

**Cour
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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 Motoc
Judge Haykel Ben-Mahfoudh

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

THE PROSECUTOR v. JOSEPH KONY

Public

Kony Defence request for leave to appeal “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”

Source: Defence for Mr Joseph Kony

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

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I. INTRODUCTION

1. Pre-Trial Chamber III's ("the Pre-Trial Chamber") Decision on the criteria for holding confirmation of charges proceedings *in absentia* ("Impugned Decision") will change fundamentally the operations of the International Criminal Court ("ICC").¹ All previous confirmation hearings, trials and appeals before the ICC have been conducted, absent a waiver from the person concerned, in the presence of the suspect and/or accused. The Impugned Decision has found, for the first time in the Court's history, that a confirmation hearing can be conducted without their participation or appearance.

2. The central legal error upon which this conclusion is based, and for which leave to appeal is sought, is the Pre-Trial Chamber's interpretation of Articles 60(1) and 61(2)(b) of the Statute of the ICC. Article 60(1) expressly provides, without exceptions, that "the person" against whom charges are to be confirmed must have made an initial "appearance before the Court". The second alternative of Article 61(2)(b), providing for a confirmation hearing when a person "cannot be found", can be interpreted perfectly consistently with this requirement, while remaining an alternative to the situation of a person who has "fled". The Pre-Trial Chamber erred by adopting an interpretation of "cannot be found" that contradicts the express terms of Article 60(1). In addition to this issue, leave to appeal is also sought in respect of the Pre-Trial Chamber's failure to define a standard of review of Pre-Trial Chamber II's previous decisions on the issue, which impermissibly shifted the burden to the Defence, and its failure to consider relevant factors in determining whether there is "cause" to hold such an *in absentia* hearing.

3. Each of the three issues is appealable. They arise from the Impugned Decision; they significantly affect the fair and expeditious conduct of proceedings; and their immediate resolution may materially advance the proceedings. The expenditure of resources and impact on the credibility of the Court could not be remedied by later appellate review should the Appeals Chamber find that the confirmation hearing, once concluded, was conducted outside of the Court's legal framework. This is particularly the case in respect of a decision that implicates the exercise of a person's fundamental rights, which favours immediate appellate

¹ [Decision on the criteria for holding confirmation of charges proceedings in absentia](#), ICC-02/04-01/05-532, 29 October 2024 ("Impugned Decision").

review.² Furthermore, as the confirmation procedure purports to set irreversibly the framework for any future trial against Mr Kony,³ the propriety of that procedure must be assessed now to avoid irremediable error.⁴ Finally, an immediate decision by the Appeals Chamber would serve as appellate precedent for future cases, should the Prosecution again seek to confirm charges against other absent suspects who have not made an initial appearance before the Court.

4. Should the Pre-Trial Chamber consider that the formulation of any of these issues is deficient or defective, it is invited to make any modifications thereto as are deemed necessary and appropriate, as permitted.⁵

II. PROCEDURAL HISTORY

5. On 23 November 2023, Pre-Trial Chamber II, in its previous composition, issued its “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence” (“First Decision”),⁶ as a result of which it instructed “the Registry to submit a plan indicating the outreach activities and notification efforts it would pursue to inform Mr Kony of the charges against him”.⁷ This plan was filed on 19 December 2023.⁸

6. On 29 November 2023, the Office of the Public Counsel for the Defence requested leave to appeal the First Decision on the issue of whether Pre-Trial Chamber II had erred in law “in failing to address and properly consider the primacy of Rome Statute rights of a suspect – namely Articles 55, 66 and 67 – in establishing a novel legal framework for a confirmation of charges hearing *in absentia*”.⁹ On 11 December 2023, Pre-Trial Chamber II rejected this

² *Prosecutor v. Bemba et al.*, [Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.”](#), ICC-01/05-01/13-1533, 23 December 2015, para. 16.

³ See e.g. [Public Redacted Version of the “Prosecution’s Request to hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”](#), ICC-02/04-01/05-446-Red, 24 November 2022, para. 36 (“Prosecution Request on in absentia Confirmation of Charges Hearing”); [Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence](#), ICC-02/04-01/05-466, 23 November 2023, para. 65 (“First Decision”).

⁴ *Prosecutor v. Yekatom & Ngaïssona*, [Decision on the Yekatom Defence Request for Leave to Appeal the Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial](#), ICC-01/14-01/18-730, 13 November 2020, para. 8 (“Decision on the Yekatom Defence Request for Leave to Appeal”).

⁵ [Decision on the Yekatom Defence Request for Leave to Appeal](#), paras 14-15; *Prosecutor v. Ruto & Sang*, [Decision on the Defence’s Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”](#), ICC-01/09-01/11-1953-Red-Corr, 10 September 2015, para. 20.

⁶ [First Decision](#).

⁷ *Id.*, para. 57.

⁸ [Registry’s Proposed Plan on Outreach Activities and Notification Efforts](#), ICC-02/04-01/05-473-Conf-AnxI, 19 December 2023.

