

Original: **English**No.: **ICC-02/05-01/20**Date: **6 March 2023****TRIAL CHAMBER I**

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

**SITUATION IN DARFUR, SUDAN**

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

**Public**

**Prosecution’s response to the “Demande d’autorisation d’interjeter appel de la  
décision ICC-02/05-01/20-885”, 2 March 2023, ICC-02/05-01/20-888**

**Source: Office of the Prosecutor**

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## I. INTRODUCTION

1. The Prosecution respectfully requests Trial Chamber I (“Chamber”) to reject the Defence’s request for leave to appeal (“Request”)<sup>1</sup> the Chamber’s “Decision on the Prosecution’s bar table motion” (“Decision”).<sup>2</sup> The purported issue identified by the Defence in the Request (“Issue”) does not arise from the Decision, is not an appealable issue, and does not fulfil any of the requirements of article 82(1)(d) of the Rome Statute.

## II. SUBMISSIONS

2. The Prosecution refers to the applicable legal framework for deciding a request for leave to appeal under article 82(1)(d) of the Statute as set out by the Chamber in its previous decisions.<sup>3</sup>

3. As a preliminary matter, and contrary to the Defence’s submission, the Chamber did not introduce “new conditions” in a recent decision on leave to appeal.<sup>4</sup> The Chamber correctly stated, consistent with the well-established jurisprudence of the Court,<sup>5</sup> that a request for leave to appeal should demonstrate an error of law, fact or procedure that it made in issuing the impugned decision.<sup>6</sup> A mere disagreement or conflicting opinion does not constitute an appealable issue.<sup>7</sup>

### **The Issue does not arise from the Decision and is not an appealable issue**

4. The Defence challenges only one aspect of the Decision, namely, the submission into evidence of an interview of the Accused conducted by the Government of Sudan

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<sup>1</sup> Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-885, [ICC-02/05-01/20-888](#) (“Request”).

<sup>2</sup> Decision on the Prosecution’s bar table motion, [ICC-02/05-01/20-885-Red](#) (“Decision”).

<sup>3</sup> See e.g. Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, [ICC-02/05-01/20-525](#), paras. 10-14.

<sup>4</sup> [Request](#), para. 4.

<sup>5</sup> See *Yekatom & Ngaiissona* Admissibility Decision, [ICC-01/14-01/21-514](#), paras. 14, 16.

<sup>6</sup> [ICC-02/05-01/20-875-Conf](#), paras. 26-27.

<sup>7</sup> *DRC* Extraordinary Review Judgment, [ICC-01/04-168](#), para. 9; *Al Hassan* Leave to Appeal Decision on Witness Preparation, [ICC-01/12-01/18-734](#), para. 14; *Yekatom & Ngaiissona* Leave to Appeal Decision, [ICC-01/14-01/18-161](#), para. 21.

in 2006 (“Interview”).<sup>8</sup> In this regard, the Request identifies one Issue for which it seeks immediate resolution by the Appeals Chamber, which is summarised as follows:

- a. Whether the Chamber erred in law by rejecting the Defence’s objections to the submission of the Interview into evidence based on the Defence’s lack of objection to its use during the Prosecution’s opening statements, in violation of rule 64(1) of the Rules of Procedure and Evidence and the Directions on the conduct of proceedings.<sup>9</sup>

5. The Issue identified by the Defence does not arise from the Decision and does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

6. The Issue mischaracterises the Decision and therefore does not arise from it. The Chamber did not reject the Defence’s objections regarding the submission of the Interview on the basis that they should have been raised earlier. To the contrary, the Chamber stated that it would take the Defence’s objections regarding the reliability, relevance, probative value and potential prejudice into account at the judgment stage pursuant to article 74 of the Statute.<sup>10</sup> The Chamber also ruled on the substance of the Defence’s arguments that items related to the Interview could have been submitted through witnesses.<sup>11</sup>

7. The Chamber, having found no procedural bar to the submission of the items at this stage, then authorised their formal submission.<sup>12</sup> This was in accordance with the approach to the submission of evidence adopted by the Chamber in the Directions on the conduct of proceedings (“Directions”),<sup>13</sup> and consistent with the now established practice of the Court.<sup>14</sup> Contrary to the Defence’s assertion,<sup>15</sup> the Chamber’s

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<sup>8</sup> [Request](#), para. 6. The Interview consists of four items: DAR-OTP-0218-0231; DAR-OTP-0219-7007; DAR-OTP-0218-0386; DAR-OTP-0219-6910.

