

**Cour
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**International
Criminal
Court**

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No.: **ICC-02/04-01/05**
Date: **12 November 2025**

PRE-TRIAL CHAMBER III

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

SITUATION IN THE REPUBLIC OF UGANDA

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

Public

**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-02/04-01/05-633)**

Source: Defence for Mr Joseph Kony

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I. INTRODUCTION

1. Pre-Trial Chamber III's ("the Pre-Trial Chamber" or "the Chamber") Decision on the confirmation of charges *in absentia* against Joseph Kony ("Impugned Decision")¹ is the first of its kind, having been rendered without appearance or participation of the suspect to the process. It can be expected to shape the future practice of the International Criminal Court ("ICC").

2. The Pre-Trial Chamber has concluded this two-year process, in which it had a heightened responsibility to preserve the rights of an absent accused, by misinterpreting and misapplying the Court's core texts and endangering the fairness and expeditiousness of any subsequent trial. The Impugned Decision now establishes the framework for any future trial against Mr Kony and creates a precedent for the conduct of future *in absentia* confirmation processes and decisions. This request for leave to appeal is therefore essential because of the practical implications of the Impugned Decision, which must be assessed now to avoid irremediable error.

3. The Impugned Decision contains systemic legal errors pertaining to the role and functions of a Pre-Trial Chamber at the confirmation stage, with the Pre-Trial Chamber acting *ultra vires* in two important respects (First Issue). The Pre-Trial Chamber rejected the Defence request for a stay of proceedings prior to issuing the Impugned Decision,² while at the same time attempting to block any appeal of the Impugned Decision by imposing what amounts to a *de facto* indefinite stay, which it styled as a "suspension". This *ultra vires* procedure, which does not preserve Mr Kony's rights, raises significant issues of fairness, clarity, timing, and access, as detailed in the present request (Sub-Issue 1). Furthermore, having confirmed the charges, a committal to a Trial Chamber for trial was an inevitable and immediate consequence, pursuant to article 61(7) of the Rome Statute ("Statute"),³ at which point the Pre-Trial Chamber was *functus officio*. The Pre-Trial Chamber has accordingly improperly assumed the role of the Presidency under article 61(11) and again acted *ultra vires* (Sub-Issue 2).⁴

4. Finally, the Impugned Decision was reached with extremely minimal scrutiny of the charges and evidence, and with a total absence of findings of fact and of law despite this being a statutory requirement,⁵ thereby undermining the entire purpose of a confirmation of charges decision. The

¹ [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-02/04-01/05-633, 6 November 2025 ("Impugned Decision").

² [Impugned Decision](#), paras 25-31.

³ *See Id.*, para. 27.

⁴ *Id.*, para. 25.

⁵ *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](#)

Impugned Decision fails to link factual findings to evidence and contains no clear indication of the reasoning underpinning the confirmed charges (Second Issue). The Pre-Trial Chamber should have been guided at all times by the fact that it was issuing a confirmation decision *in absentia*. For this reason, it was quintessential that the Pre-Trial Chamber thoroughly justified its findings by relying on specific, clearly identified evidence. Should Mr Kony be surrendered to the Court in a number of years' time, the parties will be unable to assess which evidence and legal reasoning led to the confirmed charges. As the years pass, new judges and assistants will lack the institutional memory behind the Impugned Decision.

5. Counsel appointed to represent the interests of Mr Kony, as he has consistently argued at all stages of these proceedings,⁶ is in no position to contest substantive and factual problems, including the ones inherent from the decision. Given, however, the impact of the procedural errors affecting this decision on Mr Kony's fair trial rights, it is imperative to preserve those rights through the correction of these errors on appeal. As a party to the Impugned Decision, the Defence has the right to request leave to appeal within five days of being notified of it, pursuant to rule 155 of the Rules of Procedure and Evidence ("Rules"), regardless of the Impugned Decision's suspension of the date from which this time limit begins to run .

II. PROCEDURAL HISTORY

6. On 24 November 2022, the Office of the Prosecutor submitted a request to hold a confirmation of charges hearing in the case against Joseph Kony in his absence.⁷

7. On 23 November 2023, Pre-Trial Chamber II rendered its "Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence",

[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.

⁶ [Transcript of Confirmation of Charges Hearing](#), ICC-02/04-01/05-T-015-ENG, 9 September 2025, p. 40, ln. 2 – p. 41, ln. 5; [Transcript of Confirmation of Charges Hearing](#), ICC-02/04-01/05-T-016-Red-ENG, 10 September 2025, p. 41, lns 14-16; p. 44, lns 2-14; p. 45, lns 9-15; p. 46, lns 18-23; [Joint Prosecution and Defence report on agreed facts](#), ICC-02/04-01/05-615, 18 June 2025, para. 3, See also, [Impugned Decision](#), para. 25.

