



**Original: English**

**No. ICC-02/04-01/05  
Date: 11 December 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**

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’

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Mr Mame Mandiaye Niang

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel  
for Victims**

Ms Paolina Massidda  
Ms Sarah Pellet

**The Office of Public Counsel  
for the Defence**

Mr Xavier-Jean Keïta

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER II** of the International Criminal Court (the ‘Chamber’) issues this 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”’ (the ‘OPCD Request’ or ‘Request’).<sup>1</sup>

## **I. PROCEDURAL HISTORY AND SUBMISSIONS**

1. On 8 July 2005, the Chamber issued an under seal warrant of arrest against Mr Kony for war crimes and crimes against humanity allegedly committed in 2003-2004 in Uganda.<sup>2</sup> The arrest warrant was amended on 27 September 2005 and unsealed in October 2005.<sup>3</sup>

2. On 24 November 2022, the Prosecution filed a request to hold a hearing on the confirmation of charges against Mr Kony in his absence pursuant to article 61(2)(b) of the Statute (the ‘Prosecution Request’).<sup>4</sup>

3. On 28 November 2022, the Office of Public Counsel for Victims (the ‘OPCV’) requested an extension of time to respond to the Prosecution Request.<sup>5</sup> On 2 December 2022, the Office of Public Counsel of the Defence (the ‘OPCD’) requested leave to appear in relation to the Prosecution’s Request, particularly to make submissions on the impact of *in absentia* proceedings for suspects and accused before the Court.<sup>6</sup>

4. On 7 February 2023, the Chamber issued an order (the ‘Procedural Order’) inviting the OPCV to gather and transmit the views and concerns of the victims and the OPCD to file observation on the Prosecution’s Request.<sup>7</sup>

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<sup>1</sup> 29 November 2023, [ICC-02/04-01/05-467](#).

<sup>2</sup> Warrant of Arrest for Joseph Kony, 8 July 2005, ICC-02/04-01/05-2-US-Exp (warrant amended on 27 September 2005, see ICC-02/04-01/05-28-US-Exp).

<sup>3</sup> Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest, 13 October 2005, [ICC-02/04-01/05-52](#); Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, [ICC-02/04-01/05-53](#).

<sup>4</sup> 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 (public redacted version filed the same day, [ICC-02/04-01/05-446-Red](#)).

<sup>5</sup> Legal Representatives’ Joint Request for an Extension of Time to Respond to the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”, 28 November 2022, [ICC-02/04-01/05-447](#).

<sup>6</sup> 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 2023, [ICC-02/04-01/05-450](#).

<sup>7</sup> 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](#).

5. On 23 November 2023, the 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’ (the ‘Decision’),<sup>8</sup> concluding, *inter alia*, (i) that Mr Kony qualifies as a person who cannot be found within the meaning of article 61(2)(b) of the Statute; (ii) that under the prevailing circumstances there would be cause to hold a confirmation hearing in his absence; and (iii) deferring the remainder of the decision.

6. On 29 November, the OPCD filed the Request. On 1 and 4 December 2023, respectively, the OPCV and the Prosecution filed responses to the OPCD Request (the ‘OPCV Response’)<sup>9</sup> (the ‘Prosecution Response’).<sup>10</sup>

7. As regards its standing to request leave to appeal, in its Request the OPCD refers to a precedent in the *Gicheru* case, where a Pre-Trial Chamber granted it leave to appeal a decision on grounds that the contested issue constituted a ‘significant precedent for any future proceedings’.<sup>11</sup> In addition, the OPCD alleges that the Chamber’s previous invitation to submit observations in this case gives it standing pursuant to regulation 77(4)(d) of the Regulations of the Court (the ‘Regulations’).

8. The OPCD requests leave to appeal the Decision under article 82(1)(d) of the Statute, and submits the following issue (the ‘Issue’):

*Whether the Pre-Trial Chamber erred in law in failing to address and properly consider the primacy of Rome Statute rights of a suspect – namely Articles 55, 66, and 67 – in establishing a novel legal framework for a confirmation of charges hearing in absentia pursuant to Article 61(b)(2).*<sup>12</sup>

9. The OPCD submits that the Decision: (i) fails to mention or list the core fair trial rights in articles 55, 66, and 67 of the Statute; (ii) fails to address and assess how these rights are implicated in *in absentia* confirmation of charges proceedings; and (iii)

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<sup>8</sup> [ICC-02/04-01/05-466](#).

