

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/20
Date: 9 September 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 Document

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

Source: Office of Public Counsel for Victims
Legal Representatives of the Victims

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

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I. INTRODUCTION

1. Counsel representing victims participating in the proceedings (the “Legal Representatives”)¹ submit that the Defence request (the “Request”)² for leave to appeal the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (the “Impugned Decision”)³ does not satisfy the requirements of article 82(1)(d) of the Rome Statute (the “Statute”) and must be rejected.

2. The Defence does not demonstrate that any of the ten identified questions (the “Issues”) can be the subject of an interlocutory appeal. Instead, the Defence either reiterates its disagreement with or misconstrues the Impugned Decision. Since disagreements or such conflicts of opinion are not appealable issues, the Request must fail on that basis alone. Even if, *arguendo*, appealable issues do arise from the Impugned Decision, the Defence fails to show how those significantly affect the fair and expeditious conduct of the proceedings and how their immediate resolution would materially advance the proceedings.

II. PROCEDURAL BACKGROUND

3. On 9 July 2021, Pre-Trial Chamber II (the “Chamber”) issued the Impugned Decision committing Mr Abd-Al-Rahman for trial,⁴ and decided that the time limit for filing a request for leave to appeal said decision should run from the notification of the Arabic translation thereof.⁵

¹ See *Prosecutor v. Abd-Al-Rahman*, “Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests” (Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-398](#), 20 May 2021.

² See *Prosecutor v. Abd-Al-Rahman*, “Requête aux fins d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-433”, [No. ICC-02/05-01/20-465](#), 3 September 2021 (the “Request”).

³ See *Prosecutor v. Abd-Al-Rahman*, “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-433](#), 9 July 2021 (the “Impugned Decision”).

⁴ *Idem*.

⁵ *Ibid.*, para. 115.

4. On 21 July 2021, the Presidency assigned the case to Trial Chamber I.⁶
5. On 27 August 2021, the Registry filed a draft and non-official translation of the Impugned Decision.⁷
6. On 3 September 2021, the Defence filed the Request.⁸

III. SUBMISSIONS

1. The Issues do not fulfil the requirements for leave to appeal under article 82(1)(d) of the Statute

7. The legal requirements applicable to requests for leave to appeal under article 82(1)(d) of the Statute are well-established, and were previously summarised by the Chamber as follows:

*“[F]or leave to appeal to be granted pursuant to article 82(1)(d) of the Statute, the matter at hand must constitute an appealable issue that could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and in the opinion of the Chamber, the immediate resolution of the matter by the Appeals Chamber could materially advance the proceedings. The above requirements are cumulative in nature and therefore each criterion must be met in order to obtain leave to appeal”.*⁹

8. An appealable issue “cannot represent a hypothetical concern or an abstract legal question”.¹⁰ It must arise from the relevant decision and must be an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is

⁶ See *Prosecutor v. Abd-Al-Rahman*, “Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’)” (Presidency), [No. ICC-02/05-01/20-440](#), 21 July 2021.

⁷ See *Prosecutor v. Abd-Al-Rahman*, “Draft and non-official Arabic translation to Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’) and its annex”, No. ICC-02/05-01/20-433-DraftARB + Conf-Anx1-DraftARB, 27 August 2021.

⁸ See the Request, *supra* note 2.

⁹ See *Prosecutor v. Abd-Al-Rahman*, “Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-254](#), 12 January 2021.

¹⁰ See *Prosecutor v. Gbagbo*, “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 8.

disagreement or conflicting opinion".¹¹ The Appeals Chamber also considered that "[n]ot every issue may constitute the subject of an appeal. It must be one apt to 'significantly affect', i.e. in a material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'".¹² In fact,

"[w]hile an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial".¹³

9. In relation to each of the ten Issues, the Defence either misconstrues or simply disagrees with the Impugned Decision, failing to demonstrate the existence of an appealable issue genuinely arising therefrom. While there is no need to address the second prong of the requirements under article 82 (whether resolution of the issues would materially advance the proceedings) - since none of the Issues is appealable - the Legal Representatives nonetheless recall that:

"Materially 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'".¹⁴

¹¹ See *Situation in the Democratic Republic of the Congo*, "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), 13 July 2006, [No. ICC-01/04-168](#), para. 9.

