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PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Iulia Antoanella Motoc
Judge Haykel Ben Mahfoudh

**SITUATION IN UGANDA
IN THE CASE OF
*THE PROSECUTOR v. JOSEPH KONY***

Public

**Prosecution's Response to the Defence Request for Leave to Appeal
the Decision on the criteria for holding confirmation of charges proceedings
*in absentia***

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Defence's request for leave to appeal ("Request")¹ Pre-Trial Chamber III's ("Chamber") "Decision on the criteria for holding confirmation of charges proceedings in absentia" ("Impugned Decision")² should be rejected. The three issues raised for certification ("Three Issues") mischaracterise the Chamber's approach and determinations to date and do not amount to appealable issues arising from the Impugned Decision. Further, the Three Issues fail to meet the remaining requirements for leave to appeal under article 82(1)(d) of the Rome Statute, as they do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would their immediate appellate review materially advance the proceedings.

II. SUBMISSIONS

2. The Request identifies Three Issues, which allegedly arise from the Impugned Decision:

First issue: *Whether the Pre-Trial Chamber erred in reviewing prior Pre-Trial Chamber II decisions without having articulated a standard of review or providing notice to the parties, in a procedure which shifted the burden of proof to the Defence ("First Issue");*

Second Issue: *Whether an initial appearance by the person charged is required pursuant to Article 60(1) of the Statute before a confirmation of charges hearing can be held in absentia under Article 61(2)(b) ("Second Issue");*

Third Issue: *Whether the Pre-Trial Chamber failed properly to exercise its discretion by failing to address relevant factors impacting on the utility of in absentia confirmation proceedings in the circumstances ("Third Issue").*

¹ ICC-02/04-01/05-533.

² ICC-02/04-01/05-532.

a. The First Issue does not arise from the Impugned Decision

3. The First Issue mischaracterises the Impugned Decision and, as such, does not genuinely arise from it.³ The Defence claims that the Chamber conducted an “appellate-style review” of Pre-Trial Chamber II’s (“PTCII”) prior decisions, and in doing so shifted to the Defence the burden of persuading the newly composed Chamber of the errors made in these prior decisions.⁴ This argument is unavailing and misconstrues the Chamber’s approach.

4. Far from reversing the burden of proof – which is in any case an *evidentiary* burden⁵ – the Impugned Decision does not consist of a review of PTCII’s decision, but instead is a *de novo* determination by this Chamber, which also does not in any way infringe on the rights of the Defence. First, the Chamber invited broad and unhindered observations, and – in its 2 May 2024 “Decision on the Procedure for Appointing Counsel”⁶ – did not limit the scope of the Defence’s observations on PTCII’s decisions⁷ as well as the Registry’s Report.⁸ Second, in rendering its decision,⁹ it is apparent that the Chamber took into account every aspect raised in the Defence’s subsequently filed Observations.¹⁰ Third, with reference to PTCII’s decisions, the Chamber articulated how it reached its own conclusions on each of the legal and factual issues in question.¹¹

5. Such an articulation from the newly composed Chamber – *i.e.* the Chamber that will be conducting the confirmation hearing – is clearly in the interest of all parties and participants. In any event, given that the Chamber’s stance is, for all relevant

³ See ICC-01/09-02/11-406, para. 46; ICC-01/04-01/07-1732, paras. 15, 17-18; ICC-01/04-01/10-487, paras. 32-33; ICC-01/04-01/07-1088, paras. 33-35; ICC-01/04-535, paras. 26-29; ICC-01/04-01/10-106, p. 6.

⁴ Request, paras. 21-22.

⁵ See the jurisprudence relied upon by the Defence in fn. 44 of its Request: ICC-01/04-01/06-1191, para. 42 (on the question of participating victims introducing “evidence touching on the issue of the guilt or innocence of the accused” [emphasis added]; ICC-01/04-01/10-487, para. 11 (on the question of applying an “erroneous burden of proof” by assessing the “reliability and consistency” of the Prosecution’s evidence at confirmation stage).

⁶ ICC-02/04-01/05-499, para. 27(a).

⁷ ICC-02/04-01/05-466; ICC-02/04-01/05-481.

⁸ ICC-02/04-01/05-491.

⁹ See Impugned Decision, para. 22 (“In the present decision the Chamber fully considers the Defence observations including those related to the legal and factual findings of the First and the Second Decision, conclusively reaches its own determination as to each of those requirements, and makes any additional findings which are still outstanding and necessary. Accordingly, this decision will constitute the basis for any and all subsequent steps in these proceedings.”), *see also*, para. 93.

