

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **29 November 2023**

PRE-TRIAL CHAMBER II

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

SITUATION IN UGANDA

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

Public

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”

Source: Office of Public Counsel for the Defence

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I. INTRODUCTION

1. On 23 November 2023, Pre-Trial Chamber II took a significant step in authorising a pathway to *in absentia* Confirmation of Charges proceedings through the present case (the “Impugned Decision”).¹ This avenue has wide implications in the mandate of this institution and on the rights of its defendants; here, Mr Joseph Kony. Yet, in doing so, the Pre-Trial Chamber made absolutely no mention of the Rome Statute provisions affording fair trial rights or the internationally recognised human rights necessary to *in absentia* proceedings. Further, there is scant discussion on the impact of such proceedings on the full battery of rights held by Mr Kony. Not once does the Impugned Decision refer to the core rights-bearing Articles of the Statute – 55, 66, or 67. Whilst the Pre-Trial Chamber mentions the general rights of the suspect to be informed of and to participate in the proceedings, these were only made as part of the ‘additional consideration that ‘may play a role’ when assessing whether there is cause to hold a confirmation hearing *in absentia*’.² As such, it is averred that the Pre-Trial Chamber failed to give proper consideration to the primacy of the Rome Statute rights of the suspect and consequently failed to conduct a proper balancing exercise.
2. Thus, the Office of Public Counsel for the Defence (‘OPCD’) seeks leave to appeal the Impugned Decision on one error of law: the Pre-Trial Chamber’s failure to adequately assess the suspect’s rights in the applicability of Article 61(2)(b). The OPCD submits that this issue meets the standard for leave to appeal pursuant to Article 82(1)(d) and that a final resolution is necessary at this juncture to preserve the rights of the suspect with immediate effect.

¹ *Prosecutor v. Joseph Kony*, Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence, 23 November 2023, [ICC-02/04-01/05-466](#) [“Impugned Decision”].

² Impugned Decision, para 61.

II. RELEVANT PROCEDURAL HISTORY

3. On 24 November 2022, the Prosecution filed its request to hold a hearing on the confirmation of charges against Mr Joseph Kony in his absence pursuant to Article 61(2)(b) of the Rome Statute.³
4. On 2 December 2022, the OPCD filed a request for leave to appear in relation to the Prosecution Request,⁴ which was granted on 7 February 2023.⁵
5. The OPCD submitted its observations on 30 March 2023.⁶ On the same day, the OPCV submitted a report on victims 'view and concerns'.⁷
6. On 12 April, the Chamber rejected the Prosecution request for leave to reply to the OPCD.⁸
7. On 23 November 2023, the Pre-Trial Chamber issued its Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence.⁹

III. PRELIMINARY ISSUE - STANDING

8. The OPCD has previously been granted leave to appeal at the Pre-Trial level. In the *Gicheru & Bett* case, Pre-Trial Chamber A granted leave to appeal where the ruling "*constitute[d] a significant precedent for any future proceedings to be conducted on this basis [...]*" and it considered it "*essential that [the issue] be*

³ Public Redacted Version of the "Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 24 November 2022, [ICC-02/04-01/05-446-Red](#).

⁴ OPCD Request for Leave to Appear on Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 2 December 2022, [ICC-02/04-01/05-450](#).

⁵ Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant, 7 February 2023, [ICC-02/04-01/05-453](#). [The Pre-Trial Chamber had deferred this decision on OPCD request until the issuance of an order on the conduct of the proceedings. Decision regarding the 'OPCD Request for Leave to Appear on Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence', 8 December 2022, [ICC-02/04-01/05-451](#)].

⁶ OPCD Observations on the Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 30 March 2023, [ICC-02/04-01/05-458](#).

⁷ Victims' Views and Concerns on the "Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence", 30 March 2023, [ICC-02/04-01/05-457](#).

⁸ Decision on the Prosecution request for leave to reply to the OPCD Observations, 12 April 2023, [ICC-02/04-01/05-462](#).

⁹ Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence; 23 November 2023, [ICC-02/04-01/05-466](#).

reviewed by the Appeals Chamber with a view to ensuring legal certainty regarding the basis of such proceedings".¹⁰

The OPCD submits this request for leave to appeal on the same basis – that the Impugned Decision in the present matter constitutes a significant precedent at the ICC.