¹² *Idem*, para. 10.

¹³ See *Prosecutor v. Gbagbo*, "Decision on three applications for leave to appeal" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 21 October 2015, para. 70.

¹⁴ See *Prosecutor v. Abd-Al-Rahman*, "Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-254](#), 12 January 2021, para. 7. See also *Situation in the Democratic Republic of the Congo*, "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 11, para. 16.

10. In the case at hand, the Defence does not show that any issue is appealable nor how the immediate resolution by the Appeals Chamber of any of the identified Issues could “*materially advance*” the proceedings.

a) Issue 1 is not an appealable issue

11. As regards Issue 1,¹⁵ the Defence challenges the correctness of the Chamber’s decision to reject its request for reclassification of a Registry report and communication of documents relating to Mr Abd-Al-Rahman’s surrender.¹⁶ However, the Defence fails to clearly identify an appealable issue, including by way of indicating a specific factual and/or legal error. Instead, it merely reiterates its disagreement with the Chamber’s decision to reject the request. In addition, the Defence does not show how gaining access to the requested documents - merely related Mr Abd-Al-Rahman inventory of his personal belongings at the time of his surrender - could possibly affect either “*the fair and expeditious conduct of the proceedings*” or “*the outcome of the trial*”; and even less so how its resolution could “*materially advance the proceedings*”. Accordingly, Issue 1 does not meet any of the criteria under article 82(1)(d) of the Statute and should be dismissed.

b) Issue 2 misrepresents the Impugned Decision and is not an appealable issue

12. With respect to Issue 2,¹⁷ the Defence challenges the Chamber’s decision to reject its request alleging violation of disclosure obligations and seeking exclusion of eight transcripts.¹⁸ However, the Defence misrepresents the Chamber’s ruling and fails to identify an appealable issue. Contrary to the Defence’s suggestion that “*disclosure of*

¹⁵ See the Request, *supra* note 2, paras. 4-8.

¹⁶ See the Impugned Decision, *supra* note 3, paras. 13-14. See also, *Prosecutor v. Abd-Al-Rahman*, “*Requête aux fins de reclassification de document et d’injonction au Greffe*”, [No. ICC-02/05-01/20-316-Red](#), 22 March 2021; and the “*Version publique expurgée de l’Addendum à la Requête ICC-02/05-01/20-316-Conf*”, [No. ICC-02/05-01/20-331-Red](#), 15 July 2021.

¹⁷ See the Request, *supra* note 2, paras. 9-11.

¹⁸ See the Impugned Decision, *supra* note 3, paras. 15-16. See also, *Prosecutor v. Abd-Al-Rahman*, “*3ème Requête aux fins d’exclusion de moyens de preuve*”, [No. ICC-02/05-01/20-389](#), 20 May 2021.

the evidence [...] would be at the sole discretion of the Prosecutor",¹⁹ the Chamber simply found that the Defence must show the "*relevance and potential significance*"²⁰ of the items to which it demands access and concluded that it had failed to do so in the case at hand.

13. In addition, the Defence argument merely amounts to a disagreement with the Chamber's decision to reject its request to access the Prosecution's internal documents and to exclude the eight related transcripts. The Defence fails to show how the issue of excluding evidence on which the Prosecution did not rely for the purpose of the confirmation of charges affects either "*the fair and expeditious conduct of the proceedings*" or "*the outcome of the trial*"; nor how resolution of this issue could "*materially advance the proceedings*". Accordingly, Issue 2 does not meet any of the criteria under article 82(1)(d) of the Statute and should be dismissed.

c) Issue 3 misrepresents the Impugned Decision and is not an appealable issue

14. Concerning Issue 3,²¹ the Defence challenges the Chamber's dismissal of its objection to the inclusion in the "Document Containing the Charges" (the "DCC")²² of charges which were not mentioned in the applications for either the First or Second Warrant of Arrest.²³ However, the Defence misrepresents the Chamber's ruling and fails to identify an appealable issue. Contrary to the Defence's reading of the Impugned Decision,²⁴ the Chamber did not base its decision on the mere consideration that the Prosecutor has no obligation "*to seize the Chamber each time the precise conception*

¹⁹ See the Request, *supra* note 2, para. 9.

