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No.: ICC-02/05-01/20

Date: 11 January 2021

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

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

Public

**Prosecution’s Response to “Demande d’autorisation d’interjeter appel de la
Décision ICC-02/05-01/20-238”**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Pre-Trial Chamber II (“Pre-Trial Chamber” or “Chamber”) should dismiss the Defence’s request for leave to appeal¹ the “Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits”² (“Impugned Decision”) because neither issue raised for certification is appealable within the meaning of article 82(1)(d) of the Rome Statute.

2. The proposed issues either misread the Impugned Decision and/or are premised on a mere disagreement with it and therefore do not constitute appealable issues.³

II. SUBMISSIONS

3. Mr Abd-Al-Rahman seeks leave to appeal the Impugned Decision in relation to two issues proposed for certification.⁴ The first issue – as framed by the Defence – relates to the Chamber’s alleged abuse of discretion in modifying what the Defence claims are previous *res judicata* decisions and to whether the Chamber abused its authority by granting the Prosecution’s request and postponing the confirmation hearing, despite having found that the Prosecution failed to comply with the Chamber’s instructions.⁵ The Defence goes on to assert that the Chamber creates the perception that its decisions can be modified *ad nauseam* to satisfy the procedural needs of the Prosecution and that it has lost all control over the conduct of the preliminary phase of the proceedings.⁶

¹ [ICC-02/05-01/20-245](#) (“Request”).

² [ICC-02/04-01/15-238](#) (“Impugned Decision”).

³ [ICC-01/04-168 OA3](#), para. 9; *see also* [ICC-01/05-01/13-801](#), 23 January 2015, para. 12; [ICC-02/11-01/15-1051](#), 11 October 2017, paras. 5-7.

⁴ [Request](#), para. 16.

⁵ [Request](#), para. 20.

⁶ [Request](#), paras. 20, 23-24 (“[La Chambre Préliminaire II] crée la perception que ses décisions peuvent être remises en cause *ad nauseam* pour satisfaire aux besoins procéduraux du BdP sans qu’il soit nécessaire à ce dernier de justifier d’un quelconque motif raisonnable [...] l’Honorable Chambre Préliminaire II a en réalité perdu tout contrôle sur le déroulement de la phase préliminaire, entièrement dicté par les besoins et/ou desiderata du BdP.”).

4. The second issue – as framed by the Defence – is whether the Chamber can postpone the confirmation hearing anew on the basis of witness security concerns alone after having noted that the Prosecution cannot protect witnesses located in Sudan.⁷

5. In relation to both issues the Defence either misrepresents the record and/or simply disagrees with the Impugned Decision, failing to demonstrate the existence of an appealable issue genuinely arising from it.

A. Preliminary matter

6. As a preliminary matter, the Prosecution wishes to correct the Defence's misstatement of the record in relation to the Prosecution's disclosure on 7 December 2020.

7. Contrary to the Defence's assertion,⁸ the Prosecution regrettably was not able to fully comply with the first postponement decision,⁹ which required that it disclose all core witnesses to be relied upon at the confirmation hearing, by 7 December 2020. In its second postponement request,¹⁰ the Prosecution informed the Chamber that it would unfortunately not be in a position to fully meet this deadline. Instead, on 7 December 2020, the Prosecution disclosed the items relied upon to establish a link between Mr Abd-Al-Rahman and Mr Ali Kushayb, as ordered by the Chamber, together with *some* core witness statements cited in the arrest warrant applications and/or to be relied upon at the confirmation hearing.¹¹

⁷ [Request](#), para. 30.

⁸ [Request](#), para. 7 (“*le BdP s’acquittait avec succès des tâches qui lui incombait en vertu de la Décision de Report pour cette première échéance*”).

⁹ [ICC-02/05-01/20-196](#), paras. 38, 43.

¹⁰ [ICC-02/05-01/20-218-Red](#), paras.4, 19 (“Second Postponement Request”).