9. Further, the OPCD can be heard based upon the previous standing granted in this case pursuant to Regulation 77(4)(d) of the Regulations of the Court.¹¹ The reasons governing the decision of the Pre-Trial Chamber to grant OPCD leave to file submissions remains unchanged; “Mr Kony has neither designated legal representation nor has the Court appointed counsel to represent him” and, as held by the Pre-Trial Chamber, “the Chamber’s Decision” [– *the herein ‘Impugned Decision’* –] “will have an impact on Mr Kony’s rights under the Statute” and the “outcome of these novel proceedings may affect the rights of future defendants at the Court”.¹²

IV. ISSUE FOR APPEAL

10. In the Impugned Decision, the Pre-Trial Chamber recognises the centrality of the defendant in Confirmation of Charges proceedings by stressing that “[c]onfirmation hearings serve to *protect ‘the suspect from wrongful and unfounded accusations’*”;¹³ however, the Impugned Decision fails to give proper meaning to this primary purpose.
11. The Impugned Decision extensively highlights the exceptionality of *in absentia* Confirmation of Charges proceedings, noting:

A confirmation hearing in absentia is an extraordinary procedural step. Normally, the person concerned is available to the Court and can exercise the rights conferred upon him or her during the confirmation of charges

¹⁰ *Prosecutor v. Gicheru*, Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’, 23 December 2020, [ICC-01/09-01/20-153-Red](#).

¹¹ *Prosecutor v. Joseph Kony and Vincent Otti*, Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant, 7 February 2023, [ICC-02/04-01/05-453](#), paras 16-17.

¹² *Ibid.*

¹³ Impugned Decision, para. 25.

*proceedings. In light of its exceptional nature, the requirements for authorising a confirmation hearing pursuant to Article 61(2)(b) of the Statute must be narrowly construed.*¹⁴

Yet, despite these overarching sentiments, the Impugned Decision: 1) fails to mention or list the core fair trial rights encapsulated in Articles 55, 66, and 67; 2) fails to address and assess how these rights are implicated in *in absentia* confirmation of charges proceedings; and 3) engages in an improper balancing exercise between “the fair trial rights of the suspect, on the one hand, and the interests of justice on the other hand”.¹⁵ The aforementioned failures constitute one ground of appeal as submitted by the OPCD:

Whether the Pre-Trial Chamber erred in law in failing to address and properly consider the primacy of Rome Statute rights of a suspect – namely Articles 55, 66, and 67 – in establishing a novel legal framework for a confirmation of charges hearing in absentia pursuant to Article 61(b)(2).

Failure to enumerate the fair trial rights held by the suspect in confirmation proceedings

12. Articles 55, 66, and 67 are the load-bearing rights provisions of the Rome Statute and were judiciously enshrined by the drafters to be applied in all proceedings against a defendant before the Court. These explicit provisions are supplemented by an overarching framework of Article 21(3) that guarantees that all decisions will be “consistent with internationally recognized human rights”. At the ICC, these principles of fair trial extend to pre-trial proceedings and investigatory stages of a case.¹⁶
13. Of the 49 operative paragraphs of the Impugned Decision, only four refer to the rights of notice of charges and only four about presence in the proceeding;¹⁷ their textual provisions, and their underlying framework, are not once referenced. The OPCD submits that it is an error of law for the Pre-

¹⁴ Impugned Decision, para. 37.

¹⁵ Impugned Decision, para. 64.

¹⁶ *Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, [ICC-01/04-168](#), 13 July 2006, para. 11.

¹⁷ Impugned Decision, paras 25-27, 36, 49, 54, 56, 59.

Trial Chamber to issue such significant decision without any reference to the specific provisions of the Rome Statute and internationally recognised human rights that compete with an Article 61(b)(2) process where a person has never been before the ICC.

