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**International
Criminal
Court**

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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 'Defence Request for Leave to Appeal
the "Decision on the confirmation of charges *in absentia* against Joseph Kony
pursuant to articles 61(2)(b) and 61(7) of the Rome Statute"' (ICC-02/04-01/05-635)**

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 confirmation of charges in absentia against Joseph Kony pursuant to articles 61(2)(b) and 61(7) of the Rome Statute" ("Impugned Decision")² should be dismissed *in limine*. Counsel appointed to represent the rights and interests of Mr Kony ("Counsel") until the conclusion of the confirmation hearing now lacks standing to seek leave to appeal. Even assuming *arguendo* that Counsel has standing, the Request should be dismissed since the issues raised for certification do not meet the requirements under article 82(1)(d) of the Rome Statute. In particular, the proposed issues do not arise from the decision and in any event they do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would immediate appellate review materially advance the proceedings.

II. Submissions

A. Counsel lacks standing to seek leave to appeal

2. The Request should be dismissed *in limine* because Counsel is no longer a party³ in the case, in spite of his purporting to be "Counsel for Joseph Kony".⁴ The issuance of the Impugned Decision on 6 November 2025 brought the confirmation proceedings,⁵ and Counsel's appointment with them, to an end. As the Chamber recalled in the Impugned Decision, Counsel was appointed only until the end of the confirmation hearing.⁶ Thus, the mandate of Counsel has ended.

3. Assuming, *arguendo*, that Counsel's appointment has not ended, his role within the proceedings still does not allow him to apply for leave to appeal the Impugned Decision.

¹ ICC-02/04-01/05-635.

² ICC-02/04-01/05-633.

³ See, for example, ICC-02/17-T-002-Eng ("Afghanistan Victims' Standing Oral Decision"), 3:15-21, ICC-02/17-137 ("Afghanistan Reasons for Oral Decision"), paras. 12, 14; ICC-01/09-01/20-107 ("Gicheru Rule 165 AD"), para. 32. See also ICC-01/09-01/20-68 ("Gicheru Rule 165 ALA Decision"), para. 24.

⁴ See Request, p. 20.

⁵ Impugned Decision, paras. 258-259.

⁶ Ibid, para. 259, referring to ICC-02/04-01/05-503.

4. *First*, the suspension of the time limit expressly and unequivocally vests Mr Kony (assisted by an appointed counsel of his choosing) with the opportunity to fully assess the advisability or feasibility of a request for leave to appeal the Impugned Decision.⁷

5. *Second*, and notwithstanding, it remains unclear whether Counsel's role in the proceedings allows him to seek leave to appeal the Impugned Decision, in the absence of instructions. By his own submissions at the confirmation hearing, it is clear that Counsel views his mandate as "paradoxical" and, having received no instructions, states that his role is "to ensure that Joseph Kony, and any counsel that he may subsequently retain to represent him, holds the greatest possible latitude to make arguments in relation to the Prosecution's case".⁸ It is precisely for this purpose – to ensure that Mr Kony holds the greatest possible latitude to appeal the Impugned Decision – that Counsel's Request should be dismissed *in limine*.

6. Similarly, as held by the Appeals Chamber of the Special Tribunal for Lebanon, *in absentia* Defence counsel, who have not been accepted by an accused, lack standing to file an appeal against a judgement issued *in absentia*.⁹ While this decision related to a trial *in absentia*, the underlying reasoning is pertinent in the current circumstances. This is because the Impugned Decision is an important procedural milestone in that it frames the charges against Mr Kony. Any potential future appeal should therefore be requested by a duly instructed counsel. As set out below,¹⁰ allowing Counsel to appeal the Impugned Decision could potentially deprive Mr Kony of a procedural remedy against the Impugned Decision in the future.

⁷ Ibid, para. 258.

⁸ ICC-02/04-01/05-T-016-CONF-ENG, p. 41-42, lns. 9-6.

⁹ 'Decision on Admissibility of "Notice of Appeal On Behalf of Mr Ayyash against Conviction and Sentence"', Appeals Chamber, *Prosecutor v. Ayyash*, STL-11-01/A-1/AC, para. 95. *See also* the submissions of Counsel, then as Representative of the Participating Victims, on the matter, "The Legal Representative of Victims Observations on the Standing of Counsel for Ayyash to File Notice of Appeal", *Prosecutor v. Ayyash*, STL-11-01/A-1/AC, para. 1 ("...there is no precedent anywhere in international or domestic criminal law which permits appeals to be brought in the name of absent accused by counsel, who necessarily has no instructions. *Presenting an appeal in such circumstances is thus both ultra vires counsel and unethical.*" (emphasis added)).