<sup>9</sup> [Request](#), para. 11.

<sup>10</sup> [Decision](#), para. 48.

<sup>11</sup> [Decision](#), paras. 37, 48.

<sup>12</sup> [Decision](#), para. 48.

<sup>13</sup> Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), paras. 25-30.

<sup>14</sup> [Decision](#), para. 25, fn. 51.

<sup>15</sup> [Request](#), paras. 7-11, 13.

approach did not violate either the Directions<sup>16</sup> or the Defence's right to raise issues under rule 64(1) of the Rules.<sup>17</sup>

8. In this context, the Chamber's observation that it would have been appropriate for the Defence to raise an objection to the use of the Interview in the Prosecution's opening statements<sup>18</sup> had no material impact on the Decision. The subject identified by the Defence in the Issue was therefore not "essential for the determination of matters arising in the judicial case under examination",<sup>19</sup> and the Issue is not appealable.<sup>20</sup>

### **The Issue does not satisfy the cumulative requirements of article 82(1)(d)**

9. Even if the Chamber were to consider that the Issue arises from the Decision and is appealable, it does not satisfy either of the cumulative requirements under article 82(1)(d) of the Statute.

*The Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial*

10. The Defence fails to demonstrate how the Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

11. First, the Defence's arguments regarding the impact on the fairness of the trial are based on the incorrect assertion that the Chamber refused to consider the merits of the Defence objections to the submission of the Interview.<sup>21</sup> As stated in the Decision, the Chamber will consider the reliability, relevance, probative value and potential prejudice of the Interview when deciding its judgment under article 74 of the Statute.<sup>22</sup> This is in accordance with the Chamber's approach to the submission of evidence in

<sup>16</sup> [Directions](#), paras. 25-30, 55-56.

<sup>17</sup> See *Bemba* Admission of Evidence Judgment, [ICC-01/05-01/08-1386](#), paras. 48-50.

<sup>18</sup> [Decision](#), para. 47.

<sup>19</sup> [DRC Extraordinary Review Judgment](#), para. 9.

<sup>20</sup> See e.g. *Gbagbo & Blé Goudé* Leave to Appeal Decision on Admission of Prior Recorded Statements, [ICC-02/11-01/15-1023](#), para. 14; *Bemba et al.* Leave to Appeal Decision on Admissibility of Certain Materials, [ICC-01/05-01/13-1489](#), para. 8; *Abu Garda* Leave to Appeal Decision on Confirmation of Charges, [ICC-02/05-02/09-267](#), paras. 13, 18; *Ongwen* Leave to Appeal Decision on Witness Preparation, [ICC-02/04-01/15-537](#), para. 8.

<sup>21</sup> [Request](#), para. 13.

<sup>22</sup> [Decision](#), paras. 25-26, 48.

this case and the established jurisprudence of the Court.<sup>23</sup> The merits of the Defence's arguments, and the appropriate weight to be afforded to the Interview, will therefore be considered by the Chamber as part of its holistic assessment of all evidence submitted in the case at the appropriate juncture. The Chamber's observation regarding the timing of the Defence's objections to the submission of the Interview thus had no material impact on the Decision.<sup>24</sup>

12. Second, the Defence generally refers to the purported frustration of its rights under rule 64(1) of the Rules, and to alleged prejudice flowing from the submission of the Interview into evidence, without identifying any specific prejudice.<sup>25</sup> In fact, given the Chamber's indication that it will take into account the merits of the Defence's arguments in its judgment under article 74,<sup>26</sup> there is no identifiable prejudice to the Defence, and any assessment of the impact of the Issue on the outcome of the trial is hypothetical and speculative. The Defence cannot rely on vague and general assertions of unfairness in the abstract to demonstrate that an issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>27</sup>

*The immediate resolution of the Issue by the Appeals Chamber would not materially advance the proceedings*

13. The Defence also fails to demonstrate that immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings.

14. The Defence, by reference to the Chamber's finding on another piece of evidence, asserts that resolution of the Issue by the Appeals Chamber would provide the Defence "*une idée claire des enjeux qu'elle devra relever au cours de la présentation de sa*

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<sup>23</sup> See above, para. 6.