⁹ [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, 29 November 2023.

request, on the basis that a final determination as to whether to hold a confirmation of charges hearing *in absentia* was yet to be made.¹⁰

7. On 19 January 2024, the Prosecution submitted the Document Containing the Charges (“DCC”).¹¹

8. On 26 January 2024, Pre-Trial Chamber II issued the “Order to initiate notification efforts and related outreach activities”, in which it instructed the Registry to use the DCC and a summary of the DCC provided by the Chamber to initiate its proposed plan on notification efforts and outreach activities, and to take all reasonable steps to inform Mr Kony of the charges against him as described in the DCC.¹²

9. On 23 February 2024, the Registry filed a Report on its notification efforts and outreach activities,¹³ in which it detailed the outreach activities and notification efforts undertaken to inform the suspect of the DCC, annexing the notification of the request for assistance sent to the Republic of Uganda and subsequent response from the authorities of Uganda.¹⁴

10. On 4 March 2024, Pre-Trial Chamber II issued the Second Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case, in which set the date of 15 October 2024 for the commencement of the hearings and instructed the Registry to “initiate notification efforts and outreach activities in respect of the date for the commencement of the confirmation of charges hearing” (“Second Decision”).¹⁵

11. On 12 March 2024, the Presidency reassigned the situation in Uganda from Pre-Trial Chamber II to Pre-Trial Chamber III.¹⁶

¹⁰ [Decision on 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-02/04-01/05-470, 11 December 2023, paras 23-24.

¹¹ [Document Containing the Charges](#), ICC-02/04-01/05-474, 19 January 2024.

¹² [Order to initiate notification efforts and related outreach activities](#), ICC-02/04-01/05-475, 26 January 2024.

¹³ [Report on the Registry’s implementation of the proposed Plan on outreach activities](#), ICC-02/04-01/05-479-Conf-AnxI, 23 February 2024.

¹⁴ *Id.*

¹⁵ [Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence](#), ICC-02/04-01/05-481, 4 March 2024 (“Second Decision”).

¹⁶ [Decision assigning judges to divisions and recomposing Chambers](#), ICC-02/04-01/05-485, 12 March 2024.

12. On 25 March 2024, the Registry submitted its Report on the implementation of the Second Decision,¹⁷ detailing its best efforts with regards to outreach activities and notification in respect of the date for the commencement of the confirmation of charges hearing.¹⁸

13. On 2 May 2024, the Single Judge of the Pre-Trial Chamber set deadlines for Counsel for Mr Kony to file certain observations and responses following appointment.¹⁹ On 21 June 2024, Peter Haynes KC was appointed as Counsel to represent the rights and interests of Joseph Kony during the confirmation proceedings.²⁰ Mr Haynes's appointment became public on 24 June 2024.²¹

14. On 28 August 2024, the Defence filed its Observations on holding a confirmation of charges hearing *in absentia*, in which it argued, *inter alia*, that Pre-Trial Chamber II erred in its interpretation of Article 61(2)(b) of the Statute; that the notification requirements had not been met, and that factors relevant to whether there was "cause" to hold an *in absentia* confirmation hearing were not considered.²² The Prosecution sought leave to reply to those observations on 2 September 2024,²³ and filed its reply on 5 September 2024.²⁴ The Defence responded to those submissions on 9 September 2024.²⁵

15. On 12 September 2024, having received submissions from the Defence, the Prosecution and Victims Representatives on this matter,²⁶ the Pre-Trial Chamber vacated the date of 15 October 2024 for the confirmation hearing *in absentia* until further notice.²⁷

¹⁷ [Registry's Report on the implementation of "Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence" dated 4 March 2024 \(ICC-02/04-01/05-481\)](#), ICC-02/04-01/05-488, 25 March 2024.

¹⁸ *Id.*

¹⁹ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024 ("Decision on the Procedure for Appointing Counsel").

²⁰ [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, 21 June 2024.

²¹ *Id.*

²² [Defence Observations on the Decision to hold an in absentia confirmation of charges hearing](#).

²³ [Prosecution's Request for Leave to Reply to Defence Observations](#), ICC-02/04-01/05-518, 2 September 2024; [Kony Defence Response to Prosecution's Request for Leave to Reply to Defence Observations](#), ICC-02/04-01/05-519, 3 September 2024; [Annex 26 to the Report on decisions and orders issued by way of email for the period November 2022 – September 2024](#), ICC-02/04-01/05-530-Anx26, 25 October 2024.

²⁴ [Prosecution's Reply to Defence Observations](#), ICC-02/04-01/05-520-Conf, 5 September 2024.

²⁵ [Kony Defence Reply to Prosecution's Submissions in Response to Defence Observations](#), ICC-02/04-01/05-524-Conf, 9 September 2024.

²⁶ [Victims' observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-521, 6 September 2024; [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), ICC-02/04-01/05-522, 6 September 2024; [Prosecution's observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-523, 6 September 2024.

²⁷ [Decision Postponing the Confirmation of Charges Hearing](#), ICC-02/04-01/05-526, 12 September 2024.

16. On 29 October 2024, the Pre-Trial Chamber rendered the Impugned Decision, considering the Defence observations in relation to the factual and legal findings of the First and Second Decisions, and any additional findings which were still outstanding and necessary.²⁸ The Pre-Trial Chamber held that: (i) Mr Kony is a person who “cannot be found” within the meaning of Article 61(2)(b) of the Statute; (ii) all reasonable steps have been taken to inform him of the charges and original date of the confirmation hearing, and (iii) there is cause to hold the confirmation of charges hearing *in absentia*. The Impugned Decision added that, once a new date for the confirmation hearing is set, the Registry must immediately undertake notification and outreach activities of the same nature, variety, and range of those carried out in relation to the October 2024 date, complete those activities within 30 days, and report to the Chamber within one week of their completion.²⁹

III. APPLICABLE LAW

17. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

18. The Appeals Chamber has defined an “issue” as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”³⁰ “Essential” in this context is understood as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”³¹ A right of appeal will arise only if, in the Chamber’s opinion, the impugned decision “must receive the immediate attention of the Appeals Chamber.”³²

²⁸ [Impugned Decision](#).