¹⁰ *See below*, para. 13.

B. The issues are not appealable

7. Even if, *arguendo*, Counsel still has standing to seek leave to appeal the Impugned Decision, his Request should be rejected on its merits for the reasons set out below.

8. The Request identifies two issues, which allegedly arise from the Impugned Decision:

First Issue: *Whether the Pre-Trial Chamber acted ultra vires by indefinitely postponing the time limit for requests for leave to appeal and/or by committing Mr Kony to a Trial Chamber in his absence under article 61(11) of the Statute (“First Issue”);*

Sub-Issue 1: *The Pre-Trial Chamber acted ultra vires by indefinitely postponing the time limit for leave to appeal requests (“Sub-Issue 1”);*

Sub-Issue 2: *The Pre-Trial Chamber acted ultra vires by committing Mr Kony to a Trial Chamber in his absence (“Sub-Issue 2”).*

Second Issue: *Whether the Pre-Trial Chamber erred by failing to subject the Prosecution’s case to sufficient or any scrutiny in in absentia confirmation proceedings (“Second Issue”).*

a. The First Issue is not an appealable issue arising from the Impugned Decision

9. The First Issue mischaracterises the Impugned Decision and, as such, does not genuinely arise from it. Counsel argues that the Chamber took “unprecedented steps outside the scope of its powers”,¹¹ presenting an exceptional circumstance that warrants granting leave to appeal. This argument misconstrues the Chamber’s approach and findings: the Chamber did not act *ultra vires* by suspending the time limit under rule 155, nor did it overstep the boundaries of its authority when committing Mr Kony to a Trial Chamber. Rather, the Chamber merely exercised its powers regulating *in absentia* confirmation proceedings.¹²

¹¹ Request, para. 32.

¹² Impugned Decision, para. 258.

Sub-Issue 1

10. With Sub-Issue 1, Counsel claims that the suspension of the time limit under rule 155 amounts to an indefinite stay of the proceedings, unduly limiting Mr Kony's right to appeal, which must be maintained in full.¹³ Counsel speculates that – given the likely elapse of time – it may be a differently composed Chamber, lacking in knowledge of the case, that will hear an appeal in the future.¹⁴ Further, Counsel alleges that the Impugned Decision violates rule 155(2) on notification to the parties.¹⁵ Finally, Counsel questions what event may trigger the time limit, and assumes that once it is triggered, only five days would remain.¹⁶

11. These arguments are unavailing and misconstrue the Chamber's ruling.

12. *First*, contrary to Counsel's arguments, the Impugned Decision does not amount to a stay of proceedings. Rather, as set out above,¹⁷ it simply marks the *end* of the proceedings in the absence of the Accused.¹⁸

13. *Second*, contrary to Counsel's representation of the Impugned Decision, the suspension of the time limit fully preserves Mr Kony's opportunities for legal remedy, to be exercised once he is arrested and surrendered. Far from furthering the rights and interests of Mr Kony, in purporting to request leave to appeal the Impugned Decision, Counsel risks extinguishing the right to a future appeal by a duly appointed counsel. In contrast, the suspension of the time limit fully preserves Mr Kony's opportunities for legal remedy.

Sub-Issue 2

14. With Sub-Issue 2, Counsel alleges that the Chamber "overstepped the boundaries of its authority" by committing Mr Kony to a Trial Chamber in his absence.¹⁹ He argues

¹³ Request, para. 25.

¹⁴ *Ibid.*, para. 26.

¹⁵ *Ibid.*, para. 27.

¹⁶ *Ibid.*, para. 28.

¹⁷ *See above*, para. 2.

¹⁸ Impugned Decision, paras. 258-259.

¹⁹ Request, para. 30.

that the Chamber erroneously relied on article 61(11) and rule 126, neither of which permit a Pre-Trial Chamber to take such action.²⁰ These arguments are unavailing as they misconstrue—or in any event merely express the Defence’s disagreement with—the Chamber’s ruling.

15. The Chamber’s wording, including its references to article 61(11) and rule 126(3), is wholly appropriate and consistent with that of other pre-trial chambers before it.²¹ In no way does it purport to assume the powers of the Presidency.²² Nor does the addition of the words “upon his surrender to and appearance before the Court”²³ have this effect. This is made abundantly clear by the Chamber’s reference to rule 126(3), which refers in turn to “the Trial Chamber established under article 61, paragraph 11”. The use of the past tense “established” means that the Chamber clearly envisaged that a trial chamber would be constituted by the Presidency already, to which Mr Kony would be committed upon his arrest or surrender. Further, the order to the Registry to transmit the Impugned Decision and the record of the proceedings to the Presidency to take all subsequent steps²⁴ also acknowledges the authority of the Presidency.