14. Thus, if granted leave, the OPCD would expound upon the number of rights that are uniquely impacted in permitting this exceptional process of *in absentia* confirmation of charges proceedings where a person who “cannot be found” and “has never been accessible”,¹⁸ including, *inter alia*:

- Internationally recognized human rights law on *in absentia* proceedings [Article 21.3] and the heightened need to assure the rights of the absent person;
- The presumption of innocence [Article 66] and implications of *in absentia* confirmation proceedings and, furthermore, implications of importing findings from a previous judgment [here, *Ongwen*];
- Right to legal representation – choice of and communication with Counsel of his/her choosing [Articles 55(2)(c) and 67(1)(d)] and the implications when a suspect is not available to instruct his/her Counsel;
- Right to confront evidence [Article 61(6) and 67(1)(e)] when the defendant is not present;
- Right to make an unsworn statement [Article 67(1)(h)] if he is not able to participate in the proceedings;
- Right to submit a defence [Article 61(6) and 67(1)(e)] when the defendant is not there to present evidence or reasons for excluding criminal responsibility;
- Right to admissibility or jurisdictional challenges [Article 19 and Rules 58, 122(2), and 126(1)] held by a defendant that are meant to occur prior to the confirmation of charges proceedings; and

¹⁸ Impugned Decision, paras 29, 31.

- Right to receive the charges in a language that the person fully understands or speaks [Articles 55(1)(c) and 67] when it is impossible to know from the defendant his proficiency levels in any given language.

Failure to address how Mr Kony's fair trial rights are implicated in the Impugned Decision

15. Compounding the failure to simply name these rights, the Pre-Trial Chamber has also failed to provide adequate reasoning in its conclusion that “the rights of Mr Kony would not be unduly prejudiced if a confirmation hearing takes place in his absence”.¹⁹ In fact, the Pre-Trial Chamber gave absolutely no explanation in support of such an imperatively grave conclusion. Moreover, the Impugned Decision is incongruent in its highlight of the primacy of the rights of a suspect²⁰ whilst also iterating that the rights of the person concerned are only considered generally as “an additional factor” or a secondary consideration in determining whether the requirements of Article 61(2)(b) are met.²¹
16. If granted leave, the OPCD will identify how the specific provisions, as identified above, present a host of pressures on Mr Kony's fair trial rights in such proceeding where he has never once been present to be given adequate notice of both the charges and his rights.

Improper balancing exercise between fair trial rights and the interests of justice

17. If granted leave to appeal, the OPCD will underscore how the Impugned Decision's rights-balancing exercise compounded the error. Whilst the Pre-Trial Chamber correctly set forth a balancing exercise, it went on to balance fair trial rights *against* the interests of justice.²² The OPCD will argue that this

¹⁹ Impugned Decision, para. 68.

²⁰ Impugned Decision, para. 26.

²¹ Impugned Decision, paras 61 and 68.

²² Impugned Decision, para. 64.

constitutes an error in that the fair trial rights of the suspect *are wholly part of* the factors that need to be considered in the interest of justice and not something in contradiction or on ‘the other hand’. The interests of justice, in the jurisprudence, include a multiplicity of factors *inter alia*: the impact on the victims and witnesses; the need to and prospect of advancing the case; the gravity of the alleged crimes and the alleged role of the suspect;²³ and also, the ability to ensure the fair trial rights of the suspect.²⁴

18. The Impugned Decision, however, rather than embarking on a balancing exercise which properly takes into consideration all the factors set out above, which includes fair trial rights, instead focuses on the gravity of the alleged crimes and the alleged role of the suspect in their perpetration; the rights of and impact on the victims; and the prospect of advancing the case.²⁵
19. If granted leave, the OPCD would argue that the exclusion of fair trial rights from the interests of justice constituted an improper assessment and contributed to a lack of concrete examination of whether Mr Kony’s fair trial rights can be upheld in such a novel process.

V. THE ISSUE SOUGHT FOR LEAVE MEETS THE TEST OF ARTICLE 82(1)(D)

20. Under Article 82(1)(d), a successful request for leave to appeal a decision must satisfy the following cumulative criteria:
 - i. Whether the matter is an ‘appealable issue’;
 - ii. Whether the issue at hand would significantly affect:
 1. The fair and expeditious conduct of the proceedings;
 - or
 2. The outcome of the trial; and

²³ Impugned Decision, para. 60.