²⁹ *Id.*, paras 95, 97, 104-105 (*inter alia*).

³⁰ *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), ICC-01/04-168, 13 July 2006, para. 9 (“DRC Judgment on Application for Extraordinary Review”).

³¹ *Prosecutor v. Lubanga*, [Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008](#), ICC-01/04-01/06-1191, 26 February 2008, para. 8 (“*Lubanga* Decision on Leave to Appeal”).

³² [DRC Judgment on Application for Extraordinary Review](#), para. 20.

19. An appealable issue may be “legal or factual or a mixed one.”³³ Issues that have previously been recognised as appealable include alleged errors of law and fact in relation to the Chamber’s interpretation of the Statute³⁴ and whether the Chamber erred in the exercise of its discretion.³⁵

IV. DEFENCE SUBMISSIONS AS TO APPEALABLE ISSUES

A. Issue 1: 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”)

20. The First Decision and Second Decision (“the Decisions”) were rendered before Counsel for Mr Kony had been appointed. On 2 May 2024, the Single Judge invited Counsel to “provide observations, if any” on the Decisions.³⁶ At a Status Conference on 23 July 2024, the Single Judge recalled that the prior Pre-Trial Chamber II had already found that several of the criteria for conducting an *in absentia* confirmation of charges hearing had been met, and that the newly composed Pre-Trial Chamber III would determine in due course whether the “final criterion” had been fulfilled.³⁷ There was no indication that the new Pre-Trial Chamber would revisit and review the earlier findings on the other criteria, nor, if so, on what basis. Nevertheless, the Defence was ethically bound to draw the Pre-Trial Chamber’s attention to several fundamentally flawed findings of law and fact in the Decisions, and invite the new Pre-Trial Chamber to reconsider them.³⁸

21. Rather than limiting itself to this final criterion, the Pre-Trial Chamber adopted a different procedure. In the Impugned Decision, the Pre-Trial Chamber professes to make a “final determination” on whether “all the requirements” for the confirmation of charges hearing have been met,³⁹ purporting to assess each criteria anew “in light of Pre-Trial Chamber II’s findings”.⁴⁰ Essentially, therefore, it conducted an appellate-style review of another Pre-Trial

³³ [DRC Judgment on Application for Extraordinary Review](#), para. 9.

³⁴ *E.g.*, *Prosecutor v. Abd-Al-Rahman*, [Decision on Defence’s request for leave to appeal the decision on the admissibility of a video](#), ICC-02/05-01/20-894, 8 March 2023, paras 16-17 (“*Abd-Al-Rahman* Decision on leave to appeal”).

³⁵ *E.g.*, *Prosecutor v. Kenyatta*, [Decision on the Prosecution’s request for leave to appeal](#), ICC-01/09-02/11-1004, 9 March 2015, para. 25.

³⁶ [Decision on the Procedure for Appointing Counsel](#), para. 27.

³⁷ [Transcript of Status Conference](#), ICC-02/04-01/05-T-013-CONF-ENG, 23 July 2024, p. 3.

³⁸ [Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence](#), ICC-02/04-01/05-517-Conf, 28 August 2024 (“Defence Observations on the Decision to hold an *in absentia* confirmation of charges hearing”).

³⁹ [Impugned Decision](#), para. 22.

⁴⁰ *Id.*, para. 93.

Chamber's decisions, with the Defence bearing the burden of persuading a second, differently-composed, Chamber that errors had been made by the first. Although no standard of review is articulated in the Impugned Decision, the Pre-Trial Chamber repeats on several occasions that it is "not persuaded" by the Defence arguments to overturn or quash the first Pre-Trial Chamber's findings.⁴¹ Furthermore, on several occasions the Chamber appears to give some unspecified weight to the previous Pre-Trial Chamber's determinations of law or fact.⁴²

22. The burden of demonstrating that an *in absentia* confirmation hearing should be convened rests with the Prosecution. A Pre-Trial Chamber seized with this question is entitled to consider the Prosecution's submissions made in accordance with this burden, and the Defence response. In this case, the Pre-Trial Chamber reached this decision on the basis of a review of a prior Chamber's findings on one hand, considered against its assessment of whether the Defence had met an unspecified burden of persuading it that these findings should be overturned, on the basis of an unknown standard of review, without having informed the parties in advance that this exercise would be conducted. Having not articulated a standard of review, the Pre-Trial Chamber consequently rendered a decision which was insufficiently reasoned.

23. The Defence position remains that the Decisions need to be revisited and re-made.⁴³ As such, if leave to appeal is granted, the Defence will outline the prejudice arising from the Pre-Trial Chamber's failure genuinely to consider the issues *de novo*, but rather shifting the burden onto the Defence to seek to persuade the Pre-Trial Chamber to overturn prior decisions of another Chamber with no notice of either the procedure to be followed, nor the applicable standard of review.

⁴¹ See, e.g., *Id.*, para. 32 "The Chamber is not persuaded by the arguments put forward by the Defence."; para. 77 "Second, the Chamber is not persuaded by the Defence's argument that the fact that the reward for Mr Kony's arrest has not been collected, Mr Kony's absence from public attention for almost 20 years, or his lack of reaction to the *in absentia* announcement in 2023 adequately support the proposition that Mr Kony is not alive."; para. 84 "Furthermore, the Chamber is not persuaded that the fact that the Ugandan authorities have tried another person signals their intention to proceed against Mr Kony on the basis of the domestic warrant of arrest."; para. 90 "In addition, the Chamber is not persuaded by the Defence's submission that Pre-Trial Chamber II failed to consider whether there are other ways to give victims a voice."

