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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN UGANDA

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

Public

Prosecution's Response to the OPCD Request for Leave to Appeal the Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence (ICC-02/04-01/05-467)

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I. INTRODUCTION

1. The request by the Office of the Public Counsel for Defence (“OPCD”) for leave to appeal (“Request”)¹ the Chamber’s Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence (“Decision”)² should be dismissed in limine. The OPCD, which is not a party to the proceedings, has no standing to seek leave to appeal the Decision under article 82(1)(d) of the Statute.

2. But even if the Chamber were to find that the OPCD has standing, the Request should be dismissed on its merits since the issue raised for certification does not meet the requirements under article 82(1)(d) of the Rome Statute. The Request mischaracterises the Decision. Most importantly, the issue raised does not significantly affect the fair and expeditious conduct of the proceedings, nor would immediate appellate review materially advance the proceedings.

II. SUBMISSIONS

a. The Request should be dismissed in limine as the OPCD lacks standing to make the Request

3. The OPCD lacks standing under article 82(1)(d) to seek leave to appeal the Decision. As the Appeals Chamber has confirmed, the question of standing to seek leave to appeal is to be resolved by reference to the chapeau of article 82(1) which provides that “either party” may appeal certain decisions.³ The meaning of the term “either party” depends on the procedural context, taking into account the type of

¹ [ICC-02/04-01/05-467](#).

² [ICC-02/04-01/05-466](#).

³ 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.

decision that is the subject of the appeal.⁴ The OPCD fails to demonstrate that it is a party with standing to seek leave to appeal the Decision.

4. First, while the OPCD was permitted to provide observations on the Prosecution's request to hold a confirmation hearing in Mr Kony's absence,⁵ this does not equate to ongoing standing to seek leave to appeal the Decision under article 82(1)(d).⁶ As the Appeals Chamber has confirmed, simply because a participant was allowed to make representations before the Pre-Trial Chamber, that participant is not automatically a potential appellant once the Pre-Trial Chamber has issued a decision.⁷

5. Second, the fact that the Decision may hold significant precedential value is not a sufficient basis to claim standing in this case.⁸ While the Pre-Trial Chamber in Gicheru granted the OPCD standing to seek leave to appeal a decision that constituted a significant precedent,⁹ that finding was limited to the specific procedural context of that case.¹⁰ Moreover, unlike in Gicheru where the Single Judge of the Pre-Trial Chamber found that appellate intervention would provide legal certainty on the first-time application of a provisional Rule 165 in the Court,¹¹ appellate intervention is neither necessary nor appropriate at this stage, where—as further developed below—the Chamber has only issued a preliminary decision and is yet to order a confirmation hearing in Mr Kony's absence.

6. Third, the term “party” in the chapeau of article 82(1) should be read in conjunction with article 61(2), which expressly provides that the charged person may be represented by counsel if the Pre-Trial Chamber determines that this would be in the interests of justice. In the context of article 61(2) therefore, it is the Prosecutor and

⁴ [Afghanistan Victims' Standing Oral Decision](#), 3:15-21, [Afghanistan Reasons for Oral Decision](#), paras. 12, 14; [Gicheru Rule 165 AD](#), para. 32. See also [Gicheru Rule 165 ALA Decision](#), para. 24.

⁵ ICC-02/04-01/05-453 (“[Procedural Matters Order](#)”), para. 17, p. 8.

⁶ *Contra* [Request](#), para. 9.

⁷ [Afghanistan Victims' Standing Oral Decision](#), 4:7-10.

⁸ *Contra* [Request](#), para. 8.

⁹ [Gicheru Rule 165 ALA Decision](#), para. 26.

¹⁰ [Gicheru Rule 165 AD](#), paras. 35-36.