16. For these reasons, the First Issue does not amount to an appealable issue arising from the Impugned Decision.

b. The First Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would immediate resolution of the First Issue materially advance the proceedings

17. In addition, Counsel has failed to demonstrate that either sub-issue of the First Issue significantly affects the fair and expeditious conduct of the proceedings or the

²⁰ Ibid, paras. 29-31.

²¹ See, *inter alia*, ICC-01/14-01/21-218-Red (“Commits Mr Said to a Trial Chamber for trial on the charges as confirmed; Orders the Registrar to transmit this decision on the confirmation of charges and the record of these proceedings to the Presidency”); ICC-02/05-01/20-433-Corr (“Commits Mr Abd-Al-Rahman to a Trial Chamber for trial on the charges as confirmed; Orders the Registrar to transmit this decision on the confirmation of charges and the record of these proceedings to the Presidency.”).

²² Request, para. 30.

²³ Impugned Decision, p. 103.

²⁴ Ibid.

outcome of the trial, and that its immediate resolution would materially advance the proceedings.

18. To the contrary, an appellate intervention at this stage threatens to infringe upon Mr Kony's fair trial rights. Far from limiting the parties' ability to exercise their rights to appeal,²⁵ the Impugned Decision preserves Mr Kony's rights to be exercised in full – if he so wishes – at a time when he can fully assess the feasibility and advisability of seeking leave to appeal.

19. Counsel's arguments as to the suspension of the right to appeal amounting to an effective removal of the right²⁶ are premature and highly speculative. Such arguments assume that a future appointed Counsel would seek, and the Chamber in its future form would deny, an extension of the five-day limit to seek leave to appeal. The Chamber should not entertain the present Request on the basis of an imagined future prejudice that has not as yet materialised.

20. Finally, Counsel's submission that the first issue "would likely lead to significant litigation"²⁷ at later stage if not resolved now by the Appeals Chamber is equally speculative. It will be for Mr Kony, upon his arrest and surrender, to determine whether to seek leave to appeal the Impugned Decision and on which basis. It follows, for all the same reasons, that Counsel has failed to show that immediate resolution of the First Issue by the Appeals Chamber would materially advance the proceedings.

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

21. The Second Issue also mischaracterises the Impugned Decision and, as such, does not genuinely arise from it. Counsel incorrectly alleges that the Chamber "abdicated its responsibility rigorously to scrutinise the Prosecution's case."²⁸ Counsel purports to demonstrate this submission with several examples of alleged undemanding

²⁵ See Request, paras. 23, 33.

²⁶ See Ibid, paras. 34-35.

²⁷ Ibid, para. 37.

²⁸ See Ibid, para. 49.

approaches to the evidence,²⁹ and argues a lack of “specific findings of fact or law”.³⁰ Counsel submits that the Chamber’s responsibility to subject the charges and the evidence to rigorous scrutiny is higher when the person charged is not present to defend themselves,³¹ and that therefore, the Chamber has failed to issue a sufficiently reasoned decision.³² These arguments are unavailing as they misconstrue—or, in any event, merely express the Defence’s disagreement with—the Impugned Decision.

22. *First*, it is not correct that the Chamber departed from the appropriate and accepted legal standard in crafting the Impugned Decision. The Chamber set out in detail the nature, purpose and content of its confirmation of charges decision.³³ In application of the correct standard for this stage of the proceedings, it analysed the evidentiary material relied upon by the Prosecution and referenced in the Pre-Confirmation Brief following the structure of the amended Document Containing the Charges (“DCC”).³⁴ Each of the Impugned Decision’s sections relating to the assessment of the evidence includes references to the evidence the Chamber deemed pertinent as well as the Chamber’s conclusions on whether there is sufficient evidence underpinning each required legal element.³⁵ There is not one paragraph in the detailed section on the assessment of evidence in the Impugned Decision that does not reference evidence in a clear manner. That the Chamber rigorously scrutinised the Prosecution’s submitted evidence underpinning the charges as set out in the DCC is also evident from its correction of an inadvertent error in Count 15,³⁶ as well as its declining to confirm one ground of persecution in relation to one victim in Count 39.³⁷ Further, contrary to Counsel’s submissions,³⁸ recent confirmation decisions such as in the *Prosecutor v. Abd-Al-Rahman* follow a similar approach and style as the Impugned

²⁹ See *Ibid*, para. 47.