⁴² See *Id.*, para. 89 "This Chamber is tasked with assessing whether, also in light of the findings contained in the previous decisions issued by Pre-Trial Chamber II, all relevant criteria [...] have been fulfilled [...]"; para. 93 "the Pre-Trial Chamber 'has addressed anew whether the requirements for conducting a confirmation of charges procedure *in absentia* have been met in light of Pre-Trial Chamber II's findings [...]"

⁴³ [Defence Observations on the Decision to hold an in absentia confirmation of charges hearing](#), paras 2, 24, 39, 61, 62.

i. The First Issue arises from the Impugned Decision and is appealable

24. The First Issue relates to the overall procedure adopted in this case, which led the Pre-Trial Chamber to conclude that the Court's first *in absentia* confirmation hearing can indeed go ahead. The Defence is not merely disagreeing with the procedure, but rather is seeking an appellate ruling on whether this procedure is compatible with the burden resting on the Prosecution to demonstrate that the criteria for an *in absentia* hearing had been met, where the procedure had not been notified to the parties and a standard of review has not been articulated. Given that the First Issue concerns the procedure governing the process through which the Impugned Decision was reached, it is thus essential to the disposition ultimately reached by the Pre-Trial Chamber.

ii. The First Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial

25. The First Issue addresses the application of the burden of proof, which is inherently linked to the fairness of a judicial proceeding. For this reason, appealable issues alleging the application of an erroneous burden of proof have been recognised as “affecting the fairness of the proceedings”, warranting certification to appeal under Article 81(2)(d) of the Statute.⁴⁴ In addition, the First Issue also addresses the failure of the Pre-Trial Chamber to articulate and apply a standard of review that the Defence was required to meet before the first Pre-Trial Chamber's earlier findings would be overturned or quashed. The articulation and application of standards of review are an indispensable tool in the hands of a fact-finder, because they serve to eliminate arbitrariness and inject transparency and predictability into a decision making process, which is essential for the fairness of adjudication. Without being informed of the standard of review, a party is unable adequately to frame submissions to meet the requisite standard, meaning the process is subject to arbitrariness and resulting unfairness. In addition, the corollary of the failure to articulate and apply a standard of review is that the resulting decision does not provide sufficient reasoning as to how, and according to what standard, the

⁴⁴ See, e.g., [Lubanga Decision on Leave to Appeal](#), para. 42 “Although the Impugned Decision does not have the effect *per se* of shifting the burden of proof, it could lead, in particular circumstances and in some degree, to such an effect, and this could significantly affect the fairness of the proceedings pursuant to Article 67(l)(i) of the Statute”; *Prosecutor v. Mbarushimana*, [Decision on the “Prosecution’s Application for Leave to Appeal the Decision on the confirmation of charges”](#), ICC-01/04-01/10-487, 1 March 2012, para. 11 “Applying an erroneous burden of proof can create a “direct and detrimental impact” on correctly assessing the evidence and can affect the degree to which the Defence can effectively challenge the evidence presented, thus affecting the fairness of the proceedings.”.

Defence arguments were assessed, or what burden the Defence was required to meet. The duty to provide a reasoned decision has been consistently recognised as “an element of the broader right to a fair trial, which applies as early as a person’s initial appearance before the Court.”⁴⁵ For each of these reasons, jointly and severally, the First Issue significantly affects the fair conduct of the proceedings.

26. As regards expeditiousness, without an appellate ruling on the propriety of the procedure addressed in the First Issue, the Defence in the diligent exercise of its representation of Mr Kony’s interests will be entitled, and arguably required, to raise and re-litigate this issue both during the confirmation of charges hearing, and as grounds to challenge any adverse findings that follow that procedure. This will expand and prolong the confirmation process itself, significantly affecting the expeditious conduct of the proceedings.

iii. An immediate resolution of the First Issue by the Appeals Chamber would materially advance the proceedings

27. If the procedure for rendering the Impugned Decision impermissibly shifted the burden of proof or was otherwise procedurally unfair, these errors will mean that the decision authorising the confirmation of charges hearing *in absentia* is legally unsound. This would open the entire process to challenge and ultimately require the quashing of any findings reached. As such, an immediate resolution of the First Issue by the Appeals Chamber at this stage, before the start of the process would undoubtedly, and materially, advance the proceedings.

⁴⁵ *Prosecutor v. Abd-Al-Rahman*, [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled ‘Decision on the Defence Request to provide written reasoning for two oral decisions’](#), ICC-02/05-01/20-236, 18 December 2020, para. 14, citing: *Prosecutor v. Lubanga*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81](#), ICC-01/04-01/06-773, 14 December 2006, para. 20, referring to ECtHR, *Hadjianastassiou v. Greece*, [Judgment](#), application no. 12945/87, 16 December 1992, para. 32; see also *Prosecutor v. Said*, [Public Redacted Version of ‘Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions’’’](#), 29 June 2021, ICC-01/14-01/21-111-Conf-Red, ICC-01/14-01/21-111-Red, 17 May 2022, paras 40-43.