¹¹ [Gicheru Rule 165 ALA Decision](#), para. 26.

the charged person who are the two opposing parties to the proceedings and to whom the term “party” in the chapeau of article 82(1) applies,¹² not any other participant who was authorised to make representations in the interests of certain groups of persons.¹³ In this case, the OPCD has not been appointed to act for Mr Kony.¹⁴ Rather, it was only invited to file observations on the Prosecution’s request to hold a confirmation hearing in Mr Kony’s absence, concerning, inter alia, the impact of in absentia proceedings for Mr Kony and for suspects and accused in general before the Court.¹⁵ If the Chamber ultimately orders a confirmation hearing in this case under article 61(2), the Court’s legal framework contains adequate safeguards to ensure that Mr Kony’s rights are protected at that stage, such as through the possibility of permitting counsel to represent his interests under article 61(2), and the mechanism in Rule 126(3) of the Rules of Procedure and Evidence allowing Mr Kony, if arrested and the charges confirmed, to request that matters be referred to the Pre-Trial Chamber for the effective and fair functioning of the Trial Chamber.

7. The Request should therefore be dismissed in limine due to the OPCD’s lack of standing.

b. The Issue is not an appealable issue

8. Even if, arguendo, the OPCD has standing to seek leave to appeal the Decision, the Request should be rejected on its merits, for the reasons set out below.

9. The OPCD seeks leave to appeal the Decision in relation to one formulated issue (“Issue”):

Whether the Pre-Trial Chamber erred in law in failing to address and properly consider the primacy of Rome Statute rights of a suspect – namely Articles 55,

¹² ICC-01/09-01/11-1816-Red (“[Ruto & Sang Duty Counsel ALA Decision](#)”), para. 13.

¹³ See by analogy [Afghanistan Reasons for Oral Decision](#), paras. 19-21 (reaching this conclusion in relation to the victims lack of standing to seek leave to appeal decisions issued under article 15).

¹⁴ [Procedural Matters Order](#), para. 16.

¹⁵ [Procedural Matters Order](#), paras. 16-17.

66, and 67 – in establishing a novel legal framework for a confirmation of charges hearing in absentia pursuant to Article 61(b)(2).

10. The Issue raised mischaracterises the Decision and therefore does not genuinely arise from it.¹⁶ The Chamber properly assessed Mr Kony's rights within the legal framework of article 61(2)(b) of the Statute. In fact, the rights of the suspect are at the heart of the Decision.

11. Contrary to the submissions by the OPCD, the Chamber made Mr Kony's rights the centrepiece of its reasoning, including by extensively addressing the OPCD's submissions made in advance of its Decision.¹⁷ This is also reflected in the Chamber's numerous references to the core rights of the suspect and the exceptional nature of an in absentia confirmation proceeding.¹⁸ An alleged "failure to enumerate the fair trial rights held by the suspect"¹⁹ is therefore a mischaracterisation of the Decision's reasoning, as is the assertion that the Decision focusses excessively on "the gravity of the alleged crimes and the alleged role of the suspect in their perpetration; the rights of and the impact on the victims; and the prospect of advancing the case".²⁰

12. The OPCD also mischaracterises the Decision in submitting that the Chamber did not properly balance fair trial rights with the interests of justice.²¹ To the contrary, rather than moving straight into confirmation in absentia proceedings as requested by the Prosecution, the Chamber determined that further steps were required to adequately ensure the rights of the suspect in such proceedings. It held that the Prosecution would first have to submit a Document Containing the Charges and that the Prosecution and Registry would have to take necessary and adequate steps to inform the suspect of the charges.²² Only then can the Chamber decide whether to

¹⁶ 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.

¹⁷ [Decision](#), paras.17-19.

¹⁸ [Decision](#), para. 37.

¹⁹ [Request](#), paras. 12, 15.

²⁰ [Request](#), para. 18.

²¹ [Request](#), para. 17.