⁷ [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.

finding that Joseph Kony qualified as a person who “cannot be found” and that there would be cause to hold a confirmation of charges hearing against him in his absence.⁸

8. On 19 January 2024, the Prosecution submitted the Document Containing the Charges.⁹

9. On 4 March 2024, Pre-Trial Chamber II rendered its “Second Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence”.¹⁰

10. On 21 June 2024, Peter Haynes KC was appointed as Counsel to represent the rights and interests of Joseph Kony during the confirmation proceedings.¹¹

11. On 29 October 2024, the Chamber rendered its Decision on the criteria for holding confirmation of charges proceedings *in absentia*.¹²

12. On 12 December 2024, the Chamber rendered, *inter alia*, its Decision on the Document Containing the Charges and the ‘Victims’ Concerns on the Document Containing the Charges” instructing the Prosecution to submit a revised Document Containing the Charges, a list of evidence and a Pre-Confirmation Brief.¹³

13. On 3 April 2025, the Defence submitted its Request for Reconsideration of the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”,¹⁴ which was rejected on 28 May 2025.¹⁵

14. On 17 April 2025, the Prosecution submitted several documents, including its Amended Document Containing the Charges¹⁶ and its Pre-Confirmation Brief.¹⁷

⁸ [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.

⁹ [Document Containing the Charges](#), ICC-02/04-01/05-474, 19 January 2024.

¹⁰ [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.

¹¹ [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, 21 June 2024.

¹² [Decision on the criteria for holding confirmation of charges proceedings *in absentia*](#), ICC-02/04-01/05-532, 29 October 2024.

¹³ [Decision on the Document Containing the Charges and the ‘Victims’ Concerns on the Document Containing the Charges](#), ICC-02/04-01/05-538, 12 December 2024.

¹⁴ [Request for Reconsideration of the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#) (ICC-02/04-01/05-532), ICC-02/04-01/05-583, 3 April 2025.

¹⁵ [Decision on the Defence request for reconsideration of the ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’](#) (ICC-02/04-01/05-532), ICC-02/04-01/05-608, 28 May 2025.

¹⁶ [Amended Document Containing the Charges](#), ICC-02/04-01/05-591, 17 April 2025.

¹⁷ [Pre-Confirmation Brief](#), ICC-02/04-01/05-593-Conf, 17 April 2025.

15. On 3 June 2025, the Appeals Chamber confirmed the Decision on the criteria for holding confirmation of charges proceedings *in absentia*.¹⁸

16. On 18 June 2025, the Prosecution and the Defence submitted a joint report on agreed facts notifying the Chamber that they had not reached an agreement on any alleged facts.¹⁹

17. On 9 and 10 September 2025, the confirmation of charges hearing was held.²⁰

18. On 6 November 2025, the Pre-Trial Chamber issued its Decision on the confirmation of charges *in absentia* against Joseph Kony.²¹

III. APPLICABLE LAW

19. Rule 155 of the Rules sets out the process for requesting leave to appeal:

1. When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.
2. The Chamber shall render a decision and shall notify all parties who participated in the proceedings that gave rise to the decision referred to in sub-rule 1.

20. A decision is subject to appeal, pursuant to article 82(1)(d) of the Statute, 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.

21. 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.”²² “Essential” in this context is understood

¹⁸ [Judgment on the appeal of Mr Joseph Kony against the decision of Pre-Trial Chamber III of 29 October 2024 entitled “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#), ICC-02/04-01/05-610, 3 June 2025.

¹⁹ [Joint Prosecution and Defence report on agreed facts](#), ICC-02/04-01/05-615, 18 June 2025.

²⁰ [Transcript of Confirmation of Charges Hearing](#), ICC-02/04-01/05-T-015-ENG, 9 September 2025; [Transcript of Confirmation of Charges Hearing](#), ICC-02/04-01/05-T-016-Red-ENG, 10 September 2025.

²¹ [Impugned Decision](#).

²² *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”).

as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion”.²³ 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.”²⁴

22. An appealable issue may be “legal or factual or a mixed one.”²⁵ Issues that have previously been recognised as appealable include alleged errors of law and fact in relation to the Chamber’s interpretation of the Statute²⁶ and whether the Chamber erred in the exercise of its discretion.²⁷

IV. SUBMISSIONS

A. 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

23. In issuing the Impugned Decision, the Pre-Trial Chamber has acted *ultra vires* in two important respects. Firstly, it effectively stayed proceedings indefinitely without explicitly imposing a stay of proceedings. In so doing, it severely limited the parties’ ability to exercise their rights of appeal, by holding that the time limit for requests for leave to appeal would not commence until such time as Mr Kony was arrested and notified of the confirmation decision. Secondly, in deciding to “commit Mr Kony to a Trial Chamber for trial on the charges as confirmed upon his surrender to and appearance before the Court”, the Chamber erroneously relied upon article 61(11) of the Statute and rule 126(3) of the Rules, neither of which permit a Pre-Trial Chamber to take any such course of action.

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

24. The Impugned Decision indefinitely suspends the time limit applicable under rule 155 of the Rules, under which the parties have five days to request leave to appeal, pursuant to article 82(1)(d) of the Statute. Finding that “it is important to ensure that both parties are in a position to properly assess the advisability and feasibility of lodging a request pursuant to this provision,

²³ *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.

²⁴ [DRC Judgment on Application for Extraordinary Review](#), para. 20.

²⁵ *Id.*, para. 9.

²⁶ See 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.