¹⁰ ICC-02/04-01/05-517-Conf and ICC-02/04-01/05-524-Conf.

¹¹ See *e.g.* Impugned Decision, para. 22.

intents and purposes, the same as that of PTCII, it is hard to imagine how the Impugned Decision could possibly impinge upon the Defence's procedural rights. In arguing that it does, the Defence mischaracterises the Impugned Decision as well as the process leading to it. The First Issue should therefore be rejected.

b. The Second Issue is not an appealable issue arising from the Impugned Decision

6. The Second Issue is not an appealable issue within the meaning of article 82(1)(d), but “merely a question over which there is disagreement or conflicting opinion”.¹² Instead of putting forward an “identifiable subject or topic requiring a decision for its resolution”,¹³ the Defence simply re-litigates the merits of its legal position by rehearing the same arguments presented in its Observations, including on i) the plain meaning of “cannot be found”; ii) the reading of article 61(2)(b) in the context of article 60 of the Statute and rule 122 of the Rules; and iii) the inferences to be drawn from the drafting history of the relevant provisions.¹⁴

7. The Defence's incorrect approach is further apparent when alleging that the Chamber's approach in the Impugned Decision “constitutes an error, in the interpretation that a person who has ‘fled’ can be distinguished from a person who ‘cannot be found’”.¹⁵ The purpose of an application for leave to appeal is not to allege and substantiate errors in a decision, but to raise appealable issues. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d). The sole question is whether there is an appealable issue that meets the criteria set out in the provision.¹⁶

¹² 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; ICC-02/11-01/11-99-Conf, para. 21.

¹³ Ibid.

¹⁴ See ICC-02/04-01/05-517-Conf, paras. 5-23, summarised in the Impugned Decision, paras. 28-31.

¹⁵ Request, para. 29.

¹⁶ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

8. In its Request, the Defence merely disagrees with the determinations made by the Chamber to the extent that these conflict with their own arguments. Such a disagreement falls short of identifying an appealable issue and the Second Issue should be rejected on that basis.

9. In any event, the Second Issue does not arise from the Impugned Decision. The Defence misapprehends the approach taken by the Chamber in asserting that the Chamber interpreted the term “has never been accessible” differently from PTCII. Instead, the Chamber, after weighing the Defence’s arguments and reviewing the information on the record and the prior findings, adopted the same interpretation as PTCII.¹⁷ Even if, *arguendo*, there is a difference in interpretation, this would have no bearing on the current situation, as the operative disposition as regards Mr Kony, who has never been available or accessible, is one and the same.

10. Furthermore, the Defence’s argument that the Second Issue is “likely to be important, should the Prosecution seek to confirm the charges *in absentia* against high-profile persons for *whom an arrest warrant or summons to appear has been issued and who have never made an initial appearance in future*,”¹⁸ is inapposite. The alleged importance of an argument to a potential future case does not demonstrate that the Second Issue arises from the Impugned Decision. Rather, it represents “an abstract question or a hypothetical concern.”¹⁹ It is irrelevant for granting leave to appeal that an issue for which leave is sought is of general interest or that it may arise in future pre-trial or trial proceedings,²⁰ or that it may have a potential impact on the jurisprudence of this Court.²¹ Crucially, the Impugned Decision does not compel (hypothetical) future requests for *in absentia* confirmation hearings to be heard, let alone decided in the positive. Any such requests, should they even be contemplated, will be heard on their

¹⁷ See Impugned Decision, paras. 32-34, 95-96.

¹⁸ Request, para. 31.

¹⁹ ICC-01/05-01/08-532, para. 17; ICC-01/05-01/08-75, para. 11, ICC-02/04-01/05-367, para. 22; ICC-01/09-01/11-301, para. 34; ICC-01/09-02/11-406, paras. 50, 61.

²⁰ ICC-01/04-01/06-1557, para. 25; ICC-02/04-01/05-20, para. 21; ICC-01/04-135-tEN, para. 21; ICC-01/04-01/06-1191, para. 11; ICC-01/05-01/08-1169, para. 25; ICC-01/05-01/08-980, para. 16.

²¹ ICC-01/05-01/08-980, para. 16.

own facts and circumstances by pre-trial chambers exercising their full decision-making discretion. For all these reasons, the Second Issue should be rejected.

c. The Third Issue is not an appealable issue arising from the Impugned Decision

11. The Third Issue is a compilation of mere disagreements on miscellaneous issues contained in the Impugned Decision, and the Defence merely re-litigates those issues, instead of identifying any appealable issues. As a result, the Third Issue does not constitute an appealable issue arising from the Impugned Decision.