<sup>9</sup> Victims' response to "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'" (No. ICC-02/04-01/05-467), 1 December 2023, [ICC-02/04-01/05-468](#).

<sup>10</sup> Prosecution’s Response to the OPCD Request for Leave to Appeal the Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence (ICC-02/04-01/05-467), 4 December 2023, [ICC-02/04-01/05-469](#).

<sup>11</sup> See OPCD Request, para. 8 referring to PTC A, Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’, 23 December 2020, [ICC-01/09-01/20-68](#), (the ‘*Gicheru* Request for Leave to Appeal Decision’) para. 26.

<sup>12</sup> OPCD Request, para. 11.

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’.<sup>13</sup>

10. The OPCD argues that the Issue is appealable, as it ‘significantly affects the fairness of the proceedings in failing to consider the rights of the suspect and assess the impact of an *in absentia* hearing on those rights.’<sup>14</sup> The OPCD further sustains that the implications of the grounds of appeal have far reaching consequences, affecting not only this case but future *in absentia* proceedings. Thus, an immediate review by the Appeals Chamber is necessary to ensure the expeditiousness of the proceedings, in accordance with article 81(2)(b) of the Statute.<sup>15</sup>

11. The Prosecution responds that the Request should be dismissed *in limine*, as the OPCD is not a party to these proceedings and, as a result, it has no standing to seek leave to appeal the Decision under article 81(1)(d) of the Statute. It sustains that the Prosecution and the charged person are the only *parties* in the context of article 61(2)(b) proceedings and the OPCD has not been appointed to represent Mr Kony’s interests.

12. The Prosecution submits that if the Chamber decides that the OPCD has standing to seek leave to appeal the Decision, the OPCD Request should be dismissed on its merits, as it fails to meet the requirements of article 81(2)(d) of the Statute. According to the Prosecution, the Issue raised by the OPCD mischaracterises the Decision and, consequently, it does not arise from it.<sup>16</sup>

13. The Prosecution avers that the OPCD failed to substantiate that the Issue identified in its request would significantly affect the fairness of the proceedings; and that an appeal will not serve the expeditious conduct of the proceedings, given that the Chamber has not yet rendered a final decision on whether it will hold a confirmation hearing *in absentia*.<sup>17</sup> For the same reasons, an appeal would not materially advance the proceedings, but actually cause unnecessary delays in the case.

14. The OPCV’s counsels respond that the OPCD Request should be dismissed *in limine* as the OPCD lacks standing to seek leave to appeal, and its request is premature. The OPCV avers that the OPCD failed to explain how the Decision – which is a

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<sup>13</sup> OPCD Request, para. 11.

<sup>14</sup> OPCD Request, para 24.

<sup>15</sup> OPCD Request, para. 27.

<sup>16</sup> Prosecution Response, paras 11-12.

<sup>17</sup> Prosecution Response, para. 13.

preliminary one and does not take any operative decision *vis-à-vis* the suspect – constitutes ‘a significant precedent for any future proceedings’ or ‘an issue that is essential to “be reviewed by the Appeals Chamber with a view to ensuring legal certainty regarding the basis of such proceedings”’.<sup>18</sup>

15. The OPCV also claims that OPCD fails to identify an appealable issue that would significantly affect the fair and expeditious conduct of proceedings.<sup>19</sup> In its view, granting leave to appeal would not expedite or advance the proceedings.

## II. DETERMINATION BY THE CHAMBER

16. The term ‘either party’ in article 82(1) of the Statute depends on the procedural context, taking into account the type of decision that is the subject of the appeal.<sup>20</sup>

17. The Chamber allowed the OPCD to submit observations on the Prosecution Request, pursuant to regulation 77(4)(d) of the Regulations, considering that: (i) neither Mr Kony had designated legal representation nor the Court had appointed yet counsel to represent him; and (ii) the outcome of the article 61(2)(b) litigation would have a significant impact on Mr Kony’s rights, as well as those of future defendants before the Court.<sup>21</sup>

18. Given that the Chamber has not yet rendered a final decision on the Prosecution Request and that Mr Kony is not yet represented by a counsel, the Chamber believes that the abovementioned reasons continue to apply and that it is appropriate to consider that the OPCD has standing to seek leave to appeal the Decision.