¹¹ [ICC-02/05-01/20-225](#), para. 4 (“The Prosecution informs the Single Judge that in these INCRIM packages, all items are either relied upon by the Prosecution for the purpose of establishing the link between Abd-Al-Rahman and Ali Kushayb and/or cited in the first and second Arrest Warrant applications and/or will be relied upon at the confirmation hearing”).

8. In the Impugned Decision, the Chamber set a new deadline of 29 March 2021 for the disclosure of this evidence.¹² The Defence's contention that the Prosecution could have dispensed with requesting additional time¹³ is therefore clearly incorrect.

B. The proposed issues do not constitute appealable issues

(i) The first issue

9. The first issue proposed for certification is not appealable within the meaning of article 82(1)(d) of the Rome Statute as it not only misconstrues the Impugned Decision but also merely expresses the Defence's disagreement with it.

10. *First*, the Defence's arguments are predicated on the incorrect assumption that the Chamber reconsidered previous final, *res judicata*, decisions.¹⁴ While the Prosecution takes the position that a Chamber may, in appropriate circumstances, reconsider previous (final) decisions,¹⁵ the Defence wrongly asserts that the Chamber had made a final, *res judicata*, determination in relation to the deadlines related to the confirmation hearing. In reaching that conclusion, the Defence misconstrues both the 4 December 2020 email from the Pre-Trial Chamber to the Parties¹⁶ and the Impugned Decision, by taking into account only part of the Chamber's reasoning.

11. Far from taking a final decision, the Chamber, in the 4 December 2020 email, merely issued "instructions". These instructions indicated that the Prosecution's second request to postpone the confirmation hearing and related deadlines¹⁷ would be considered in relation to the date of the confirmation hearing only and that all other deadlines remained applicable. The Chamber instructed the Prosecution that it may apply in writing to extend the other deadlines pursuant to regulation 35 of the Regulations of the Court.¹⁸ It also directed the Defence to file its response to the Prosecution's second postponement request within the statutory deadlines, thereby

¹² [Impugned Decision](#), para. 46. *See also*, Request, para.18.

¹³ [Request](#), para. 7.

¹⁴ The principle of *res judicata* only applies *inter partes* in cases where a matter has already been finally determined within the case. [Kajelijeli Appeal Judgement](#), para. 202.

¹⁵ Despite its arguments, the Defence seems to agree with the Prosecution on this point. *See*, [Request](#), para. 20.

¹⁶ Email from the Chamber to the Parties, 4 December 2020, 13:29.

¹⁷ [Second Postponement Request](#).

¹⁸ Impugned Decision, para, 10. *See also*, the Email from the Chamber to the Parties, 4 December 2020, 13:29.

giving the Defence an opportunity to be heard before taking a final decision. The language of the Chamber's 4 December 2020 email therefore clearly indicates that the Pre-Trial Chamber did not intend to issue a final, *res judicata* decision in relation to the deadlines related to the confirmation hearing.

12. The Defence's assertion that the Pre-Trial Chamber dismissed the Prosecution's request for variation of time limits in the Impugned Decision is equally incorrect.¹⁹ The Pre-Trial Chamber notes, in paragraph 41 of the Impugned Decision, that the Prosecution, in relation to the 7 December 2020 disclosure of witness statements it intends to rely upon for the confirmation hearing, "has failed to provide a convincing explanation for why it has failed to comply with the Chamber's instructions."²⁰

13. With regard to the other deadlines related to the confirmation hearing, the Chamber went on to find that the new schedule outlined in the Impugned Decision renders the Prosecution's Regulation 35 request of 11 December 2020 in relation to these deadlines²¹ "moot".²² Nowhere in the Impugned Decision does the Chamber reject the Prosecution's requests for additional time in relation to the deadlines related to the confirmation hearing, as the Defence contends.²³ Thus, Defence's arguments that the Pre-Trial Chamber made a final, *res judicata*, determination in relation to the extension of time limits related to the confirmation hearing, is based on a selective and piecemeal reading of the Chamber's email and the Impugned Decision. The first issue proposed for certification should be dismissed on that basis alone.