²⁷ See 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.

and that counsel must be able to rely on their client's contribution for such assessment", the Chamber decided to suspend the five-day time limit under rule 155 for both the Prosecution and the Defence until such time as the confirmation decision "is notified to [Mr Kony] upon his surrender."²⁸

25. Effectively, then, the Pre-Trial Chamber stayed the proceedings indefinitely, despite noting that a stay of proceedings was "a drastic and exceptional remedy, and that the threshold triggering its application is therefore high."²⁹ Paradoxically, the Pre-Trial Chamber denied the Defence's request for a conditional stay of proceedings prior to the issuance of a confirmation decision on the basis that the "scenarios advanced by the Defence are speculative...[and] do not currently exist."³⁰ Yet, the possibility that Mr Kony might one day appear before the Court is equally speculative and also does not currently exist. With the issuance of a confirmation decision, the right of the parties to that decision to request to appeal it under article 82(1)(d) must now "be maintained in full."³¹

26. Pursuant to rule 155(1), a party shall "make a written application to the Chamber that gave the decision" within five days of being notified of that decision. Under the suspended regime imposed in the confirmation decision, application to the currently constituted Pre-Trial Chamber will likely be impossible, because of the length of time that may reasonably be expected to pass until Mr Kony is eventually surrendered to the Court (if that ever happens) and the time limit on judicial appointments. Therefore, the Chamber adjudicating any potential future leave to appeal request will almost certainly be a different Chamber to the one that issued the decision. It would lack the in-depth knowledge of the decision required to consider leave to appeal requests under article 81(2)(d) and rule 155.

27. Moreover, rule 155(2) provides that "The Chamber shall render a decision [on requests for leave to appeal] and shall notify all **parties who participated in the proceedings that gave rise to the decision** referred to in sub-rule 1." Defence counsel appointed to represent Mr Kony's interests in the proceedings leading to the Impugned Decision was clearly a "party" who "participated in the proceedings". However, the Impugned Decision appears to exclude him from

²⁸ [Impugned Decision](#), para. 258.

²⁹ *Id.*, para. 28.

³⁰ *Id.*, para. 29.

³¹ *Prosecutor v. Ongwen*, Decision on the Defence request for leave to appeal the decision on the confirmation of charges, [Partially dissenting opinion of Judge Marc Perrin de Brichambaut](#), ICC-02/04-01/15-428-Anx-tENG, 14 September 2016, para. 35 ("The possibility for the Defence to challenge the decision on the confirmation of charges must therefore be maintained in full. The instant case does present an exceptional circumstance that would warrant granting the Defence leave to appeal.").

the notification required under rule 155. Only Mr Kony (who played no part in the proceedings leading to the Impugned Decision) is deemed to be entitled to notification of the decision.

28. What might constitute notification of the confirmation decision to Mr Kony “upon his surrender” and thus trigger the five-day time limit is also unclear. Might the five-day time limit start from the moment of Mr Kony’s arrest, from his initial appearance before the Court, or from a later date? Regardless of which option applies, counsel of Mr Kony’s own choosing would face an extremely limited time frame within which to familiarise him or herself with the entire record of the case, consult with Mr Kony, and decide whether to seek leave to appeal the confirmation decision, and if so, on what grounds. This would have a significant impact on the fairness and expeditiousness of later proceedings.

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

29. The Pre-Trial Chamber “commit[ed] Mr Kony to a Trial Chamber for trial on the charges as confirmed upon his surrender to and appearance before the Court, pursuant to article 61(11) of the Statute and rule 126(3) of the Rules” and ordered the Registry to transmit the decision and record of proceedings “to the Presidency, for it to take all necessary subsequent steps pursuant to article 61(11) of the Statute and rule 126(3) of the Rules.”³²

30. In this regard, the Pre-Trial Chamber has overstepped the boundaries of its authority under the Statute, and its references to article 61(11) and rule 126(3) are inapposite. While article 61(7) permits the Chamber to “confirm those charges in relation to which it has determined that there is sufficient evidence and commit the person to a Trial Chamber for trial on the charges as confirmed”, article 61(11) applies only to the Presidency. It confers no powers on the Pre-Trial Chamber. It reads, in full:³³

Once the charges have been confirmed in accordance with this article, **the Presidency shall** constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

The Pre-Trial Chamber, recognising that the committal to a Trial Chamber would be the inevitable consequence of issuing the Impugned Decision confirming the charges, purported to insert the novel and additional requirement of “surrender to and appearance before the Court”

³² [Impugned Decision](#), p. 103.

³³ Emphasis added.

prior to the composition of a Trial Chamber. However, it is for the Presidency, not the Chamber, to act under article 61(11).

31. Similarly, rule 126(3) only applies after “the person who has fled is subsequently arrested” and thus does not empower the Pre-Trial Chamber at this stage of proceedings. It reads in full:

When the person who has fled is subsequently arrested and the Court has confirmed the charges upon which the Prosecutor intends to pursue the trial, the person charged shall be committed to the Trial Chamber established under article 61, paragraph 11. The person charged may request in writing that the Trial Chamber refer issues to the Pre-Trial Chamber that are necessary for the Chamber’s effective and fair functioning in accordance with article 64, paragraph 4.

It is plain from the wording of Rule 126(3) that it contemplates the immediate establishment of a Trial Chamber by the Presidency, following the confirmation of the charges against the person who had fled *in absentia*, hence it states that “the person charged shall be committed to the Trial Chamber established under article 61, paragraph 11.”

