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

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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN DARFUR, SUDAN

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

Public

**Prosecution’s Response to “Demande d’autorisation d’interjeter appel de la
Décision ICC-02/05-01/20-402”**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Defence's request for leave to appeal¹ the Decision on Defence requests and procedural challenges² ("Decision"), issued by Pre-Trial Chamber II ("Pre-Trial Chamber" or "Chamber"), should be dismissed because the issues raised for certification are not appealable within the meaning of article 82(1)(d) of the Rome Statute (the "Statute").

2. The proposed issues either misrepresent the Decision and/or are premised on a mere disagreement with it and therefore do not constitute appealable issues.³ Consequently, the principal focus of this response by the Prosecution will be on the failure of the Defence to demonstrate the existence of an appealable issue genuinely arising from the Decision. However, the Prosecution also demonstrates that the proposed issues fail to fulfil the cumulative criteria of article 82(1)(d), as they do not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and would not materially affect the conduct of the proceedings.

II. SUBMISSIONS

3. Mr Abd-Al-Rahman seeks leave to appeal the Impugned Decision in relation to eight issues proposed for certification:

- a. Whether, pursuant to article 74(5) of the Statute, the Chamber could reject a number of the Defences submissions without examining them or motivating the decision ("First Issue");⁴
- b. Whether, pursuant to article 67(1) of the Statute, the Chamber could base its decision on an *ex parte* submission of the Registrar without submitting it to debate ("Second Issue");⁵

¹ [ICC-02/05-01/20-413](#) ("Request").

² [ICC-02/05-01/20-402](#) ("Decision").

³ [ICC-01/04-168 OA3](#), para. 9; *see also* [ICC-01/05-01/13-801](#), para. 12; [ICC-02/11-01/15-1051](#), para. 5-7.

⁴ [Request](#), para. 3-4.

⁵ [Request](#), para. 5-6.

- c. Whether, pursuant to article 69 of the Statute, the Chamber could not examine the admissibility of evidence for the purposes of the confirmation of charges hearing (“Third Issue”);⁶
- d. Whether, notwithstanding Resolution 1593 of the United Nations Security Council (“UNSC”), the Court is required under article 4(2) of the Statute to reach an agreement with the Government of Sudan in order to conduct any activity on its territory (“Fourth Issue”);⁷
- e. Whether article 68(1) of the Statute requires that all potential risks created towards victims, witnesses and other people because of the activities of the Court are materialised in order to be taken into consideration (“Fifth Issue”);⁸
- f. Whether the integrity of proceedings continues to be assured even after the Chamber found that the Office of the Prosecutor violated the Court’s policy on information protection (“Sixth Issue”);⁹
- g. Whether the principle of equality of arms was breached in the present case regarding access to the Republic of Sudan (“Sudan”) (“Seventh Issue”);¹⁰
- h. Whether the Chamber has deprived the Defence of sufficient time to prepare for the confirmation of charges hearing, in violation of article 67(1)(b) of the Statute, in rendering its decision on nine different issues in the last working day before the opening of the hearing (“Eighth Issue”).¹¹

⁶ [Request](#), para. 7-8.

⁷ [Request](#), para. 9-10.

⁸ [Request](#), para. 11-12.

⁹ [Request](#), para. 13-14.

¹⁰ [Request](#), para. 15-16.

¹¹ [Request](#), para. 17.

4. All issues the Defence raises either misrepresent the Decision and/or simply disagree with it, failing to demonstrate the existence of an appealable issue genuinely arising from it.

(i) *First Issue*

5. The First Issue – of whether the Pre-Trial Chamber failed to consider a number of the Defence’s submissions – is not appealable within the meaning of article 82(1)(d) of the Statute as it misrepresents the Decision and, in any event, merely expresses the Defence’s disagreement with it.

6. The Chamber did address all Defence’s submissions and arguments and provided sufficient reasoning. The issues the Defence identifies as “non-resolved”¹² are addressed in the Chamber’s reasoning that lead to the main conclusions in the Decision¹³.