²⁴ *Prosecutor v. Mokom*, Judgment on the Appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled “Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022,” 19 December 2022, ICC-01/14-01/22-124-Red, para. 54.

²⁵ Impugned Decision, paras. 64-65.

iii. Whether in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁶

21. The Appeals Chamber has held that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflict opinion” and “must be one likely to have repercussions”²⁷ on the fair and expeditious conduct of the proceedings or the outcome of the trial.
22. In the present case, it is clear that this is not just a matter of disagreement, but a concrete question that impacts the entire standing of the Impugned Decision and the process that will commence therefrom. The repercussions impact not only Mr Kony, but every defendant with an arrest warrant outstanding or to come. The OPCD submits, then, that the issue presented is ‘appealable’.

The issue significantly affect the fairness of the proceedings

23. When proceeding with the interpretation of the term “fair,” the Appeals Chamber held that it “is associated with the norms of a fair trial [...] incorporated in the Statute [in] articles 64(2) and 67(1)” extending to pre-trial proceedings as provided by Article 55 of the Statute.²⁸
24. As the OPCD argues above, the issue significantly affects the fairness of the proceedings in failing to consider the rights of the suspect and assess the impact of an *in absentia* confirmation hearing on those rights. As noted by this Pre-Trial Chamber II, “the concept of fairness of proceedings under article 82(1)(d) of the Statute requires looking into the broad concept of a fair

²⁶ *Prosecutor v. Al Hassan Ag Absoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, [ICC-01/12-01/18-734](#), paras. 11-14.

²⁷ *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, 13 July 2006, [ICC-01/04-168](#), para. 10.

²⁸ *Id.*, para. 11.

trial enshrined in human rights instruments”.²⁹ In the present case, the very core of the issue is one of fairness of proceedings that will be held before the Court and how the rights Mr Kony and other defendants are and will be protected.

25. As the issue identified present error of law that can impact the fairness of the proceedings in this case and the principles that underpin all discussions of what rights are afforded to defendants before the ICC, it meets the fairness prong of Article 82(1)(d). Whether judicially created law on a new *in absentia* proceedings framework created by the Impugned Decision is inconsistent with the Rome Statute itself is indivisible from fair trial considerations, and fairness itself.

The issues significantly affect the expeditiousness of the proceedings

26. As to the second component, the Appeals Chamber held that:

*The issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.*³⁰

27. The Impugned Decision sets a brand-new procedure for *in absentia* proceedings which, as the OPCD argues, contains errors of law affecting the fairness and outcome of the proceedings. The implications of these grounds of appeal have far-reaching consequences not only with regard to this case but also to any future *in absentia* proceedings that may arise from the determinations of the Impugned Decision. Lack of immediate review by the Appeals Chamber will result in a clear antithesis to expeditiousness, that is that the review of the requirements set forth by the Pre-Trial Chamber will

²⁹ *Situation in Uganda*, Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Application for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 December 2007, [ICC-02/04-112](#), para. 26.

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, 13 July 2006, [ICC-01/04-168](#), para. 9.

only take place at the final appeal stage. It goes without saying that this carries a significant risk of invalidating or causing remand on the current and any other *in absentia* proceedings authorised in the meantime.

28. As the Appeals Chamber has held, Article 82(1)(d) creates a ‘safety net’ since it allows for the possibility to “remov[e] doubts about the correctness of a decision and map[] a course of action along the right lines”.³¹ This ‘safety net’ is especially needed in this case when the issue sought on appeal concerns the establishment of a new framework for *in absentia* proceedings under the ‘or cannot be found’ provision of Article 61(2)(b) of the Statute and a process for which, as the Pre-Trial Chamber explained, is “a departure from the general rule” of presence and one that “[n]either the Statute nor the Rules explain the rationale for conducting confirmation of charges proceedings *in absentia*”.³²

VI. RELIEF REQUESTED

29. For the foregoing, the OPCD respectfully requests the Pre-Trial Chamber to grant it leave to appeal on the issue identified in this request.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 29th day of November 2023
at Liège, Belgium

³¹ *Id.*, para. 15.

³² See Impugned Decision, para 59. See also para. 23, stating “[T]his is the first time the Chamber must assess whether such requirements are present in the present case...”