²² [Decision](#), para. 49.

hold such a hearing. Therefore, the Chamber made clear that its Decision is preliminary precisely to safeguard Mr Kony's fundamental rights under the Statute.²³ In this regard, the proposed Issue also fails to genuinely arise from the Decision, because the Chamber has yet to make any final determination that confirmation of charges will in fact proceed in Mr Kony's absence. Until such decision is rendered, the question of whether a confirmation hearing will be held in Mr Kony's absence remains speculative. The Appeals Chamber does not have any advisory function to render decisions on hypothetical questions.²⁴

c. The Issue would not significantly affect the fair and expeditious conduct of the proceedings

13. In addition, the OPCD fails to demonstrate that the Issue would significantly affect the fair conduct of the proceedings.²⁵ Its argumentation on this point is circular. First, the Decision does not create "new law on a new in absentia framework"²⁶ but assesses whether the existing criteria of article 61(2)(b) are met in this concrete case. Second, the Chamber requires further steps to be taken before it renders a decision on whether to hold a confirmation hearing in absentia against Mr Kony. These required steps are all geared precisely to ensuring that Mr Kony has been adequately informed of the charges, in protection of his rights. The Request was therefore filed wholly prematurely, based on mere speculation in the abstract that the Decision might eventually cause prejudice to the rights of the suspect.²⁷

14. The Request also fails to demonstrate that the Issue would significantly affect the expeditious conduct of the proceedings within the meaning of article 82(1)(d). The

²³ [Decision](#), para. 51.

²⁴ [ICC-01/04-503](#), para. 30, citing [ICC-01/04-01/07-3132](#), para. 7; [ICC-01/04-01/06-3026](#), para. 4.

²⁵ [ICC-01/04-168](#), para. 11.

²⁶ [Request](#), para. 25.

²⁷ See [ICC-01/04-168](#), para. 10; [ICC-02/04-01/05-316](#), p. 6; [ICC-01/09-02/11-211](#), para. 33 and 39; [ICC-01/09-02/11-88](#), para. 25, *see also* paras. 23-27; [ICC-01/04-01/06-2109](#), para. 22; [ICC-01/05-01/08-680](#), para. 36; [ICC-01/09-02/11-275](#), paras. 28-29; [ICC-01/09-01/11-301](#), para. 30.

OPCD argues that the Decision sets out a “brand-new procedure” which “contains errors of law affecting the fairness and outcome of the proceedings”.²⁸ The OPCD does not, however, advance any arguments on how the issue specifically affects the expeditiousness of the proceedings. The Prosecution submits that the expeditious conduct of proceedings means the timely and efficient conduct of proceedings, avoiding unnecessary delay.²⁹ An appeal at this stage will not serve the expeditious conduct of the proceedings at all, given that no decision has yet been rendered on whether to hold a confirmation hearing. Rather, an appeal will create unnecessary delay.

d. Immediate resolution of the Issue by the Appeals Chamber would not materially advance the proceedings

15. Finally, the last criteria of article 82(1)(d) is not met either.³⁰ The OPCD fails to present any argument to show that the immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings. The opposite would be the case, as the Decision is preliminary, further steps need to be taken before a final determination is made, and therefore an appeal would actually cause unnecessary delay in the proceedings.

²⁸ [Request](#), para. 27.

²⁹ [ICC-01/04-01/07-2259](#), paras. 43, 45, 47; [ICC-01/04-01/06-1487](#), para. 15 (Judge Pikis Diss. Op.).

³⁰ This requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.” See [ICC-01/04-168](#), paras. 14-15, 18.

III. RELIEF SOUGHT

16. For the reasons set out above, the Prosecution respectfully requests that the Pre-Trial Chamber dismiss the Request in limine on the basis that the OPCD lacks standing to make the Request.

17. In the alternative, should the Chamber find that the OPCD has standing, the Prosecution requests that the Chamber dismiss the Request on its merits.



Karim A.A. Khan KC, Prosecutor

Dated this 4th day of December, 2023
At The Hague, The Netherlands