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

28. The Pre-Trial Chamber held that the conjunction “or” between the terms “has fled” and “cannot be found” “requires the provision to be construed in such a way so as to clearly differentiate between the two situations set out therein.”⁴⁶

29. The fact that the word “or” in Article 61(2)(b) of the Statute denotes two separate situations is not disputed. What is disputed, and constitutes an error, is the interpretation that a person who has “fled” can be distinguished from a person who “cannot be found” only by interpreting the latter as referring to a person who has never appeared before the Court at all, as was held by Pre-Trial Chamber II.⁴⁷ The latter interpretation impermissibly contradicts the ordinary meaning of Article 60(1) which pre-supposes that “the person” has appeared before the Court, and is not the only interpretation of “cannot be found” that is distinguishable from “fled”.⁴⁸ Indeed, one such alternative scenario has already arisen in at least one case before the Court. In *Banda and Jerbo*, following a voluntary initial appearance, Mr Banda waived his right to be present at the confirmation hearing,⁴⁹ but was later impeded by circumstances beyond his control from appearing before the Chamber, justifying the issuance of an arrest warrant.⁵⁰ An analogous situation may clearly arise, where the person who has made an initial appearance is rendered incommunicado and is unable explicitly to waive their right to be present under Article 61(2)(a); in such a circumstance, they would indubitably be a person who “cannot be found” and the confirmation of charges hearing could be held in absentia pursuant to Article 61(2)(b).

⁴⁶ [Impugned Decision](#), para. 32.

⁴⁷ [First Decision](#), para. 29 “[T]he conjunction ‘or’... indicates that the provision covers two different and independent situations: one where the suspect has fled, referring to a case where a person who was previously accessible to the Court absconded, and a second where the suspect cannot be found and he or she ‘has never been accessible’” and para. 31 “The phrase ‘cannot be found’ refers to the situation where: (i) the concerned person has never been available to the Court, because he or she has not been arrested, surrendered, or voluntarily appeared before the Court and (ii) all efforts made to locate and arrest the person failed since his or her precise whereabouts were and remain unknown.”

⁴⁸ [Defence Observations on the Decision to hold an in absentia confirmation of charges hearing](#), para. 6.

⁴⁹ *Prosecutor v. Banda & Jerbo*, [Corrigendum of the “Decision on the Confirmation of Charges”](#), ICC-02/05-03/09-121-Corr-Red, 7 March 2011, para. 19; See also *Prosecutor v. Banda & Jerbo*, [Public redacted Decision terminating the proceedings against Mr Jerbo](#), ICC-02/05-03/09-512-Red, 4 October 2013, para. 17 (finding that whether an accused is still alive is a jurisdictional issue, implying that such issues would be appealable as of right, pursuant to Article 82(1)(a)).

⁵⁰ *Prosecutor v. Banda*, [Warrant of arrest for Abdallah Banda Abakaer Nourain](#), ICC-02/05-03/09-606, para. 21 “the Chamber concludes that, regardless of whether Mr. Banda wishes or not to be present at trial, there are no guarantees that in the current circumstances, he will be in an objective position to appear voluntarily.”

30. The Pre-Trial Chamber apparently reinterpreted Pre-Trial Chamber II’s reading of the term “cannot be found” by finding that it “applies to a situation in which the suspect has never been accessible,”⁵¹ without acknowledging that Pre-Trial Chamber II did not find it “**applies to**” such a situation, but rather that the only interpretation of the term was that the person has never been available.⁵² Pre-Trial Chamber II had also added that:

The concept of “cannot be found” in article 61(2)(b) does not cover a situation in which the approximate whereabouts of the person are known but the Court is unable to have an arrest warrant executed due to reasons unrelated to the identification of the suspect’s location, for instance due to lack of co-operation from relevant States.⁵³

31. Whether this interpretation (and, indeed, other findings of the First and Second Decisions) has the status of *res judicata* remains unclear, given that the Pre-Trial Chamber noted that it “conclusively reache[d] its own determination as to each of those requirements [established in the First and Second Decisions]...” and that “this decision will constitute the basis for any and all subsequent steps in these proceedings.”⁵⁴ This 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 the future. Thus, there is an urgent need for a final appellate determination of whether “cannot be found”: (i) means only a “person who has never been available”, as Pre-Trial Chamber II held; (ii) includes, but is not limited to, a “person who has never been available”, as held by the Pre-Trial Chamber; or (iii) cannot include a person who “has never been accessible” because an initial appearance is mandated by the Court’s statutory framework, as argued by the Defence.

32. The term “subject to” in Article 61(1) qualifies the second sentence (*i.e.* the presence of the person charged at the confirmation hearing) rather than the first sentence (the holding of the hearing). This is clear from the drafting history of Article 61. In dismissing the Defence observations in this regard, the Pre-Trial Chamber found that:

⁵¹ [Impugned Decision](#), para. 33.

⁵² [First Decision](#), paras 29, 31; see further *Id.*, para. 33 (emphasis added).

⁵³ [First Decision](#), para. 32.

⁵⁴ [Impugned Decision](#), para. 22.

Had that interpretation been preferred by the drafters, one of the proposals explicitly requiring a first appearance to take place in relation to a confirmation of charges procedure in absentia would have been inserted in the final draft of the Statute. Any other understanding would contravene the ordinary meaning to be given to the term ‘or’ in article 61(2)(b) of the Statute as understood in its context.

33. However, in arriving at this conclusion, the Pre-Trial Chamber overlooked the fact that the drafters explicitly considered including the term “has never been available” in the Court’s legal framework and ultimately chose to exclude it.

34. Moreover, the language of the earlier proposed drafts was identical to that ultimately adopted in the Statute, save that the word “unless” at the end of the previous version of the provision (*i.e.* caveating the second sentence on the presence of the person charged), became “subject to” at the start of the provision when one provision became two. It is, furthermore, plain from an analysis of other language versions of the Statute that the phrase “subject to” qualifies the second sentence of Article 61(1).⁵⁵

i. The Second Issue arises from the Impugned Decision and is appealable

35. The Second Issue is an identifiable subject or topic arising from the decision, and its resolution is “essential for the determination of matters arising under the judicial cause under examination”,⁵⁶ as the Pre-Trial Chamber failed to interpret the Statute systemically, choosing instead to focus exclusively on the word “or” in Article 61(2)(b). The need to address incongruities between differing provisions of the Statute in a systemic manner, taking into account the context of the terms and their object and purpose, has been consistently emphasised in the Court’s case law.⁵⁷ The interpretation of Article 61(2)(b) adopted by both Pre-Trial Chambers contradicts the ordinary meaning of Articles 60(1) and 61(1) of the Statute.