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

32. The foregoing analysis shows that the procedure adopted in this case, under which the Pre-Trial Chamber took unprecedented steps outside the scope of its powers under the Court’s legal framework, presents an exceptional circumstance that warrants granting the Defence leave to appeal. The Defence is not merely disagreeing with the Impugned Decision but is rather seeking an appellate ruling on whether the procedure adopted by the Pre-Trial Chamber was compatible with the Statute. This Issue was central to the disposition handed down 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

33. The Impugned Decision unduly restricts the scope of actions that can be taken by counsel appointed to “represent the rights and interests of Mr Kony.”³⁴ Pursuant to rule 126(2), when the “Pre-Trial Chamber has determined that the person concerned shall be represented by counsel, the counsel shall have the opportunity to exercise the rights of that person.” That includes the right to appeal.

³⁴ [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, 21 June 2024, para. 9.

34. By denying counsel the opportunity to seek leave to appeal the Impugned Decision, the Chamber impermissibly restricted Mr Kony's own right of appeal as, upon transfer to the Court, he would have just five days to instruct a lawyer of his choosing and indeed may be represented by duty counsel in the first instance. Counsel would need to, *inter alia*, take immediate steps to travel to The Hague; meet with the relevant sections of the Registry and the Prosecution Senior Trial Lawyer; put in place the administrative processes required to gain access to the ICC premises and the ICC systems; appoint and assemble a Defence team;³⁵ and familiarise themselves with the case record.³⁶ The date of appointment of counsel would therefore not coincide with the date a Defence team becomes operational.³⁷

35. At the same time, counsel would need to take instructions from the client on various matters, including on whether to request leave to appeal the Impugned Decision, and if so, on what grounds. All of this would have to happen within the first five days. In reality, this is not a suspension of the right of appeal, but rather an effective removal of it.

36. Further and/or alternatively, the matters raised herein impact upon the expeditiousness of the proceedings, given the likelihood that they will be the subject of protracted litigation upon the arrest and transfer of Mr Kony.

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

37. While Defence counsel remains instructed by the Registry to represent the rights and interests of Mr Kony, this is the only opportunity to raise these fundamental issues arising from the Impugned Decision before the Appeals Chamber. The *ultra vires* nature of the actions taken by the Pre-Trial Chamber undoubtedly risks tainting with unfairness and legal error the entire basis for any subsequent trial. This in turn would likely lead to significant litigation, starting from the moment of the appointment of new counsel for Mr Kony. An immediate resolution of this issue by the Appeals Chamber would "rid [...] the judicial process of possible mistakes that

³⁵ For the time required to assemble a Defence team, see e.g. [Transcript of Status Conference](#), ICC-02/04-01/05-T013-CONG-ENG, 23 July 2024, p. 14, lns 3-20.

³⁶ More than 11,000 items have been disclosed in this case, more than 150 filings have been filed since the appointment of Counsel, hearings have been held. All of these things will require time to assess and review.

³⁷ The process of appointing and assembling a Defence team is also dependent on the constraints of the legal aid budget, set out by the Counsel Support Section. Case managers and legal assistants must be available, travel to the ICC premises, and be given the relevant access to the ICC system. Without a core team, ICC EPN email addresses, and access to the ICC system, Counsel is not able to start reviewing the material relevant to the submissions for which the deadlines are already running.

might taint either the fairness of proceedings or mar the outcome of the trial”,³⁸ and allow the trial phase to commence on the basis of a confirmation procedure conducted in compliance with the Court’s statutory framework.

B. 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

38. The Appeals Chamber has stated that, in the *sui generis* circumstances where Defence counsel has been appointed to represent the rights and interests of a person with whom they have no contact, the Pre-Trial Chamber must recognise the limitations of counsel’s mandate:

in the absence of any contact or communication between Counsel for the Defence and the [person charged], the Pre-Trial Chamber could not have envisaged that the former should actually represent, or act on behalf of, the latter; hence its statement that Counsel for the Defence was “vested with a limited mandate”.³⁹

Counsel appointed to represent the views and interests of an absent suspect “should not prejudice the arguments which the defence may put forward at a later stage.”⁴⁰

39. In light of this limited mandate, it was for the Pre-Trial Chamber to subject the Prosecution’s Pre-Confirmation Brief to an even higher level of scrutiny than would normally apply in a contested confirmation procedure. Instead, the Impugned Decision frames the task of the Pre-Trial Chamber in extremely broad terms. It finds that “there is no reason for the Chamber to enter separate findings of fact or of law in the confirmation decision, and in the present case the Chamber has therefore refrained from doing so.”⁴¹ This stands in contrast to other confirmation decisions, and the suggested structure for confirmation decisions in the Chambers Practice Manual, which should include, *inter alia*:

Factual findings (‘the facts’), in which the Pre-Trial Chamber provides a narrative of the relevant events (whether chronologically or otherwise), determining whether there are substantial grounds to believe with respect to the material facts and circumstances described in the charges presented by the Prosecutor... Reference to evidence (including to subsidiary facts) is made to the extent necessary and sufficient to support the factual findings on the material facts.

Legal findings (‘the legal characterisation of the facts’), in which the Pre-Trial Chamber provides its reasoning as to whether the material facts of which it is

³⁸ [DRC Judgment on Application for Extraordinary Review](#), para. 14.

³⁹ *Prosecutor v. Kony et al.*, [Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 \(1\) of the Statute” of 10 March 2009](#), ICC-02/04-01/05-408, 16 September 2009, para. 59.