²⁰ See the Impugned Decision, *supra* note 3, para. 16.

²¹ See the Request, *supra* note 2, paras. 12-15.

²² See *Prosecutor v. Abd-Al-Rahman*, "Document Containing the Charges", No. ICC-02/05-01/20-325-Conf-Anx1, (second corrected public redacted version notified on 23 April 2021, No. ICC-02/05-01/20-325-Conf-Anx1-Corr2) *annexed to the "Prosecution's submission of the Document Containing the Charges"*, [No. ICC-02/05-01/20-325](#), 29 March 2021.

²³ See the Impugned Decision, *supra* note 3, paras. 22-23. See also, *Prosecutor v. Abd-Al-Rahman*, "*Version publique expurgée des Premières observations de la Défense en vertu de la Règle 122-3 (Régularité du Document indiquant les charges)*", [No. ICC-02/05-01/20-387-Red](#), 12 May 2021, paras. 14-29.

²⁴ See the Request, *supra* note 2, para. 12.

of the criminal responsibility of the suspect evolves as new evidence is found".²⁵ Instead, the Chamber recalled the 30-day deadline provided for in rule 121(3) of the Rules of Procedure and Evidence (the "Rules") and the fact that the DCC in this case was filed considerably sooner than the statutory deadline.²⁶ On this basis, the Chamber concluded that the Defence had sufficient notice provided both by the applicable law and the specific circumstances of the case.²⁷ Accordingly, with the Third Issue, the Defence merely reiterates its disagreement with the Chamber's ruling and its application of rule 121(3) of the Rules. Disagreements or such conflicts of opinion are not appealable issues within the meaning of article 82(1)(d) of the Statute. Nor has the Defence shown how resolution of the issue would materially advance the proceedings. There is therefore no basis for an appeal.

d) Issues 4 and 5 are not appealable issues

15. As regards Issues 4 and 5,²⁸ the Defence challenges the Chamber's dismissal of its objection to the inclusion in the DCC of cumulative²⁹ and alternative³⁰ charges. However, the Defence fails to clearly identify an appealable issue, including by way of indicating a specific factual and/or legal error linked to the specific charges which were included cumulatively and/or alternatively. Instead, the Defence simply questions whether the Chamber was correct in dismissing the Defence's objection to the inclusion of such charges. Consequently, a grant of leave to appeal will simply result in a repetition of those unsuccessful arguments before the Appeals Chamber. This is incompatible with the corrective function of appellate proceedings - which are

²⁵ See the Impugned Decision, *supra* note 3, para. 23.

²⁶ *Idem*.

²⁷ *Ibid*.

²⁸ See the Request, *supra* note 2, respectively paras. 16-19 and paras. 20-23.

²⁹ See the Impugned Decision, *supra* note 3, paras. 26-27 See also, the "*Version publique expurgée des Premières observations de la Défense en vertu de la Règle 122-3 (Régularité du Document indiquant les charges)*", *supra* note 23, paras. 38-42.

³⁰ See the Impugned Decision, *supra* note 3, paras. 28-29. See also, the "*Version publique expurgée des Premières observations de la Défense en vertu de la Règle 122-3 (Régularité du Document indiquant les charges)*", *supra* note 23, paras. 43-50.

concerned with the merits of the reasoning adopted at the first instance - rather than with permitting the reiteration of prior submissions.³¹

16. By failing to identify any error in the Chamber's reasoning regarding (i) cumulative charges or (ii) alternative forms of criminal responsibility, the Defence fails to identify an appealable issue that affects the fair and expeditious conduct of the proceedings. Nor does it show how immediate resolution of its issue would materially advance the proceedings. Instead, it merely disputes the overall correctness of the Chamber's ruling. On this basis, Issues 4 and 5 must be dismissed.³²

e) Issue 6 is not an appealable issue

17. With respect to Issue 6,³³ the Defence challenges the Chamber's refusal to sanction two alleged violations of disclosure obligations by the Prosecution by failing (i) to exclude as inadmissible a total of 2,591 items of evidence³⁴ that were included in the Prosecutor List of Evidence but not mentioned in the Pre-Confirmation Brief (the "PCB");³⁵ and (ii) to exclude evidence as a result of the Prosecution's delay in clarifying the relevance of certain items of evidence.