12. While correctly acknowledging that the decision whether to hold the proceedings *in absentia* is a discretionary one,²² the Defence incorrectly alleges that the Impugned Decision “erred in law and in fact by failing satisfactorily, or at all, to address three factors relevant to the exercise of discretion.”²³ The Defence then sets out four factors, which it proports the Chamber did not give sufficient weight to. None of these factors identify an appealable issue arising from the Decision, but are nothing more than mere disagreements with the Decision.

13. First, the Defence heavily relies on the First Decision and compares it with the Impugned Decision. However, any matter decided by the PTCII in that decision does not arise from the Impugned Decision.²⁴ The Defence specifically fails to identify any appealable issue related to the Chamber’s determination to decline to exercise its discretion to rule on the admissibility of the case at this stage.²⁵

14. Second, the Defence challenges the Chamber’s assessment that there was “no conclusive information establishing Mr Kony’s death”, by comparing it with PTCII’s first decision.²⁶ Such a comparison does not demonstrate any appealable issue arising

²² Request, para. 43.

²³ Request, paras. 45-50.

²⁴ Request, para. 46. In any event, the Prosecution notes that the Defence does not correctly interpret the First Decision either, when alleging that in that Decision PTCII assessed that the “the likelihood that future Ugandan proceedings would render [the current proceedings] inadmissible” is of any relevance at this stage.

²⁵ Impugned Decision, paras. 83-85.

²⁶ Request, para. 47.

from the Impugned Decision. Moreover, the Chamber did assess whether Kony is still alive and rejected the Defence's arguments to the contrary.²⁷ A mere disagreement with the Chamber's determination falls short of identifying an appealable issue.

15. Third, the Defence's alleges that the Chamber erred in the exercise of its discretion by rejecting its argument that Kony's *in absentia* hearing could be conducted at the expense of the implementation of the *Ongwen* Reparations Order.²⁸ The Chamber fully considered the Defence's arguments and rejected them as unfounded. Merely repeating those arguments and articulating a disagreement with the Chamber's exercise of discretion fails to show an appealable error arising from the Decision.

16. Fourth, the Defence faults the Chamber for basing its conclusion that the confirmation hearing is necessary to give victims an opportunity to be heard by relying solely on the Statute and the powers within its mandate.²⁹ The Chamber's rejection to speculate about alternative mechanisms that are outside its jurisdiction cannot constitute an appealable issue within the meaning of article 82(1)(d).

17. For all the reasons set out above, and because the Impugned Decision explicitly had regard to all the above factors in determining whether there was cause to hold a confirmation hearing *in absentia* in this case,³⁰ the Third Issue should be rejected.

d. The Three Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would immediate resolution of the Three Issues materially advance the proceedings

18. The Defence fails to demonstrate that the Three Issues would significantly affect the fair and expeditious conduct of the proceedings. The Three Issues either mischaracterise the Impugned Decision or present mere disagreements. As such, they

²⁷ Impugned Decision, paras. 75-77.

²⁸ Request, para. 48; Impugned Decision, para. 89.

²⁹ Request, para. 49; Impugned Decision, para. 90.

³⁰ See Impugned Decision, para. 105.

do not affect the fairness or expeditiousness of the proceedings. Instead, any appellate intervention at this stage would cause undue further delay.

19. The Three issues would also not affect the outcome of a trial. The Impugned Decision is limited to the conduct of the confirmation of charges proceedings *in absentia* and has no bearing on a trial. Therefore, any projection on the impact of the Three Issues on a trial is speculative and unsupported.

20. The Defence also fails to show that the immediate resolution of the Three Issues by the Appeals Chamber would materially advance the proceedings. In particular, regarding the Second Issue upon which the Defence claims there is an “urgent need for a final appellate determination”,³¹ there is – for the reasons argued herein – nothing to be gained in the current proceedings by calling upon the Appeals Chamber to settle hypothetical interpretational disputes that have no bearing on the case at hand. Finally, as no unfairness arises from the Impugned Decision in relation to any of the Three Issues, it follows that appellate intervention would do nothing to materially advance the proceedings.

III. RELIEF SOUGHT

21. For the reasons set out above, the Prosecution respectfully asks the Chamber to reject the Request.



Karim A.A. Khan KC, Prosecutor

Dated this 8th day of November 2024
At The Hague, The Netherlands

³¹ Request, para. 31.