7. In any event, the Defence expresses nothing but its disagreement with the Chamber’s reasoning and conclusions. The Appeal Chamber has held that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] 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. It may be legal or factual or a mixed one.”¹⁴ Interlocutory appeals “are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber decisions.”¹⁵

¹² [Request](#), para. 3.

¹³ [ICC-02/05-01/20-202](#), para. 12-15.

¹⁴ [ICC-01/04-168](#) OA3, para. 9; [ICC-02/04-01/05-367](#), para. 22; [ICC-02/05-02/09-267](#), p. 6; [ICC-01/04-01/06-2463](#), para. 8; [ICC-01/09-02/11-27](#), para. 7. *See also*, [ICC-01/04-01/06-1433](#) OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁵ ICC-01/05-01/13-T-10-CONF-ENG (open session), p.11, l. 6-8. *See also* [ICC-02/04-01/15-1176](#), 12 February 2018, para. 10 ([T]he question of the accused’s understanding of the charges has already been ruled upon by the Chamber and this amounts to an attempt by the Defence’s own admission [...] to re-litigate matters already

8. Further, the First Issue not only misapprehends the Decision,¹⁶ but is “merely a question over which there is disagreement or conflicting opinion”.¹⁷ The First Issue thus, is not an appealable issue under the meaning of article 82(1)(d) of the Statute.

(ii) *Second Issue*

9. The Second Issue – of whether the Pre-Trial Chamber could base its Decision on an *ex parte* submission of the Registry¹⁸ - is not an appealable issue within the meaning of article 82(1)(d) of the Statute as it also misrepresents the Decision.¹⁹

10. Contrary to what it is stated in the Request,²⁰ the Defence did have access to the Registry’s observations²¹ and even submitted a response to them.²² The only document the Defence seems to not have had access to is the Registry’s Addendum to its Report on the status of cooperation with Sudan.²³

11. Further, contrary to the Defence’s contention, the Chamber did not rely on the *ex parte* Registry’s Addendum, but on other factors to reject the Defence’s submissions on the lack of legal framework to authorise the Court’s activities in Sudan²⁴. The *ex parte* document was only cited to illustrate the fact that Sudan no longer criminalises cooperation with the Court,²⁵ which is information that is, in any event, publicly available.

decided well before the Impugned Decision was rendered [...]. Accordingly, the Chamber also rejects the Request for Leave to Appeal on the Fourth Issue”).

¹⁶ [ICC-01/09-02/11-406](#), para.46; [ICC-01/04-01/07-1732](#), para. 15,17-18; [ICC-01/04-01/10-487](#), para. 32-33; [ICC-01/04-01/07-1088](#), para. 33-35; [ICC-01/04-01/10-106](#), p. 6.

¹⁷ [ICC-01/04-168](#) OA3, para. 9; [ICC-01/05-01/08-532](#), para. 17; [ICC-02/05-02/09-267](#), para. 22; [ICC-01/04-01/06-1557](#), para. 30; [ICC-01/04-01/07-2035](#), para. 25; [ICC-02/05-03/09-179](#), para. 27.

¹⁸ [Request](#), para. 5.

¹⁹ See footnote 15 above.

²⁰ [Request](#), para. 5.

²¹ ICC-02/05-01/20-339-Conf-Exp.

²² ICC-02/05-01/20-340-Conf-Exp.

²³ ICC-02/05-01/20-397-Conf-Exp.

²⁴ [Decision](#), para. 38-40.

²⁵ [Decision](#), para. 40.

(iii) *Third Issue*

12. The Third Issue – of whether the Pre-Trial Chamber had to assess the admissibility of evidence at this stage – does not constitute an appealable issue as the Defence merely expresses its disagreement²⁶ with the Chamber’s conclusion that a Pre-Trial Chamber is not obliged to rule on the admissibility of evidence at this stage of the proceedings.²⁷ The Chamber considered and dismissed this argument based on consistent jurisprudence.²⁸

13. Further, the immediate resolution of the issue would not materially advance the proceedings or significantly affect the fair and expeditious conduct of the proceeding or the outcome of the trial.²⁹ If the charges are confirmed this issue can be raised before the Trial Chamber to assess the admissibility of the evidence the Prosecution intends to rely on for trial.³⁰

(iv) *Fourth Issue*

14. The Fourth Issue – on whether there is a need for the Court to conclude an agreement with Sudan pursuant to article 4(2) of the Statute – is not appealable either. First, it is based on a misapprehension of the Decision. Contrary to the

²⁶ See footnotes 14 and 16.

