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Date: **29 July 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

Prosecution's Response to the "Defence request for leave to appeal the "Decision on the Sentencing and Amended Directions on the Conduct of the Proceedings", ICC-01/14-01/18-2600" (ICC-01/14-01/18-2608)

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Ngaissona Defence’s request for leave to appeal¹ the “Decision on the Sentencing and Amended Directions on the Conduct of the Proceedings” (“Impugned Decision”).² The Request fails to satisfy the threshold for certification to appeal, but instead at most raises concerns which may be more properly addressed—if necessary—in the continued exercise of the Chamber’s trial management discretion.

2. In particular, neither of the two issues for which certification is sought constitutes an appealable issue within the meaning of article 82(1)(d). The Defence merely disagrees with the Impugned Decision, based upon speculation regarding the factors and considerations underpinning the Chamber’s exercise of discretion in its determination. Further, the remaining cumulative criteria for an interlocutory appeal under article 82(1)(d) are not met.

II. SUBMISSIONS

3. The Defence seeks leave to appeal two issues:

- i) Whether the Chamber abused its discretion under Article 76 of the Statute, when it decided, without any prior notice to the parties and participants, to render any potential decision on sentencing pursuant to Article 76 of the Statute simultaneously with its judgment under Article 74 of the Statute, and included within the decision a procedural calendar that is untenable considering the Defence’s current workload (“First Issue”); and
- ii) Whether the Chamber abused its discretion by imposing a premature and excessive remedy in creating a scheduling order that simultaneously orders

¹ ICC-01/14-01/18-2608 (“Request”).

² ICC-01/14-01/18-2600 (“Impugned Decision”).

the parties to close their cases and prepare sentencing submissions based solely on the potential risk that the judges of the Chamber could be replaced after the delivery of the Article 74 decision (“Second Issue”).

A. No appealable issue arises from the Impugned Decision

4. The Request fails as an application for leave to appeal, but rather advances circumstances and arguments which the Defence considers (without foundation) were not adequately taken into account by the Chamber.³ This demonstrates that the Defence merely disagrees with the reasoning underpinning the Impugned Decision, and fails to show any circumstance justifying certification for appeal within the framework of article 82(1)(d) of the Statute.

1. The First Issue

5. The First Issue does not arise from the Impugned Decision as such. Instead, it comprises a mere disagreement with the Chamber’s exercise of discretion, asserting that it failed to take into account several factors.⁴ There is no substantiated basis for the assertion. Instead, the Request speculates about the Chamber’s reasoning in characterising its determination as an abuse of discretion.⁵

6. At its core, the Defence disagrees with the Chamber regarding the sufficiency or adequacy of the notice regarding the Chamber’s intention to render a potential sentencing decision together with its article 74 decision.⁶ However, the Impugned

³ See *especially* Request, paras. 25-26. While the Request argues circumstances which may found a motion for reconsideration, they arguments do not satisfy the particular legal threshold for an application under article 82(1)(d).

⁴ See Request, paras. 15 (referencing, the Defence’s reliance on the Court’s practice of bifurcating sentencing proceedings), 16 (referencing the Defence’s opportunity to be heard), 18 (referencing the Defence’s logistical and resource constraints), 24 (referencing the Defence’s inability to meet the 6 September 2024 deadline to identify evidence for submission on sentencing), 25 (asserting that the Chamber did not consider the several factors advanced in the Request).

⁵ See Request, para. 10.

⁶ See Request, paras. 14 and 26; *see also* para. 36 (arguing that given notice provided “the Defence is unable due to current resource and logistical constraints to meet the Chamber’s current deadlines”).

Decision takes express account of the question of notice. The matter was not beyond the Chamber's contemplation — but, rather, framed its determination.⁷

7. The same holds true regarding the Defence's assertion that it relied on "decades long precedent establishing bifurcated sentencing proceedings"⁸ in preparation of trial. There, conceding that the Chamber was under no obligation to consult with the Parties,⁹ the Defence acknowledges that it simply presumed (without seeking direction, clarification, or guidance—as it could have done) that the Chamber would *necessarily* implement a bifurcated process,¹⁰ even though this is not otherwise mandated by the Court's regulatory framework.¹¹ In this respect, the Request also misapplies the principle of 'legal certainty'.¹² The Chamber does not violate this principle, or otherwise do anything to suggest unfairness or partiality,¹³ by exercising exactly the discretion expressly afforded it in article 76(2). To suggest otherwise is simply untenable.

8. The Request assumes, speculatively, that the Chamber did not consider the practical implications of the Impugned Decision for the Defence preparation. Yet, on the contrary, this is why the Impugned Decision *presently* provides a calendar for the sentencing procedure regarding any written submissions to be provided in December 2024¹⁴ and potential evidence to be called in January 2025¹⁵ — to “give the participants as much notice as possible.”¹⁶ It is apparent from this calendar that the Chamber was

⁷ See Impugned Decision, para. 3 (notably, aiming “to give the participants as much notice as possible”).

⁸ Request, para. 15.