³⁰ See *Ibid*, para. 48.

³¹ See *Ibid*, para. 49.

³² See *Ibid*, para. 50.

³³ Impugned Decision, paras. 35-54.

³⁴ *Ibid*, para. 55.

³⁵ *Ibid*, paras. 64-257.

³⁶ *Ibid*, fn 75.

³⁷ *Ibid*, paras. 249-250.

³⁸ See Request, para. 43.

Decision.³⁹ In his submission, Counsel mischaracterises the Impugned Decision or, in the alternative, merely expresses his disagreement with the Chamber's sound scrutiny of the evidence presented by the Prosecution.

23. *Second*, the examples alleged by Counsel miscomprehend the Impugned Decision, and thus are unpersuasive. For instance, Annex B to the Prosecution's Pre-Confirmation Brief is not the Prosecution's List of Evidence, as asserted by Counsel,⁴⁰ but was submitted as a mere aid to the sections of the Pre-Confirmation Brief. The Chamber correctly relied on what was cited in the Pre-Confirmation Brief itself, as it expressly explained.⁴¹ Similarly, contrary to Counsel's claim,⁴² there can be no doubt about which logbook citations the Chamber referred to. As made clear at the outset of the section on assessment of evidence, the Chamber assessed in particular those logbook entries cited in the relevant sections of the Pre-Confirmation Brief.⁴³ Last, Counsel improperly conflates his disagreement with the Chamber about the use to be made of his substantive oral submissions with an alleged error in the Chamber's approach to evidence.⁴⁴ He does not even attempt to argue how this point is an example of an erroneous approach to evidence, yet includes it under this title nonetheless.

24. *Finally*, Counsel misconstrues that the Chamber insufficiently scrutinised the Prosecution's charges. On the contrary, each alleged crime is assessed both in terms of evidence and legal elements. The Chamber summarised its results in a clear and succinct manner with reference to the evidence of most relevance. As shown in the section on the systemic charges, the Chamber engaged in a more detailed assessment of whether the criteria of article 74(2) and 67(2)(b) were met by the Prosecution's charging approach where appropriate.⁴⁵ This section in particular evinces that the

³⁹ ICC-02/05-01/20-433-Corr.

⁴⁰ See Request, para. 47, first bullet point.

⁴¹ Impugned Decision, fn 82.

⁴² See Request, para. 47, second bullet point.

⁴³ Impugned Decision, para. 55.

⁴⁴ See Request, para. 47, third bullet point.

⁴⁵ Impugned Decision, paras. 181 – 242.

Chamber by no means “abdicated its responsibility” but instead rigorously scrutinised whether it could confirm the charges as framed. Further, that Counsel chose to limit his mandate,⁴⁶ cannot now serve to impose upon the Chamber a heightened standard to assess the evidence and scrutinise the charges, beyond that already foreseen by the legal framework of the Court, as Counsel seems to suggest in relation to *in absentia* proceedings.⁴⁷ For these reasons the Second Issue does not amount to an appealable issue arising from the Impugned Decision.

d. The Second Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would immediate resolution of the Second Issue materially advance the proceedings

25. In addition, Counsel failed to show that the Second Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and that its immediate resolution would materially advance the proceedings. First, as discussed above, contrary to Counsel’s arguments misrepresenting the Impugned Decision,⁴⁸ Mr Kony’s rights were not jeopardised. Further, Mr Kony’s rights are fully preserved as he can seek leave to appeal the Impugned Decision upon notification, should he be surrendered. Granting leave to appeal on the Second Issue would rather deprive Mr Kony of a vital legal remedy, which he could assess and chose to exercise together with a Defence counsel upon his instructions.

26. Finally, and for the same reasons, the Defence fails to show how the immediate resolution of the Second Issue would materially advance the proceedings. It will be for Mr Kony, upon his arrest and surrender, to determine whether to seek leave to appeal the Impugned Decision and on which basis.

⁴⁶ ICC-02/04-01/05-T-016-CONF-ENG, p. 41-42, lns. 9-11.

⁴⁷ Request, para. 49.

⁴⁸ Ibid, paras. 51-52.

III. Relief sought

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



Mame Mandiaye Niang, Deputy Prosecutor

Dated this 17th day of November 2025
At The Hague, The Netherlands