⁵⁵ See *e.g.* the Spanish version of Article 61(1), which uses “y”, *i.e.* “and” before “within a reasonable time after the person’s surrender or voluntary appearance before the Court”, in place of a comma.

⁵⁶ [DRC Judgment on Application for Extraordinary Review](#), para. 9.

⁵⁷ *Situation in Ukraine*, [Finding under article 87\(7\) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties](#), ICC-01/22-90, 24 October 2024, para. 34 “address any actual or apparent incongruities between the different provisions in the statutory framework according to a literal and a contextual interpretation, in light of and consistently with the object and purpose of the Statute” (“Mongolia non-compliance”); *Prosecutor v. Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2722 “a basic principle of statutory interpretation that presumes the legislator does nothing in vain and that the court must endeavour to give significance to every word of a statutory instrument”.

- ii. *The Second Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial*

36. As has been established:

The term “fair” in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1)) and article 21 (3); making its interpretation and application subject to internationally recognized human rights.⁵⁸

37. The fair trial implications of the Second Issue are obvious. The *in absentia* nature of proceedings will have clear implications for the pre-trial rights of the suspect, including but not limited to: his right to counsel of his own choosing;⁵⁹ his right to be informed of the evidence upon which the Prosecutor intends to rely at the confirmation hearing;⁶⁰ his right to challenge that evidence and present evidence in his own defence;⁶¹ and his right to challenge the admissibility of the case.⁶² These implications are not remedied by the appointment of Counsel to represent Mr Kony’s interests, given that Counsel cannot receive instructions from the suspect. Moreover, the Prosecution is yet to clarify whether or not it will request a full trial *in absentia*, should some or all of the charges against Mr Kony be confirmed; if so, his rights under Articles 66 and 67 would be further jeopardised as a direct consequence of the Impugned Decision.

38. Moreover, when a court is faced with two interpretations, one which favours the suspect, and the other which is prejudicial to him, the fundamental principle of *in dubio pro reo* requires that the reading that favours the suspect is to be followed. Demonstrably, the drafters of the Statute considered but ultimately chose to exclude, the term “has never appeared before the Pre-Trial Chamber” as an alternative to situations where they had “fled or cannot be found” in the Rules of Procedure and Evidence (“Rules”).⁶³ It was clear that the terms “fled or cannot be found” were inextricably linked to the suspect who had already surrendered or made a voluntary

⁵⁸ [DRC Judgment on Application for Extraordinary Review](#), para. 11.

⁵⁹ Article 55(2)(c), ICC Statute.

⁶⁰ Article 61(3), ICC Statute.

⁶¹ Article 61(6), ICC Statute.

⁶² Article 19(2), ICC Statute.

⁶³ [Defence Observations on the Decision to hold an in absentia confirmation of charges hearing](#), para. 9.

appearance before the Court. Nevertheless, Pre-Trial Chamber chose an interpretation that disadvantages the suspect on the basis that, had the drafters intended for a first appearance to be required, they would have explicitly included it. This disregards the fact that the need for an initial appearance is clear from the terms of Articles 60(1) and 61(1), and the drafting history suggests the drafters did not foresee a circumstance where an *in absentia* confirmation proceeding would be sought against a suspect who had never been available to the Court.

39. As regards expeditiousness, the Appeals Chamber has held that:

The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial. The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of articles 55 and 54(1)(c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings. This is at the core of article 82 (1)(d) of the Statute.⁶⁴

40. Should the issue of whether an initial appearance is required before a confirmation hearing can be held *in absentia* remain unresolved at appellate level, it will continue to be raised throughout the confirmation proceedings and as a ground to challenge any adverse findings that follow them. Additionally, in the absence of appellate determination, this issue is likely to be re-litigated by the suspect pursuant to Rule 126(3) should the charges be confirmed and he later appear for trial, as well as by other suspects for whom a confirmation of charges *in absentia* is sought.

iii. An immediate resolution of the Second Issue by the Appeals Chamber would materially advance the proceedings

41. An immediate resolution of the Second Issue is “essential for the determination of matters arising under the judicial cause under examination.”⁶⁵ Both the Prosecution’s request⁶⁶ and the

⁶⁴ [DRC Judgment on Application for Extraordinary Review](#), para. 11.

⁶⁵ *Id.*, para. 9.

⁶⁶ [Prosecution Request on in absentia Confirmation of Charges Hearing](#), para. 32 “to facilitate his expeditious trial if he appears before the Court”.

First Decision⁶⁷ note the intention that the outcome of these *in absentia* confirmation proceedings would provide the basis for any future trial. Should Mr Kony later appear before the Court, he may have a limited opportunity under Rule 126(3) of the Rules to request the Trial Chamber to refer issues that are necessary for the Chamber’s effective and fair functioning to the Pre-Trial Chamber. There is, in fact, some ambiguity as to the applicability of Rule 126(3), as it refers only to a person “who has fled”, whereas the Pre-Trial Chamber has determined that Mr Kony is instead a person “who cannot be found”. However, assuming, as the Prosecution has, that Mr Kony would have an equal right to request the referral of issues to the Pre-Trial Chamber,⁶⁸ it would appear likely that in such circumstances he would challenge the legality of the confirmation proceedings *in absentia* where an initial appearance has not been made.

