Leave to Appeal and the Prosecutor's Request for leave to appeal the Confirmation Decision; and

**GRANTS** the Prosecutor's Request for correction of the Confirmation Decision.


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 Monday, 15 November 2021

At The Hague, The Netherlands