⁹ See Request, para. 16.

¹⁰ See Request, para. 20 (noting “[o]nly in the event of a conviction was the Defence going to *begin concrete preparations for sentencing*”, emphasis added).

¹¹ See ICC-02/04-01/15-2023, para. 56 (“[t]he Appeals Chamber observes that by stipulating that a trial chamber “*may [...]* hold a further hearing”, article 76(2) allows for either a bifurcated system or the possibility of the sentence being pronounced together with the conviction decision. Although in practice, separate sentencing proceedings have been preferred, joint proceedings with one decision are also possible”).

¹² See Request, para. 15.

¹³ *Contra* Request, para. 21.

¹⁴ See Request, para. 9.

¹⁵ See Request, para. 10.

¹⁶ Request, para. 3.

in particular mindful of the remaining milestones before its deliberations, nor can it reasonably be considered to have overlooked the present judicial recess.¹⁷

9. The Request's core point—that “[s]even weeks to define the Defence’s sentencing strategy and define the scope of its evidence is patently insufficient”¹⁸—comprises a mere disagreement with the Chamber’s view. The further claim in this context that the Chamber failed to appreciate the breadth and scope of the case, and the evidentiary record, is not only unsubstantiated but contradicted by the reference in the Impugned Decision to the Chamber’s “[consideration of] the scope of the case.”¹⁹ In addition, the Request’s citation to the Prosecution’s prior submissions—filed in March 2024 when requesting an extension of page limits, detailing the breadth and depth of the evidentiary record²⁰—further precludes any view that the Chamber rendered the Impugned Decision in ignorance of the volume of the evidentiary record. Thus, the Defence’s contention that “[t]he Chamber should have taken into account the complexity of the case against Mr Ngaissona in finding that seven weeks’ notice was sufficient”²¹ is without basis.

10. The Defence thus fails to identify an appealable issue. Instead, the Request expresses a mere disagreement based on a speculative assessment of the factors considered by the Chamber and its balancing thereof. On this basis, the First Issue fails.

¹⁷ Cf. Request, paras. 22, 24.

¹⁸ Request, para. 22.

¹⁹ Impugned Decision, para. 12 (setting out the allotted time for closing statements).

²⁰ See Request, para. 22 (citing ICC-01/14-01/18-2391). Notably, the Ngaissona Defence objected to the request ICC-01/14-01/18-2403, para. 11 (arguing “[t]he extensiveness of the trial record, the complex nature of the evidence [...] are not new facts” justifying reconsideration). See also ICC-01/14-01/18-2417, para. 6 (noting “the circumstances raised by the Prosecution” in partially granting the requested page extension).

²¹ Request, para. 23.

2. The Second Issue

11. The Second Issue similarly does not amount to an appealable issue. It does not arise from the Impugned Decision because it relies on a misapprehension, and further constitutes a mere disagreement.

12. The Request suggests that the Chamber decided to adopt the approach to sentencing set out in the Impugned Decision *because* it wrongly assessed the potential impact of the *Ad Hoc* Presidency Decision in the *Al Hassan* case on these proceedings.²² Thus, the Request erroneously claims that the Chamber “erred in finding that the *Ad Hoc* Presidency Decision had any concrete impact on the proceedings in this case”²³ instead of finding “[a]t most” that it “*may* have a potential impact on the present case.”²⁴ The contention misapprehends the Impugned Decision.

13. The Impugned Decision makes no such finding. Instead, it states only that the Chamber “notes” the *Ad Hoc* Presidency Decision, expressly citing paragraphs 5 and 10 thereof.²⁵ The Request ignores that the only ‘finding’ made by the Chamber in fact, is that it:

“considers it to be in the *interests of justice and expeditiousness in this case* that the judges who assess the evidence and submissions relevant to any potential sentencing in the event of a conviction, are the same as those present during the trial and the deliberations pursuant to Article 74(1) of the Statute”²⁶

²² See Request, para. 27; see ICC-01/12-01/18-2596 (“Ad Hoc Presidency Decision”).

²³ Request, para. 28.

²⁴ Request, para. 29 (emphasis added).

²⁵ See Impugned Decision, para. 1 (citing ICC-01/12-01/18-2596).

²⁶ Impugned Decision, para. 2.

14. As such, the lengthy arguments in the Request regarding the Chamber's supposed misinterpretation of the *Al Hassan* Decision,²⁷ the circumstances under which it was issued,²⁸ and any impact on the present case²⁹ are simply irrelevant.

15. The Defence's further contention—which may be implicit in several submissions on the Second Issue—is effectively that “the Chamber improperly balanced the interest of justice and interests of expeditiousness of retaining the same composition of the Trial Chamber.”³⁰ More specifically, it contends that, had the Chamber “considered the[] distinctions between the *Al Hassan* case and the present case [...] [i]t would have determined that rendering a potential Article 76 decision simultaneously with the Article 74 decision would be unduly prejudicial.”³¹ However, not only does this fall short of substantiating the claimed abuse of discretion, it also quintessentially amounts to a mere disagreement.