²⁷ [Decision](#), para. 37.

²⁸ [ICC-01/04-02/06-308](#), para. 25-28. See also [ICC-01/04-01/10-465-Red](#), para. 43-44 (“an in-depth assessment as to the admissibility of the evidence submitted for the purposes of the confirmation hearing is rendered essentially meaningless in view of the fact that the Prosecution may, for the purposes of the confirmation of charges, rely on documentary or summary evidence [...] This approach is further justified by the limited object and purpose of the confirmation hearing”).

²⁹ ICC-01/04-168 OA3, para. 11. The Appeals Chamber has ruled that “[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights”. [ICC-01/04-01/07-1958](#), para. 20. [ICC-02/04-01/05-367](#), para. 21-22. [ICC-01/04-01/06-2463](#), para. 31.

³⁰ [ICC-01/04-02/06-308](#), para. 25-28. See also [ICC-01/04-01/10-465-Red](#), para. 43-44 (“an in-depth assessment as to the admissibility of the evidence submitted for the purposes of the confirmation hearing is rendered essentially meaningless in view of the fact that the Prosecution may, for the purposes of the confirmation of charges, rely on documentary or summary evidence [...] This approach is further justified by the limited object and purpose of the confirmation hearing”).

Defence's submission,³¹ the Chamber set out its interpretation of article 4(2) of the Statute and responded to the Defence's previous submissions on the issue.³²

15. Second, in any event, the issue at hand, that merely repeats arguments already dismissed by the Chamber,³³ expresses nothing but the disagreement of the Defence with the Decision that there is no need for the Court to conclude an agreement with Sudan.³⁴

(v) *Fifth Issue*

16. The Fifth Issue —on whether the Chamber should determine if any potential risk created to victims, witnesses or other people involved with the activity of the Court could justify the annulment of proceedings, particularly when the hypothetical risk could emanate from the activities of the Prosecution in Sudan — is not appealable since it is based on a misapprehension of the Court's findings and the Court's jurisprudence.

17. Contrary to the Defence's understanding of the Decision,³⁵ the Chamber did take into consideration the concerns regarding the safety of witnesses and other people.³⁶ At no point did it forgo its own obligations for the protection of witnesses and victims. The Chamber merely stated that no specific concern was identified at this stage by the Defence to justify the Chamber's intervention at this point.

18. Further, contrary to the Defence's submissions, the Decision is consistent with the precedents identified by the Defence.³⁷ The decision rendered in the *Lubanga* case establishes that "the obligation to identify, protect and respect the well-being and dignity of witnesses rests significantly with the party or participant calling the

³¹ [Request](#), para. 9.

³² [Decision](#), para. 38.

³³ [ICC-02/05-01/20-386](#), para. 19.

³⁴ [Decision](#), para. 38.

³⁵ [Request](#), para. 11-12.

³⁶ [Decision](#), para. 39.

³⁷ [Request](#), para. 11.

witness” and confirms that other parties may address the Chamber on “any specific concerns they may have regarding the integrity and well-being of a witness”.³⁸ The same approach was taken in the Decision³⁹.

19. The *Katanga* precedent mentioned by the Defence⁴⁰ does not apply to the case at hand, as it refers to relocation of witnesses.⁴¹ In any event, it simply reiterates the need for the organs of the Court to work together on the protection of witnesses, specifically on applications for the relocation of witnesses.⁴²

20. Secondly, the Defence further misapprehends the Decision as it appears to suggest that the Chamber found it would not act whenever a risk to the abovementioned persons was pointed by the Defence.⁴³ However, the Chamber simply determined that there was no plausible risk on which to act at the moment.⁴⁴ It did not determine that it would not intervene should such a risk be demonstrated by the Defence in the future.⁴⁵ As such, an interlocutory appeal on the issue would be premature and based on a hypothetical question.