18. The Defence fails to identify an appealable issue and instead merely reiterates its disagreement with the Chamber's ruling that while "*the inclusion of a considerable volume of evidence in the Prosecutor List of Evidence not specifically relied upon in the PCB may potentially be prejudicial to the right of the Defence*",³⁶ it would nonetheless be

³¹ See *Prosecutor v. Ntaganda*, "Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date" (Trial Chamber VI), [No. ICC-01/04-02/06-604](#), 21 May 2015, para. 17. See also *Prosecutor v. Gbagbo*, "Decision on three applications for leave to appeal" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 30 November 2012, para. 70; and the "Decision on the 'Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012 'on the date of the confirmation of charges hearing and proceedings leading thereto' (ICC-02/11-01/11-325)" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-350](#), 14 January 2013, para. 40.

³² See *supra* note 28.

³³ See the Request, *supra* note 2, paras. 24-26.

³⁴ See the Impugned Decision, *supra* note 3, paras. 30-32.

³⁵ See *Prosecutor v. Abd-Al-Rahman*, "Pre-Confirmation Brief", No. ICC-02/05-01/20-346-Conf-AnxA (public redacted version notified on 21 May 2021, [No. ICC-02/05-01/20-346-AnxA-Red](#)) annexed to Prosecution's submission of the Pre-Confirmation Brief and the List of Evidence, No. ICC-02/05-01/20-346-Conf, 16 April 2021, (reclassified as public on 31 May 2021, [No. ICC-02/05-01/20-346](#)).

³⁶ *Idem*, para. 32.

inappropriate to order the “*wholesale exclusion*”³⁷ of items of evidence and conclusions regarding the alleged delay.

19. The Defence fails to demonstrate that Issue 6 is an appealable one which affects either “*the fair and expeditious conduct of the proceedings*” or “*the outcome of the trial*”, or how its immediate resolution could “*materially advance the proceedings*”. Accordingly, Issue 6 does not meet any of the criteria under article 82(1)(d) of the Statute and should be dismissed.

f) Issue 7 does not arise from the Impugned Decision and is not an appealable issue

20. Concerning Issue 7,³⁸ the Defence alleges a purported failure of the Chamber to resolve certain procedural matters at the pre-trial stage, thereby undermining the overall fairness of the proceedings. The Issue does not arise from the Impugned Decision, and as such it is not an appealable one under article 82(1)(d) of the Statute. The Defence raises the Issue with reference to paragraphs 33 to 40 of the Impugned Decision. However, in the portion of the ruling identified, the Chamber solely addresses the “*nature and purpose*” of its Decision³⁹ and does not address any of the procedural questions raised by the Defence.

21. In fact, as the Defence acknowledges,⁴⁰ those matters were instead decided through earlier rulings in the course of the pre-trial proceedings. The Defence explicitly refers to its previous requests submitted before the Chamber⁴¹ – including a series of requests for leave to appeal unfavourable decisions.⁴² In so doing, it recognises that each of the procedural issues raised at the pre-trial stage was indeed considered and determined by the Chamber elsewhere. Whether the outcome was unfavourable

³⁷ *Ibid.*

³⁸ See the Request, *supra* note 2, paras. 27-32.

³⁹ See the Impugned Decision, *supra* note 3, paras. 33-40.

⁴⁰ See the Request, *supra* note 2, para. 28.

⁴¹ *Idem.*

⁴² *Ibid.*

to the Defence is immaterial. As such, the arguments on this point are without merit and Issue 7 must equally be dismissed.

g) Issues 8-a to 8-e are not appealable issues

22. Issues 8-a to 8-e concern the “*review and evaluation of the evidence*”.⁴³ The Defence asserts that a ruling from the Appeals Chamber would significantly advance the proceedings by “*specifying the exact purpose and mandate of Pre-Trial Chambers*”. The Defence fails to establish an appealable issue that goes beyond a hypothetical question or a disagreement or conflicting opinion with respect to the evaluation of evidence and these arguments should all be dismissed.