⁴⁰ *Prosecutor v. Kony et al.*, [Decision on the admissibility of the case under article 19\(1\) of the Statute](#), ICC-02/04-01/15-156, 11 March 2009, para. 32.

⁴¹ [Impugned Decision](#), para. 53.

satisfied to the required threshold constitute one or more of the crimes charged [...].⁴²

40. The lower standard of proof applicable at confirmation does not relieve the Pre-Trial Chamber of its responsibility to make findings of fact or law; it merely requires that those findings of fact be made in accordance with the applicable evidentiary standard and be applied to the law accordingly. As Judge Kovács has noted:

Being at the pre-trial phase does not justify a light assessment of facts or disregarding the proper presentation of evidence submitted. It simply means that the assessment should be carried out against the evidentiary standard required for the particular stage of the judicial process, be it low or high. Still such an assessment even against the back drop of a relatively low evidentiary standard of proof should be carried out thoroughly and the decision should demonstrate the thoroughness of the assessment conducted by the Chamber. Any other interpretation would certainly diminish the expected role of the Pre-Trial Chamber, which was actually designed by the drafters of the Statute. This is an unfortunate result for the Court as a whole.⁴³

Even when applying a lower standard of proof than that applicable at trial, the Pre-Trial Chamber is under an obligation to “provide a clear and well-reasoned decision, which presents a full account of the relevant facts and law in order to reveal transparency of the judicial process and guarantee a considerable degree of persuasiveness”.⁴⁴

41. By contrast, the Impugned Decision explicitly embraces a “style and structure of the decision under article 61(7) of the Statute which is as **concise**, simple and straightforward as possible”.⁴⁵ Unlike other confirmation decisions, which have clearly specified how the evidence supports each factual finding,⁴⁶ the Pre-Trial Chamber adopted a general approach of neither citing items of evidence, nor linking the factual findings to the evidence supporting it in a footnote.⁴⁷

⁴² ICC, [Chambers Practice Manual](#), 21 October 2024, para. 66.

⁴³ *Prosecutor v. Al Mahdi*, Separate Opinion of Judge Péter Kovács, [Annex to the Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#), ICC-01/12-01/15-84-Anx, 24 March 2016, para. 7.

⁴⁴ *Prosecutor v. Al Mahdi*, Separate Opinion of Judge Péter Kovács, [Annex to the Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#), ICC-01/12-01/15-84-Anx, 24 March 2016, para. 6.

⁴⁵ [Impugned Decision](#), para. 54 (emphasis added).

⁴⁶ See e.g. *Prosecutor v. Yekatom & Ngaïssona*, [Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’](#), ICC-01/14-01/18-403-Corr-Red, 11 December 2019 (original); *Prosecutor v. Gicheru*, [Public Redacted Version of Decision on the confirmation of charges against Paul Gicheru](#), ICC-01/09-01/20-153-Red, 15 July 2021; *Prosecutor v. Said*, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), ICC-01/14-01/21-218-Red, 9 December 2021; *Prosecutor v. Abd-Al-Rahman*, [Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman \(‘Ali Kushayb’\)’](#), 9 July 2021, ICC-02/05-01/20-433, ICC-02/05-01/20-433-Corr, 9 July 2021 (original).

⁴⁷ The text of paragraphs 64-260 refers sporadically to some of the witnesses or evidence relied upon by the Chamber, but this is framed in the most general of terms. For example, the Chamber refers to “documentary evidence” no fewer than 16 times, but without stating which documentary evidence and how it supports the charges see [Impugned Decision](#), paras 65, 84, 96, 106, 116, 128, 139, 151, 161, 172, 199, 203, 223, 244, 245, 246.

42. The Pre-Trial Chamber explains this unusual approach thus:

The adequacy of the reasoning, including for the purpose of possible challenges, is not to be measured by the number of pages or of the items specifically referred to, or by the presence of footnotes; rather, it is to be assessed against the clarity and precision of the illustration of the principles guiding the Chamber's assessment of the evidence, as well as the existence of specific references to individual, relevant items of evidence where necessary and appropriate. By providing, throughout its reasoning, appropriately specific references to the nature and content of the evidence retained as instrumental to its assessment, as well as to the relevant factual and legal elements if necessary, the Chamber meets its duty to provide adequate reasoning for its determination of the extent to which the charges brought by the Prosecution should be confirmed.

43. This is subtly yet significantly different to the standard adopted by other Pre-Trial Chambers in the most recent confirmation of charges decisions which have also referred to the need for a "simple and straightforward" style and structure of decision:

The adequacy of the reasoning is to be assessed against **the specificity, the rigour and the clarity of the formulation of the findings** made by the Chamber. While article 74(5) of the Statute provides that the decision of the Trial Chamber of acquittal or conviction 'shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions', the statutory texts do not contain a similar provision in respect of the decision on the confirmation of the charges. By providing, throughout its reasoning, **detailed and specific references to the content of the evidence retained as instrumental to its findings, as well as to all the factual and legal elements relevant to its conclusions**, the Chamber believes having fully met its duty to provide adequate reasoning for its determination on the charges brought by the Prosecutor.⁴⁸