42. Resolution of the Second Issue is essential to determine whether a confirmation hearing can proceed *in absentia* when the person has never appeared before the Court. The proposed issue is no mere disagreement with the outcome of the decision, but rather goes to the law governing the exercise of the Court’s personal jurisdiction. As such, a definitive determination by the Appeals Chamber is necessary, given that the outcome of these proceedings is likely to shape the work of the Court for the next decade, at a time when the refusal of States Parties to transfer suspects to the Court is a live and pressing issue.⁶⁹

C. Issue 3: 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”)

43. The First Decision held that “[e]ven if the legal requirements discussed above are met, the decision to hold a confirmation of charges hearing *in absentia* is discretionary.”⁷⁰ The Pre-Trial Chamber noted that “[n]either the Statute nor the Rules explain the rationale for conducting confirmation of charges proceedings *in absentia*”,⁷¹ and developed its own set of criteria for determining, pursuant to Rule 125(1) of the Rules, that “there is cause to hold a hearing on

⁶⁷ [First Decision](#), para. 65 “The Chamber considers that a confirmation hearing against Mr Kony, even in his absence, would have an impact on the victims of his alleged crimes, especially those who did not participate in the *Ongwen* case. According to the OPCV Report, the consulted victims support the Prosecution Request with a view to ‘advancing the proceedings in the present case in preparation for a potential trial [...]’.”

⁶⁸ [Prosecution Request on in absentia Confirmation of Charges Hearing](#), para. 18.

⁶⁹ See e.g., [Mongolia non-compliance](#).

⁷⁰ [First Decision](#), para. 58.

⁷¹ *Id.*, para. 59.

confirmation of charges in the absence of the person concerned.” This is a discretionary determination vested in the Judges of the Court, not the Prosecution.

44. Where leave to appeal is sought of a discretionary decision, the prospective appellant must “demonstrate an error of law, fact or procedure made by the Chamber exercising its discretion.”⁷² This does not require, however, “arguments on the merits expected to be raised before the Appeals Chamber.”⁷³ The Defence understands that what is required to meet this standard is to set out in general terms the nature of the error that impacts on the exercise of discretion, without having to set out all arguments in detail in advance. This also accords with the Prosecution’s prior stated position that a request for leave to appeal “must not engage on the merits or correctness of a Decision.”⁷⁴

45. The Impugned Decision erred in law and in fact by failing satisfactorily, or at all, to address three factors relevant to the exercise of its discretion.

46. First, the Pre-Trial Chamber failed properly to evaluate or mitigate the likelihood that the confirmation proceedings against Mr Kony would subsequently be rendered pointless by Ugandan proceedings against Mr Kony if he were ever to be arrested. Such proceedings, if they mirror those of the ICC, would lead to the case against Mr Kony being inadmissible before the ICC, which is directly relevant to the criterion of whether “there is any realistic expectation that the suspect [...] will appear before the Court to face trial.”⁷⁵ The Pre-Trial Chamber dismissed this factor on the basis that the information before it was insufficient to make an immediate determination that the case was inadmissible.⁷⁶ The issue, however, is not only whether the case is currently inadmissible, but also whether the **likelihood** that future Ugandan proceedings would render them inadmissible.⁷⁷ The Pre-Trial Chamber, accordingly, erred in law or in fact by failing to address this issue, and failing to direct that further information be obtained from the Ugandan authorities to resolve this issue.

47. Second, the Pre-Trial Chamber committed a similar error in respect of its evaluation of information indicating that Mr Kony may be dead. Instead of examining the available

⁷² [Abd-Al-Rahman Decision on leave to appeal](#), para. 14.

⁷³ *Id.*

⁷⁴ *Prosecutor v. Bemba et al.*, [Corrected version of “Prosecution’s application for leave to appeal the “Decision on Witness Preparation and Familiarisation”](#), ICC-01/05-01/13-1276-Corr, 21 September 2015, para. 24.

⁷⁵ [First Decision](#), para. 61.

⁷⁶ [Impugned Decision](#), paras 83-85.

⁷⁷ [First Decision](#), para. 61.

information to assess the extent to which these indications further diminish the likelihood of his eventual appearance – which is a relevant criterion in determining whether there is cause to hold an *in absentia* hearing⁷⁸ – the Pre-Trial Chamber instead assessed that there was “no conclusive information establishing Mr Kony’s death”.⁷⁹ On this basis, the Pre-Trial Chamber accorded no weight to this factor in its discretionary decision as to whether an *in absentia* hearing should be held. The Pre-Trial Chamber erred in law or in fact by failing to make that evaluation, not as a binary determination based on definite proof, but to inform its assessment of the current likelihood of Mr Kony ever appearing before the Court in the future.

48. Third, the Pre-Trial Chamber erred in determining that it could not consider the *Ongwen* reparations order in assessing the cost implications of *in absentia* proceedings against Mr Kony.⁸⁰ Resource considerations for the Court as a whole **have** been taken into account in previous discretionary determinations as to whether to hold *in absentia* proceedings.⁸¹ This is necessary and appropriate given the broad discretion conferred exclusively on the Chamber seized of a case – not the Prosecution, the Presidency, or the Registry – to determine whether to expend the substantial sums required for an “exceptional procedure”.⁸² In an institution of limited resources and finite capacity to fundraise in respect of exceptional expenditures, the cost implications are relevant, especially in respect of an unrealised reparations order in the same Situation. The relevance of this consideration is even greater given the 50,000 *Ongwen* victims entitled to a reparations award, who will undoubtedly anxiously scrutinise the Court’s priorities in the allocation of resources. Accordingly, the Pre-Trial Chamber erred in law or in fact by refusing to consider this manifestly relevant consideration.