21. Thirdly, and in any event, the Fifth Issue is not appealable since it expresses nothing but a mere disagreement with the Decision.

(vi) *Sixth issue*

22. The sixth issue – related to the Court’s policy on information security – is not appealable either since it misrepresents the Decision.

³⁸ [ICC-01/04-01-06-1140](#), para. 36.

³⁹ [Decision](#), para. 39.

⁴⁰ [Request](#), para. 11.

⁴¹ [ICC-01/04-01/07-428-Corr](#), para. 27.

⁴² [ICC-01/04-01/07-428-Corr](#), para. 26.

⁴³ [Request](#), para. 12.

⁴⁴ [Decision](#), para. 39-40.

⁴⁵ *Contra* [Decision](#), para. 39-40.

23. Contrary to what the Defence suggests⁴⁶ the relevant conclusion of the Chamber was not whether the Prosecution has violated the Court's information security policy (a finding not contained in the Decision). Instead, the Chamber found that the Defence failed to demonstrate that witnesses were actually put at risk by the absence of a "confidential" marking on the evidence.⁴⁷

24. In any event, the Defence's repetition of arguments dismissed by the Chamber⁴⁸ expresses nothing but disagreement with the Chamber's conclusion. In addition, this issue can be presented again at trial, so the immediate resolution of the issue would not materially advance the proceedings or significantly affect the fair and expeditious conduct of the proceeding at this stage.

(vii) Seventh Issue

25. The Seventh Issue—on whether the Chamber violated the principle of equality of arms – is not appealable since it only expresses a mere disagreement with the Decision. Further, it constitutes a purely hypothetical question, as the Chamber determined that the Defence had the opportunity to access Khartoum, just as the Prosecution, but chose not to do so.⁴⁹

26. In addition, the issue of the violation of the principle of equality of arms is premature, considering that the Defence still has the chance to organize its mission to Sudan before the trial, should it wish to do so. An interlocutory appeal, therefore, would not materially advance the proceedings on this matter.⁵⁰

⁴⁶ [Request](#), para. 13.

⁴⁷ [Decision](#), para. 42-43.

⁴⁸ [ICC-02/05-01/20-415](#), para. 67-69.

⁴⁹ [Decision](#), para. 44.

⁵⁰ [ICC-01/04-01/07-1958](#), para. 20; [ICC-01/09-02/11-406](#), para. 42-43.

(viii) *Eight issue*

27. The Eighth Issue, regarding the timing of the Decision, too, does not merit an interlocutory appeal. The question of whether the Defence had enough time to prepare its strategy for the confirmation hearing does not arise from the Decision.

28. In addition, the Eighth Issue is purely speculative as it was not demonstrated how this strategy was impacted by the Decision. The Defence was already on notice that it was not going to be able to raise repeated arguments during confirmation hearing⁵¹, and its adopted strategy during the confirmation of charges hearing did not depend on any of the issues addressed by the Chamber. Moreover, the Defence cannot intend to impose a timeframe for the Chamber to deliver its decisions⁵².

29. None of the proposed issues qualify as appealable issues within the meaning of article 82(1)(d) of the Statute. Given that article 82(1)(d) criteria are cumulative, and that failure to fulfill one of the criteria is fatal to an application for leave to appeal,⁵³ the Request should be rejected on that basis alone.

30. Nonetheless, as demonstrated above, the proposed issues also fail to fulfil the cumulative criteria of article 82(1)(d), as they do not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and would not materially affect the conduct of the proceedings.

⁵¹ [ICC-02/05-01/20-378](#), para. 18.

⁵² [ICC-02/05-01/20-338](#), para. 35. [ICC-02/05-01/20-415](#), para. 72-75.

⁵³ [ICC-01/05-01/08-3273](#), para. 8; [ICC-02/11-01/15-117](#), para. 26; [ICC-02/11-01/15-132](#), para. 5.

III. CONCLUSION

31. For the foregoing reasons, the Pre-Trial Chamber should reject the Request.



Fatou Bensouda, Prosecutor

Dated this 3rd day of June 2021

At The Hague, the Netherlands