44. These differences show the error in the Pre-Trial Chamber's approach; it is not the "principles guiding the Chamber's assessment of the evidence" that need to be set out with clarity and rigour, it is the formulation of the findings themselves. Similarly, it is well-established that the reference to the evidence deemed instrumental to the Chamber's **findings** needs to be "detailed and specific",⁴⁹ whereas the Pre-Trial Chamber deemed sufficient "appropriately specific references to the **nature and content of the evidence** retained as instrumental to its assessment".⁵⁰ Lastly, while previous confirmation decisions have set out the need for detailed

⁴⁸ *Prosecutor v. Abd-Al-Rahman*, [Corrected version of 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman \('Ali Kushayb'\)'](#), 9 July 2021, ICC-02/05-01/20-433, ICC-02/05-01/20-433-Corr, 9 July 2021 (original), para. 40; *Prosecutor v. Said*, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), ICC-01/14-01/21-218-Red, 9 December 2021, para. 42 (emphasis added, footnotes omitted).

⁴⁹ *Prosecutor v. Abd-Al-Rahman*, [Corrected version of 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman \('Ali Kushayb'\)'](#), 9 July 2021, ICC-02/05-01/20-433, ICC-02/05-01/20-433-Corr, 9 July 2021 (original), para. 40; *Prosecutor v. Said*, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), ICC-01/14-01/21-218-Red, 9 December 2021, para. 42 (emphasis added, footnotes omitted).

⁵⁰ [Impugned Decision](#), para. 54 (emphasis added).

and specific references to “all the factual and legal elements relevant to its conclusions”, the Pre-Trial Chamber in the present case sought only to provide “appropriately specific references... to the relevant factual and legal elements if necessary.”⁵¹

45. This erroneous approach – in a context requiring a more rigorous scrutiny of the evidence – jeopardises Mr Kony’s right to be informed in detail of the charges against him as recognised by international human rights law⁵² and the jurisprudence of this Court.⁵³

46. The need to demonstrate that the Prosecution has provided “concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations”⁵⁴ to establish substantial grounds to believe that the accused committed the crimes with which he is charged is particularly important in the context of *in absentia* confirmation proceedings. As the Appeals Chamber has noted, counsel is unable to fulfil the obligations regarding candid exchange and consultation with the client as set out in articles 14 and 15 of the Code of Conduct for Counsel in these circumstances.⁵⁵ Moreover, more time will inevitably pass between the issuance of the confirmation decision and any eventual trial than would normally be the case. As such, it was incumbent on the Chamber clearly and rigorously to specify its findings, and to document which evidence underpinned each of those findings. Should Mr Kony ever be arrested and transferred to The Hague to stand trial in 10, 15, or 20 years from now, the parties and judges will be left to

⁵¹ [Impugned Decision](#), para. 54.

⁵² As recognised by international human rights law e.g. UN, [International Covenant on Civil and Political Rights](#), 16 December 1966, Art. 14(3)(a); [European Convention on Human Rights](#), 3 September 1953, Art. 6(3)(a); OAS, [American Convention on Human Rights](#), 18 July 1978, Art. 8(2)(b). See further, Stefan Trechsel and Sarah J. Summers, [Human Rights in Criminal Proceedings](#), Academy of European Law, European University Institute, Oxford University Press, chapter 8.

⁵³ See e.g. *Prosecutor v. Lubanga*, [Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55\(2\) of the Regulations of the Court”](#), ICC-01/04-01/06-2205, 17 December 2009, para. 90, fn. 163 (“in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute”); *Prosecutor v. Abd-Al-Rahman*, [Judgment on the appeal of Mr 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; *Prosecutor v. Yekatom and Ngaïssona*, [Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial](#), ICC-01/14-01/18-703-Red, 29 October 2020 (original), para. 19. See also, *Prosecutor v. Bemba*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”](#), ICC-01/05-01/08-363-Red, 8 June 2018, para. 50; *Prosecutor v. Bemba et al.*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), ICC-01/05-01/13-2275-Red, 8 March 2018, para. 102.

⁵⁴ *Prosecutor v. Yekatom & Ngaïssona*, [Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’](#), ICC-01/14-01/18-403-Corr-Red, 11 December 2019 (original), para. 17.

⁵⁵ *Prosecutor v. Kony et al.*, [Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19\(1\) of the Statute” of 10 March 2009](#), ICC-02/04-01/05-408, 16 September 2009, para. 56.

puzzle over precisely which evidence led to the Impugned Decision, lacking both specific guidance from the Impugned Decision itself and the institutional memory underpinning it.

47. The following examples demonstrate the error in the Chamber's approach to the evidence:

- The Chamber identified “discrepancies” in the Prosecution's list of evidence submitted as Annex B to its Pre-Confirmation Brief, and as a result of these discrepancies, the list of evidence “was not deemed authoritative”.⁵⁶ The reader is left entirely in the dark as to the nature of these weaknesses in the evidentiary record.
- The Impugned Decision often refers to “the logbooks” in general terms (*e.g.* “the logbooks of intercepted radio communications show...”).⁵⁷ It is unclear which logbooks are being referred to, and whether any of those logbooks deemed credible are authenticated in any way by, for example, contemporaneous tape recordings of the intercepted communications or other corroborating evidence.⁵⁸
- The Chamber erred in fact when it stated that the Defence challenged the reliability of the logbooks.⁵⁹ This is an incorrect and misleading statement of the Defence's position, which has consistently been that it is unable to challenge the reliability of any of the Prosecution's evidence, lacking instructions to do so.⁶⁰
- The treatment of other evidence by the Chamber is similarly vague,⁶¹ making it entirely unclear to the current parties to proceedings, and perhaps more fundamentally to observers and to participants in any future proceedings, precisely which items of evidence the Chamber is referring in the paragraphs concerned.