49. Fourth, the Pre-Trial Chamber erred in concluding that holding an *in absentia* confirmation hearing would be the most effective means of allowing victims “to voice their views and

⁷⁸ *Id.*, para. 61.

⁷⁹ [Impugned Decision](#), para. 75.

⁸⁰ *Id.*, para. 89 “This Chamber is tasked with assessing whether, also in light of the findings contained in the previous decisions issued by Pre-Trial Chamber II, all relevant criteria for conducting a confirmation of charges procedure in the absence of Mr Kony have been fulfilled under the legal texts of the Court. This assessment leaves no room for considering whether or not order or decisions arising from other cases will or will not be implemented as a result of a possible finding that a confirmation of charges procedure *in absentia* should be held. It follows that the Defence’s assertion must be dismissed.”

⁸¹ [First Decision](#), para. 60 “(i) the availability of Court resources to proceed against co-suspects in their absence; (ii) whether the budget implications were justified by the circumstances of the case”; para. 68 “at present holding the confirmation hearing *in absentia* would not have a detrimental impact on the the effectiveness and efficiency by which the Court must managed [sic] its resources”; [Decision Severing the Case Against Dominic Ongwen](#), ICC-02/04-01/05-424 + Anx, 6 February 2015, para. 7.

⁸² [First Decision](#), para. 67.

concerns”.⁸³ Critically, the Impugned Decision made this evaluation only by reference to the ICC Statute, without any regard whatsoever to alternative mechanisms.⁸⁴ On the contrary, all facts relevant to the ability of victims to be heard should have been considered by the Pre-Trial Chamber, in order to assess the relative value of an ICC *in absentia* confirmation hearing in achieving that goal. One such relevant fact is the availability of other modalities for hearing victims’ views and concerns. Again, no less is required given the broad discretion conferred under Rule 125 to come to a view as to whether “there is cause” to hold such a hearing.

i. The Third Issue arises from the Impugned Decision and is appealable

50. The Third Issue arises from the Impugned Decision. An appealable issue may be “legal or factual or a mixed one.”⁸⁵ The Pre-Trial Chamber failed to give adequate weight, or gave no weight at all, to the foregoing factors, either because of a legal determination that the factors were categorically irrelevant, or a factual determination that they were irrelevant in current circumstances. Accordingly, the Pre-Trial Chamber erred in the exercise of its discretion by failing to consider all relevant considerations, and/or by failing to give adequate weight to relevant considerations.⁸⁶ This manifestly formed an essential part of the Pre-Trial Chamber’s reasoning and the exercise of its discretion. Accordingly, the issue is more than a mere disagreement with the Pre-Trial Chamber’s reasoning, but concerns an issue that arises from the Impugned Decision, and that is necessary and integral to its reasoning and ultimate outcome.

ii. The Third Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome or the trial

51. The Third Issue significantly affects the fair and expeditious conduct of proceedings. Proceeding to an *in absentia* confirmation hearing that does not satisfy the requirements of Rule 125(1) would be neither fair, nor expeditious. On the contrary, holding such a hearing outside of “exceptional circumstances” would cause unfairness by depriving the involvement of the suspect in the formulation of the potential charges against him (if there ever is a subsequent ICC trial), and would be a waste of time and resources (if he never appears because he is dead

⁸³ [Impugned Decision](#), para. 90.

⁸⁴ *Id.*, para. 90 “the Chamber’s mandate does not extend to canvassing matters that are extraneous to the Court’s legal framework.”

⁸⁵ [DRC Judgment on Application for Extraordinary Review](#), para. 9.

⁸⁶ *Prosecutor v. Kenyatta*, [Judgment on the Prosecutor’s appeal against Trial Chamber V\(B\)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), ICC-01/09-02/11-1032, 19 August 2015, paras 23-24.

or tried in Uganda). The former scenario would taint with legal error the very framework that would be the basis for a subsequent trial, and that has in the past been recognised as warranting leave to appeal even in respect of more limited issues arising from confirmation proceedings.⁸⁷

iii. An immediate resolution of the Third Issue by the Appeals Chamber would materially advance the proceedings

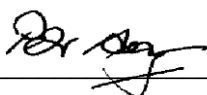
52. An immediate resolution of the Third Issue may materially advance the proceedings by ensuring appellate review prior to the expenditure of substantial sums of money. The current stage is the only opportunity to do so. The current issue – including the range of criteria properly considered under Rule 125 – has never been subject to appellate scrutiny, which increases doubt about the correctness of the Pre-Trial Chamber’s decision, and the possibility of error. This enhances the likelihood that an “authoritative determination” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial”.⁸⁸ The Appeals Chamber’s review is necessary now to ensure that the substantial allocation of resources associated with a confirmation hearing is not conducted on the basis of reversible error.

V. CONCLUSION AND RELIEF REQUESTED

53. For the foregoing reasons, the Defence respectfully requests that the Pre-Trial Chamber:

GRANT leave to appeal the Impugned Decision

The whole respectfully submitted.



Peter Haynes KC
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The Hague, The Netherlands,
Monday, 4 November 2024

⁸⁷ See [Decision on Decision on the Yekatom Defence Request for Leave to Appeal](#), paras 8-9.

⁸⁸ [DRC Judgment on Application for Extraordinary Review](#), para. 14.