16. The Second Issue does not arise from the Impugned Decision as such. It is predicated on a misconstruction of the Chamber's findings, speculative, and it otherwise amounts to a mere disagreement with its conclusions. On this basis, the Second Issue also fails.

B. The cumulative article 82(1)(d) criteria are not met

1. The Impugned Decision does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

17. As is well established, article 82(1)(d) criteria are cumulative. The failure to fulfil any one inevitably requires that an application for leave to appeal be rejected. As there

²⁷ See Request, para. 27 (asserting that “[t]he Defence respectfully submits that the Chamber erred in its interpretation of the *Ad hoc* Presidency Decision”).

²⁸ See Request, paras. 30-31.

²⁹ See Request, para. 28.

³⁰ Request, para. 10.

³¹ Request, para. 32.

are no appealable issues within the meaning of article 82(1)(d), the Request should be dismissed on this basis.

18. In any event, even assuming *arguendo* that one or more of the proposed issues is appealable—which they are not—the Defence fails to demonstrate that any of the remaining cumulative criteria is met.

a. *Fair and Expeditious Conduct of the Proceedings*

19. *First*, the Request fails to show any significant impact on the fairness of the proceedings. The Impugned Decision does not preclude the Defence from seeking different remedies, including seeking extensions of time, as may be appropriate in the circumstances. Indeed, the Request itself recognises as much.³² It is also worth noting that, historically, almost every decision issued by the Chamber bearing on the conduct of the proceedings has been varied to some degree in view of the attendant circumstances. The Chamber has demonstrated its capacity and willingness to address such matters. There is no reason to assume that the circumstances of the Impugned Decision are different, or that the fairness of the Chamber or of the proceedings is in doubt.

20. *Second*, the Request fails to show any significant impact on the expeditious conduct of the proceedings. The Impugned Decision expressly states—and the Defence concedes—that an important factor motivating the Chamber’s determination is exactly the expeditious conduct of the proceedings.³³ The Defence merely conjectures when it attempts to argue that the proceedings “will be prolonged due to the lack foreseeability [*sic*] as to the facts upon which the Chamber will enter a possible

³² See Request, para. 36 (noting that the Defence will “ask for extensions of time that account for the significant workload”).

³³ See Request, para. 25.

conviction”,³⁴ and that unfocused submissions will lead to subsequent delays.³⁵ This overlooks not only that a consolidated procedure is within the scope of article 76(2), as the Appeals Chamber confirmed,³⁶ but also that it has often been implemented by other international courts and tribunals in accordance with fundamental fair trial rights.³⁷

b. Outcome of trial

21. The assertion that the Impugned Decision adversely impacts the outcome of the trial is also unfounded. At best, it is premature. The Defence’s assertion that its “ability to make cogent and persuasive closing submissions in the form of the Final Trial Brief and closing statement has been compromised”³⁸ is unpersuasive. As noted above, nothing precludes the Defence’s capacity to seize the Chamber of any material facts and circumstances which may affect the Accused’s representation. While the Defence has not yet done so, this remains open to it. Moreover, there exists more than one procedural avenue and/or means by which any such matters may be adequately addressed at the appropriate time.

C. The Appeals Chamber’s intervention would not advance the proceedings

22. Finally, the immediate intervention of the Appeals Chamber would not materially advance the proceedings. Given that the heart of the issues raised in the

³⁴ Request, para. 37.

³⁵ See Request, para. 37.

³⁶ See ICC-02/04-01/15-2023, para. 56.

³⁷ See e.g., [Kosovo Specialist Chambers, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, amended as 30 April 2020](#), rule 159(6) (providing “[i]f the Panel finds the Accused guilty of one or more crime(s), it shall determine the appropriate sentence to be imposed on the Accused with the pronouncement of the Trial Judgment”, unless the Panel decides to order a separate penalty phase in accordance with rules 162 and 164). Notably, the ICTR and ICTY issued consolidated decisions on guilt and sentencing: see e.g., [ICTY, Manual on Developed Practices](#) (“[i]n the early practice of the Tribunal, sentencing was a separate process which took place only after a judgment had been issued in which one or more convictions were entered. For reasons of efficiency, Trial Chambers quickly moved to a procedure in which sentencing submissions were made as part of the trial process. These could then be considered by the Chamber concerned in the event that they were to reach a verdict of guilt”).

³⁸ Request, para. 38.

Request goes to the Chamber's management of the trial, the Chamber itself is best placed to address any concerns related by the Parties and Participants as to its conduct, and to make any modifications or adjustments in respect of any prevailing circumstances as it deems appropriate.

23. As noted, the Chamber has consistently demonstrated that it is amenable to considering and/or reconsidering properly motivated requests to modify its directions on the conduct of the proceedings throughout, and having due regard to the several competing interests at stake. The present situation is no different.

III. CONCLUSION

24. For the reasons above, the Prosecution requests that the Chamber reject the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 29th day of July 2024
At The Hague, The Netherlands