48. The Chamber's undemanding approach to the evidence also applies to its scrutiny of the charges. To give just one example, the Impugned Decision uncritically accepts the Prosecution's

⁵⁶ [Impugned Decision](#), para. 55, fn. 82.

⁵⁷ *Id.*, para. 70.

⁵⁸ The logbooks of intercepted LRA communications have three separate sources: the Uganda People's Defence Force (UPDF); the Internal Security Organisation of Uganda, and the Ugandan police.

⁵⁹ [Impugned Decision](#), para. 58.

⁶⁰ The Defence's actual statement from the transcript is worth repeating in full to clarify this point: “**you will not be hearing about the serious unreliability of some of the Prosecution's central evidence...** It was very uncomfortable for me to have to sit on my hands as the Prosecution presented on screen, entries from logbooks as though they were the diaries of Joseph Kony himself. Madame President, your Honours will know from your scrutiny of the evidence in this case that these logbooks are purportedly English summaries of rough notes compiled by another person who listened in to conversations in Acholi, in coded language that they oftentimes didn't understand. These logbooks went through many, many links in the chain of custody. **But I cannot go into any of that.** That's just my personal irritation. **Because simply put, in our assessment, it is not in Joseph Kony's interests to give the Prosecution the opportunity to remedy the defects in the case while it still can, and attempt to make its case stronger for trial**” see [Transcript of Confirmation of Charges Hearing](#), ICC-02/04-01/05-T-016-Red-ENG, 10 September 2025, pp 42-43 (emphasis added).

⁶¹ See *e.g.* [Impugned Decision](#), paras 93-94.

position that “Children born to enslaved women and girls were enslaved themselves and forced to remain in the LRA.”⁶² The reasoning in support merely states that “Children born to girls and women in the LRA were also integrated into the LRA, under similar conditions as abductees.”⁶³ However, the reasoning underpinning the finding is unpersuasive and merely circular.⁶⁴ Neither does it find support in any existing jurisprudence.⁶⁵ The Impugned Decision, by explicitly declining to enter any specific findings of fact or law, is replete with examples of this approach, where the legal elements of crimes are neither set out nor applied to the facts to determine whether the requisite standard of proof has been met.

49. In this way, the Pre-Trial Chamber abdicated its responsibility rigorously to scrutinise the Prosecution’s case. Central to the nature and purpose of confirmation proceedings before the Court is that it is for the Pre-Trial Chamber, not the Prosecution, to delineate the parameters of the case for trial.⁶⁶ By adopting the Prosecution’s charges without such scrutiny, and by declining to provide specific details of what evidence was relied upon, or even how the Pre-Trial Chamber defined the crimes, the Impugned Decision undermines the core purpose of a confirmation process, in “filtering out those cases and charges for which the evidence is insufficient to justify a trial”.⁶⁷ The Pre-Trial Chamber’s responsibility to subject the charges and the evidence to rigorous scrutiny is undoubtedly higher when the person charged is not present to defend themselves.

⁶² [Impugned Decision](#), p. 97.

⁶³ *Id.*, para. 211.

⁶⁴ *Id.*

⁶⁵ Which “consistently holds the critical determinate of enslavement or sexual slavery is proof that the accused exercised any or all powers attaching to the right of ownership over a victim, Patricia V. Sellers and Jocelyn G. Kestenbaum, ‘Missing in action: The international crime of the slave trade’ (2020) 18 *Journal of International Criminal Justice* 517, at 520. See e.g. *Situation in Libya*, [Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri](#), ICC-01/11-188, 10 July 2025, paras 79-86; *Prosecutor v. Al Hassan*, [Public redacted version of Trial Judgment](#), ICC-01/12-01/18-2594-Red, 26 June 2024, paras 1193-1194; *Prosecutor v. Katanga*, [Judgment pursuant to article 74 of the Statute](#), ICC-01/04-01/07-3436-tENG, 7 March 2014, paras 975-976; *Prosecutor v. Ntaganda*, [Judgment](#), ICC-01/04-02/06-2359, 8 July 2019, para. 952; *Prosecutor v. Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2712; ICTY, *Prosecutor v. Kunarac et al.*, [Judgement](#), IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 542; SCSL, *Prosecutor v. Brima et al.*, [Decision of acquittal or conviction \(article 74\)](#), SCSL-04-16-T, 20 June 2007, para. 1148; ICTY, *Prosecutor v. Krnojelac*, [Judgment](#), IT-97-25-T, 15 March 2002, paras 358-430.

⁶⁶ See e.g. *Prosecutor v. Banda and Jerbo*, [Decision on the Confirmation of Charges](#), ICC-02/05-03/09-121, 7 March 2011, paras 45-47; *Prosecutor v. Bemba et al.*, [Decision on the Submission of Auxiliary Documents](#), ICC-01/05-01/13-992, 10 June 2015, para. 12; *Situation in Georgia*, [Separate Opinion of Judge Péter Kovács](#), Annex to the Decision on the Prosecutor’s request for authorization of an investigation, ICC-01/15-12-Anx-Corr, 27 January 2016, para. 6 (“Judicial control entails more than automatically agreeing with what the Prosecutor presents”).