23. As regards Issue 8-a, the Defence suggests that evidence submitted by the Prosecutor in Arabic was introduced “*improperly*” because it was “*not available in one of the two working languages of the Court*” and that “*the entirety of the confirmed charges are likely to be impacted*” as a result.⁴⁴ The Defence fails to identify an appealable issue requiring a decision from the Appeals Chamber for its resolution and also misconstrues the Chamber’s observations.⁴⁵ Contrary to the Defence’s suggestion, the Chamber did not state that it would “*take into account*” all the evidence submitted by the Prosecutor in its decision. Instead, it stated that it would address “*only what the Chamber considers necessary and sufficient for its determination on the charges*” and would refer only “*to those elements (i.e. submissions and items of evidence) [...] necessary to show the line of reasoning underpinning its conclusions*”.⁴⁶

24. Under the heading of Issue 8-b, the Defence objects to the Chamber’s evaluation of evidence concerning the meaning of ‘*Kushayb*’ when considering the link between the nickname ‘*Ali Kushayb*’ and the Accused.⁴⁷ The Defence suggests that the Chamber “*admitted [...] as proven*” that the term “*meant to evoke strength and courage*” on the basis

⁴³ See the Request, *supra* note 2, para. 34.

⁴⁴ *Idem*, para. 35.

⁴⁵ Cf. the Impugned Decision, *supra* note 3, para. 39.

⁴⁶ *Idem*.

⁴⁷ See the Request, *supra* note 2, para. 36.

of submissions by one of the Legal Representatives but “dismissed as insufficient” witness evidence that ‘Kushayb’ referred to a type of alcohol.⁴⁸ The Defence misconstrues the Chamber’s finding and fails to identify an appealable issue. The Chamber did not rule out that ‘Kushayb’ could denote a type of alcohol but concluded that “[t]he few available items” did not prove “that the word would exclusively refer to alcohol consumption”.⁴⁹

25. Issue 8-c similarly constitutes an objection by the Defence to the Chamber’s evaluation of evidence, concerning an item of evidence described by the Chamber as “a document, which would indicate that an individual named ‘Abd-Al-Rahman’ would have joined the ranks of the police in 2005”.⁵⁰ The Defence misconstrues the Chamber’s ruling, ignoring that “even assuming that this [document] refers to the suspect [...], it remains that it refers to period subsequent to the events of the charges and remains isolated”.⁵¹ There is no “manifest error of fact” in this finding nor is the Chamber applying a “double standard” when examining the evidence.

26. Issue 8-d concerns the Chamber’s reference to Witnesses P-0008 and P-0085 in the Impugned Decision despite having previously stated that it would not rely on these witnesses while their identities remained withheld.⁵² The Defence fails to explain how this might significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial since the Chamber found that information provided by these witnesses “is corroborated by other witnesses whose identities have been disclosed to the Defence” and that therefore “non-disclosure of the witnesses’ identity [...] does not unduly prejudice the rights of the Defence”.⁵³

⁴⁸ *Idem*.

⁴⁹ See the Impugned Decision, *supra* note 3, para. 57 (emphasis added).

⁵⁰ *Idem*, para. 59.

⁵¹ *Ibid*.

⁵² See the Request, *supra* note 2, para. 38.

⁵³ See *Prosecutor v. Abd-Al-Rahman*, “Decision on the Prosecutor’s requests for non-disclosure of witness identities” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-386](#), 12 May 2021, para. 28.

27. Under the heading of Issue 8-e, the Defence complains that the Accused “is brought to trial without any link to the OTP evidence” and that it is “impossible to say which piece(s) of evidence were deemed sufficiently credible to meet the applicable standard of proof”.⁵⁴ The Defence’s claim is unfounded. In confirming charges, the Chamber must determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.⁵⁵ As the Defence itself acknowledges, the Chamber lists “the OTP witnesses whose statements were considered in relation to each event”.⁵⁶ Accordingly, it fails to identify an appealable issue that would materially affect the proceedings or the outcome of the trial.