¹⁹ [Request](#), para. 19.

²⁰ [Impugned Decision](#), paras 40-42, which refers to the Chamber's finding in para. 25, which provides as follows: "As regards the 4 December 2020 Request, the Chamber notes that the Prosecutor should have notified the Chamber sufficiently in advance if the Prosecutor was unable to meet the deadline and should have provided concrete and specific examples demonstrating the concern that redactions would make the statements 'of limited value to the preparation of the Defence case'. The Chamber notes, furthermore, that the Prosecutor's 4 December 2020 Request does not even address this issue. The Chamber therefore cannot but conclude that the Prosecutor has violated the Chamber's instructions".

²¹ [ICC-02/05-01/20-228](#).

²² [Impugned Decision](#), paras. 40-42.

²³ [Request](#), para. 19.

14. *Second*, the Defence's related claim that the Pre-Trial Chamber abused its authority by failing to adequately reason the Impugned Decision and to take the appropriate measures to remedy the Prosecution's violations of the Chamber's instructions,²⁴ are unfounded and should be dismissed. Here, the Defence is simply expressing its disagreement with the finding and conclusion of the Impugned Decision and has failed to point to any provision under the Court's framework that would support its claim. As stated by the Pre-Trial Chamber, mere disagreements with a Chamber's decision do not constitute a sufficient basis for a leave of appeal.²⁵

15. Furthermore, the Impugned Decision specifically considered the suspect's right to appear swiftly before the Pre-Trial Chamber and the need to limit his pre-trial detention to that which is strictly necessary.²⁶ It further balanced these rights against the Court's obligations towards the protection of victims and witnesses.²⁷

16. In addition, contrary to the Defence's contention,²⁸ the Chamber's indication that the Prosecution has failed to provide a convincing explanation in relation to its failure to meet one of the judicial deadlines does not necessarily entail that it should sanction the Prosecution or rule in favour of the Defence. The Defence's Requests again merely disagrees with the Chamber's exercise of its discretion.

17. Finally, the Defence's allegation that the Chamber has lost all control over the conduct of the preliminary phase proceedings²⁹ is utterly baseless. The Defence is drawing unwarranted conclusions and simply attempting to substitute its own judgment with that of the Chamber. As previously stated by the Prosecution, these sweeping, abstract and recurring claims of bias on the part of the Chamber by the Defence cannot not be given any weight and should be dismissed.³⁰

(ii) *Second issue*

²⁴ [Request](#), paras. 20, 23, 25.

²⁵ [ICC-02/05-01/20-202](#), para.10.

²⁶ [Impugned Decision](#), para. 16.

²⁷ [Impugned Decision](#), para. 16.

²⁸ [Request](#), para. 23.

²⁹ [Request](#), para. 20.

³⁰ [ICC-02/05-01/20-193](#), paras.7-8.

18. The second issue proposed for certification – of whether the Pre-Trial Chamber could again postpone the date of the confirmation hearing, based on witness safety and security concerns alone, when it had concluded that the Prosecution was unable to protect those witnesses,³¹ – again fails to identify an appealable issue within the meaning of article 82(1)(d) of the Rome Statute. To the contrary it repeats arguments that have previously been addressed by the Chamber and misconstrues the findings of the same.

19. The Defence merely repeats arguments that have already been raised not only in its “*Réponse aux requêtes ICC-02/05-01/20-218-Red et ICC-02/05-01/20-228*”³² and addressed by the Chamber in the Impugned Decision³³ but also litigated in the Request.³⁴ Arguments to the effect that the Pre-Trial Chamber was required to sanction the Prosecution for its non-compliance with the Chamber’s instructions, and could not simply postpone the date of the confirmation hearing and related deadlines in light of said non-compliance, have already been exhaustively litigated by the Defence and addressed by the Chamber and should not be entertained anew here. As stated by the *Bemba* Trial Chamber, interlocutory appeals “are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber decisions.”³⁵

20. Moreover, the Defence misreads the Impugned Decision when stating that the Chamber found the Prosecution to be unable to protect witnesses in Sudan.