⁶⁷ *Prosecutor v. Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’](#), ICC-01/04-01/10-514, 30 May 2012, paras 46-47; *Prosecutor v. Gbagbo*, [Decision adjourning the hearing on the confirmation of charges pursuant to Article 61\(7\)\(c\)\(i\) of the Rome Statute](#), ICC-02/11-01/11-432, 3 June 2013, para. 18. See also Kai Ambos, *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th ed.), Beck, 2022, pp 1806-1807.

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

50. The Issue of whether a Pre-Trial Chamber met its obligation to subject the Prosecution's case to rigorous scrutiny in *in absentia* confirmation proceedings is an identifiable subject or topic arising from the decision. Its resolution is "essential for the determination of matters arising under the judicial cause under examination",⁶⁸ because it goes to the very heart of the Impugned Decision issued and the reasons which underpin it. As the Appeals Chamber has noted, the right to a reasoned decision requires that decisions are supported by sufficient reasoning.⁶⁹ While the "extent of the reasoning will depend on the circumstances of the case", "it is essential that it indicates with sufficient clarity the basis of the decision" and that the Chamber identifies "which facts it found to be relevant in coming to its conclusion".⁷⁰

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

51. The right to 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."⁷¹ In the present circumstances, a well-reasoned decision is particularly necessary for Mr Kony, and any future counsel that he may instruct, properly to understand the nature, scope, and content of the charges against him. It is also a matter of fairness to the Prosecution; given that many of the witnesses referred to in the Impugned Decision may be unavailable to testify, in view of the passage of time since the events outlined in the confirmed charges, it would be

⁶⁸ [DRC Judgment on Application for Extraordinary Review](#), para. 9.

⁶⁹ *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 (citing ECtHR, *Hadjianastassiou v. Greece*, [Judgment](#), application no. 12945/87, 16 December 1992, para. 32; ICTY, *Prosecutor v. Momir Nikolic*, [Judgement on Sentencing Appeal](#), IT-02-60/1-A, 8 March 2006, para. 96; ICTY, *Prosecutor v. Kunarac et al.*, [Judgement](#), IT-96-23 & 23/1-A, 12 June 2002, para. 41; *Prosecutor v. Milutinovic*, [Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release](#), IT-05-87-AR65.1, 1 November 2005, para. 11.)

⁷⁰ *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.

⁷¹ *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.

important for all parties to be aware of which aspects of witnesses' evidence the Pre-Trial Chamber found credible, and for which findings. The vague references to witness numbers, but in the absence of links between factual findings and the evidence (or even entering separate findings of fact or of law) significantly affects the fair conduct of proceedings. As the Impugned Decision sets the parameters for any future trial, this lack of rigorous analysis in the decision risks imperilling the outcome of that trial. The Pre-Trial Chamber's error of fact, in suggesting that the Defence challenged the reliability of the logbooks when it explicitly declined to do so, also unduly prejudices Mr Kony's ability to raise this argument at trial. This jeopardises his right to challenge the evidence against him pursuant to article 67(1)(e) and not to have imposed on him any onus of rebuttal pursuant to article 67(1)(i). The Pre-Trial Chamber's novel approach also undermines the principle of equality of arms, given that the Impugned Decision does not provide the defendant with sufficient detail as to the Chamber's findings of fact or law in order to be able to prepare to defend the case against him.

52. The expeditious conduct of proceedings will also significantly be affected, because the identified deficiencies of the Impugned Decision stand to be raised before the Trial Chamber upon Mr Kony's surrender to the Court, leading to further litigation and delay. Moreover, the Chamber's approach, if left unexamined by the Appeals Chamber, undermines the entire purpose of confirmation proceedings, which is likely to lead to complex disputes later in the case, which would significantly affect the expeditious conduct of proceedings.

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

53. Trial Chamber V has noted that "it is of utmost importance to resolve issues related to the interpretation of the Confirmation Decision and to do so, as far as possible, early [...] in order for the accused and all parties and participants to be able to properly prepare for trial, to streamline the proceedings and to avoid recurring litigation on these issues."⁷² The Second Issue raises such fundamental concerns as to the Impugned Decision that its immediate resolution by the Appeals Chamber would materially advance the proceedings. Bringing this issue before the Appeals Chamber now will avoid uncertainty before the Trial Chamber as to the relationship between the operative part of the Impugned Decision and the reasons given for that decision. The

⁷² *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, paras 8-9.

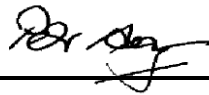
Appeals Chamber's decision would resolve, one way or the other, the issue of insufficient reasoning in the Impugned Decision, and would provide guidance to Pre-Trial Chambers in future *in absentia* confirmation proceedings as to the level of scrutiny required in such circumstances, where counsel appointed to represent the interests of an absent suspect has no instructions to challenge the evidence or the legal characterisation of the facts.

V. RELIEF REQUESTED

54. 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
Counsel for Joseph Kony

Dated this 12 November 2025

The Hague, Netherlands