<sup>24</sup> See above, para. 8.

<sup>25</sup> [Request](#), para. 13.

<sup>26</sup> [Decision](#), paras. 25-26, 48.

<sup>27</sup> See [Ongwen Leave to Appeal Decision on Witness Preparation](#), para. 8; [Bemba Leave to Appeal Decision on Two Decisions](#), [ICC-01/05-01/08-2925-Red](#), para. 34; [Kenyatta et al. Leave to Appeal Decision on Redactions and Related Requests](#), [ICC-01/09-02/11-211](#), paras. 33, 39; [Kenyatta et al. Leave to Appeal Decision on Disclosure](#), [ICC-01/09-02/11-88](#), paras. 23-27; [Lubanga Leave to Appeal Decision on Victim Participation](#), [ICC-01/04-01/06-2109](#), para. 22; [Bemba Leave to Appeal Decision on Additional Evidence](#), [ICC-01/05-01/08-680](#), para. 36; [Kenyatta et al. Leave to Appeal Decision on Viva Voce Witnesses](#), [ICC-01/09-02/11-275](#), paras. 28-29; [Ruto & Sang Leave to Appeal Decision on Confirmation Hearing Postponement](#), [ICC-01/09-01/11-301](#), para. 30.

*preuve, dont le calendrier a déjà été fixé par la Chambre*”.<sup>28</sup> The Defence further asserts that resolution of the Issue would clarify for the Chamber the degree to which it can rely on the Interview in its final deliberations,<sup>29</sup> and that postponing the resolution of the Issue until the final appeal would put the judgment at risk to the extent the Chamber may rely on the Interview to prove the identity of the Accused.<sup>30</sup>

15. None of these vague and general assertions establish how an authoritative determination of the Issue by the Appeals Chamber would ensure that the proceedings follow the right course.<sup>31</sup> The Defence does not explain how, in concrete terms, resolution of the Issue would impact the ability of the Defence to prepare and present its case. The Interview is part of a large body of diverse evidence relevant to the identity of the Accused and his responsibility for the alleged crimes. The Defence is on notice that the Chamber may rely on the Interview in its final judgment and can plan its strategy accordingly. The Defence retains the possibility of challenging the Chamber’s eventual assessment of the Interview in its judgment under article 74, as part of a final appeal under article 81 of the Statute. In this context, resolution of the Issue will not materially advance the proceedings.<sup>32</sup>

### **Submission into evidence of DAR-OTP-00001013**

16. The Prosecution does not oppose the submission into evidence of the investigation report at DAR-OTP-00001013<sup>33</sup> since it contains information relevant to the chain of custody and authenticity of the Interview, which may assist the Chamber in its assessment of the reliability and probative value of this evidence.

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<sup>28</sup> [Request](#), para. 14.

<sup>29</sup> [Request](#), para. 14.

<sup>30</sup> [Request](#), para. 14.

<sup>31</sup> [DRC Extraordinary Review Judgment](#), para. 15.

<sup>32</sup> See *Al Hassan* Leave to Appeal Two Decisions on Evidence Submission, [ICC-01/12-01/18-1542](#), para. 26; *Bemba et al.* Leave to Appeal Decision on Exclusion of Evidence, [ICC-01/05-01/13-1898](#), para. 17.

<sup>33</sup> [Request](#), para. 15.

**III. RELIEF REQUESTED**

17. The Prosecution respectfully requests the Chamber to reject the Request.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 6<sup>th</sup> day of March 2023

At The Hague, The Netherlands