21. In the Impugned Decision, the Chamber deemed that the Defence’s arguments in this regard were “misplaced”³⁶ and rejected them after due consideration. The Impugned Decision specifically found, contrary to the Defence’s claim, that “there is

³¹ [Request](#), para. 30.

³² [ICC-02/05-01/20-229](#), paras. 25-28.

³³ [Impugned Decision](#), paras. 20-25.

³⁴ [Request](#), paras. 23, 25, 29 and 31.

³⁵ [ICC-01/05-01/13-T-10-CONF-ENG](#) (open session), p.11, ll. 6-8. See also [ICC-02/04-01/15-1176](#), 12 February 2018, para. 10 ([T]he question of the accused’s understanding of the charges has already been ruled upon by the Chamber and this amounts to an attempt by the Defence’s own admission [...] to re-litigate matters already decided well before the Impugned Decision was rendered [...]. Accordingly, the Chamber also rejects the Request for Leave to Appeal on the Fourth Issue”; see also, [ICC-02/11-01/11-307](#), para.70; [ICC-01/04-02/06-604](#), para.17.

³⁶ [Impugned Decision](#), para. 24.

hope of making some significant further progress in the relatively near future in relation to the 23 witnesses whose security situation has not been resolved” and further noted that “it is not the case that the security-related concerns mentioned by the Prosecutor are linked solely or even primarily to the witnesses inside Sudan.”³⁷ Accordingly, the second issue proposed for certification by the Defence misreads the Impugned Decision.

22. In sum, none of the proposed issues qualify as appealable issues within the meaning of article 82(1)(d) of the Rome Statute. Given that article 82(1)(d) criteria are cumulative, and that failure to fulfill one of the criteria is fatal to an application for leave to appeal,³⁸ the Request should be rejected on that basis alone.

C. The remaining article 82(1)(d) criteria are not met

23. Assuming, for the sake of argument, that the proposed issues constitute appealable issues within the meaning of article 82(1)(d), neither of the remaining two cumulative criteria for an interlocutory appeal are met.

24. *First*, the issues proposed for certification would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. Indeed, the Defence has failed to show how the postponement of the confirmation hearing and related deadlines by a mere three months would *significantly* affect the fair and expeditious conduct of the proceedings. On the contrary, further litigation on the issue would potentially delay the proceedings for a longer period of time.

25. *Second*, in order support its claim that the issues proposed for certification would materially affect the conduct of the proceedings, the Defence argues that the resolution of those issues would prevent the setting aside of the preliminary phase of the proceedings and/or cure any defects that might lead to such result.³⁹ The Defence appears to be alluding to potential upcoming litigation in relation to the Impugned Decision. However, as stated by the *Ongwen* Trial Chamber, “[t]he Defence cannot

³⁷ [Impugned Decision](#), paras. 23-24.

³⁸ [ICC-01/05-01/08-3273](#), para. 8; [ICC-02/11-01/15-117](#), para. 26; [ICC-02/11-01/15-132](#), para. 5.

³⁹ [Request](#), paras. 25.

use its own litigation strategy and the prospect of its own further complaints as affecting the expeditious conduct of the proceedings.”⁴⁰ The Trial Chamber’s reasoning in *Ongwen* equally applies to the question of whether an immediate resolution of the issue would “materially advance the proceedings” under article 82(1)(d) of the Rome Statute.

III. CONCLUSION

26. For the foregoing reasons, the Pre-Trial Chamber should reject the Request.



James Stewart
Deputy Prosecutor

Dated this 11th day of January 2021

At The Hague, the Netherlands

⁴⁰ [ICC-02/04-01/15-1259](#), para. 19.