h) Issue 9 does not arise from the Impugned Decision

28. In Issue 9, the Defence renews earlier requests – also made at the confirmation hearing and in a subsequent application to reconsider the confirmation decision that is currently pending⁵⁷ - to exclude from the evidence videos of the Accused including one in which he is recorded as referring to himself as ‘Ali Kushayb’.⁵⁸ The Defence suggests that the videos were recorded or provided to the Prosecutor in a manner that did not respect the rights of the Accused at the time of his surrender, an argument which the Chamber had considered and dismissed in the Impugned Decision.⁵⁹ The Defence misconstrues the Chamber’s ruling and fails to identify an appealable issue requiring a decision by the Appeals Chamber. Contrary to the Defence’s suggestion,⁶⁰ the video was not “considered fundamental to the establishment of an alias” and “the invalidation of this key piece of evidence” would not bring the proceedings to an end.⁶¹ As the Chamber makes clear, the videos are “obviously not decisive on their own”, but

⁵⁴ See the Request, *supra* note 2, para. 39.

⁵⁵ See the Rome Statute, article 61(7).

⁵⁶ See the Request, *supra* note 2, para. 39. The Chamber also refers to witness statements in the footnotes to its decision : see, e.g., Impugned Decision, *supra* note 3, footnotes 101-102.

⁵⁷ See the transcript of the hearing held on 26 May 2021, [No. ICC-02/05-01/20-T-009-Red-ENG WT](#), page 65, line 15 to page 68, line 10; and *Prosecutor v. Abd-Al-Rahman*, “Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433”, [No. ICC-02/05-01/20-448](#), 7 August 2021, paras. 20-24.

⁵⁸ See the Request, *supra* note 2, paras. 41-48.

⁵⁹ See the Request, *supra* note 2, paras. 43-46. See also Impugned Decision, *supra* note 3, para. 55.

⁶⁰ See the Request, *supra* note 2, para. 42.

⁶¹ *Idem*, paras. 47-48.

“suitable to be considered by the Chamber in the overall assessment of the evidence submitted in support of the issue of identify and the conduct of the suspect”, including testimonies making an “explicit and credible connection” between the nickname and the Accused.⁶² In the circumstances, the purported Issue clearly does not arise from the Impugned Decision. As a result, Issue 9 should be dismissed.

i) Issue 10 does not arise from the Impugned Decision

29. Under the heading of Issue 10, the Defence objects to the Chamber’s rejection of the Defence’s allegation that the Prosecutor failed “to demonstrate the mental elements of the crimes charged”.⁶³ The Defence misconstrues the Chamber’s ruling and fails to identify an appealable issue arising from it. The paragraphs of the Impugned Decision which the Defence seeks to challenge concern the Chamber’s consideration of the defences of mistake of fact and law raised by the Defence.⁶⁴ The Chamber did not reverse the onus on the Prosecutor to prove the required mental element. Instead, it observed that insofar as the defences raised by the Defence were concerned, the Prosecutor “is not called upon to rebut claims of mistakes of law or fact that are frivolous or merely hypothetical” and that it is “incumbent upon suspects invoking a mistake of fact or law to identify sufficient evidence to properly raise the issue”.⁶⁵ Accordingly, Issue 10 does not arise from the Impugned Decision and should therefore be dismissed.

⁶² See the Impugned Decision, *supra* note 3, paras. 53, 55. See also, *Prosecutor v. Abd-Al-Rahman*, “Prosecution’s response to ‘Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-433’ (ICC-02/05-01/20-448)” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-455](#), 20 August 2021, para. 14.

⁶³ See the Request, *supra* note 2, paras. 49-51.

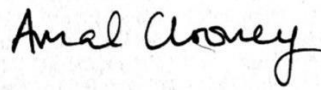
⁶⁴ See the Impugned Decision, *supra* note 3, paras. 74-85.

⁶⁵ *Idem*, para. 78.

FOR THE FOREGOING REASONS, the Legal Representatives respectfully request that the Chamber dismiss the Defence's Request as it does not meet the legal criteria set out in article 82(1)(d) of the Statute.



Paolina Massidda



Amal Clooney



Nasser Mohamed Amin
Abdalla

Dated this 9th day of September 2021

At The Hague (The Netherlands), London (U.K.) and Cairo (Egypt)