19. The Chamber may allow an interlocutory appeal of its decision provided that the requirements set out in article 82(1)(d) of the ‘Statute’ are met, namely that it ‘involves an issue that would significantly affect the fair and expeditious conduct of the

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<sup>18</sup> OPCV Response, para 21, citing *Gicheru* Request for Leave to Appeal Decision, para. 26.

<sup>19</sup> OPCV Response, para 31.

<sup>20</sup> Appeals Chamber, *The Prosecutor v. Paul Gicheru*, Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’, 8 March 2021, [ICC-01/09-01/20-107](#), para. 32; Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, 4 March 2020, [ICC-02/17-137](#), para. 14.

<sup>21</sup> Procedural Order, paras 16-17.

proceedings or the outcome of the trial’, and ‘an immediate resolution by the Appeals Chamber may materially advance the proceedings’. In addition, the requirements under article 82(1)(d) of the Statute are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.<sup>22</sup>

20. In relation to the first criterion above, the Appeals Chamber has determined that ‘[o]nly an “issue” may form the subject-matter of an appealable decision’.<sup>23</sup> Such an issue has been defined as ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.<sup>24</sup>

21. The OPCD erroneously characterises confirmation *in absentia* proceedings as ‘judicially created law’.<sup>25</sup> The Statute clearly foresees the possibility to hold a confirmation hearing in the absence of a suspect that ‘cannot be found’, provided that all reasonable steps have been taken to secure the person’s appearance and inform him or her of the charges and that a confirmation hearing will take place. As such, the Chamber did not ‘establish[] a novel legal framework’<sup>26</sup> but applied the law to the circumstances of the case at hand.

22. The OPCD seems to aver that the rights of the suspect can never be upheld during a confirmation hearing *in absentia*. This underlying criticism fails to recognise that the Statute provides safeguards to ensure the protection of Mr Kony’s rights if confirmation proceedings are held in his absence, such as the appointment of a counsel to represent his interests.

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<sup>22</sup> PTC II, *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, Decision on Mr Mokom’s requests for reconsideration and leave to appeal the ‘Order on appointment of Mr Kaufman as Counsel for Mr Mokom’, 14 April 2022, [ICC-01/14-01/22-43](#), para.23; see also PTC II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Decision on the Defence alternative request for reclassification of a document or reconsideration of a decision and subsidiary request for leave to appeal a decision, 3 May 2021, [ICC-02/05-01/20-372](#), para. 10; PTC II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiisona*, Decision on the ‘Ngaiisona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’, 24 May 2019, [ICC-01/14-01/18-206](#), para. 11; PTC II, *Situation in the Republic of Kenya*, Decision on a Request for Leave to Appeal, 11 February 2011, [ICC-01/09-43](#), para. 12; PTC I, *Situation in the Democratic Republic of the Congo*, Decision on the OPCD’s request for leave to appeal the 3 July 2008 decision on applications for participation, 4 September 2008, [ICC-01/04-535](#), para. 16.

<sup>23</sup> Appeals Chamber, *Situation in the Democratic Republic of Congo*, Judgement 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](#), (the ‘DRC Appeals Chamber Judgement on the Application for Extraordinary Review’), para. 9.

<sup>24</sup> DRC Appeals Chamber Judgement on the Application for Extraordinary Review, para 9.

<sup>25</sup> OPCD Request, para. 25.

<sup>26</sup> OPCD Request, para. 11.

23. The Chamber underscores that the Decision defers the final determination on whether it will hold a confirmation hearing against Mr Kony in his absence until the charges against him are submitted and all reasonable efforts to inform him thereof are made.

24. Pending a final determination on whether a confirmation hearing *in absentia* will take place, it would have been premature for the Chamber to set measures to ensure that Mr Kony's rights are not unduly prejudiced by the hearing. The need to take into account considerations of this nature, and to adopt specific measures for this purpose, will only arise if and when the Chamber decides to grant the Prosecution Request, in which case it will consider whether to appoint counsel to represent the interests of the suspect in the context of the *in absentia* proceedings. At this stage, the OPCD's claim in this regard is speculative. Therefore, the Issue, as phrased by the OPCD, does not arise from the Decision.

25. Having found that the Issue does not constitute an appealable one, the Chamber is not required to consider the remaining criteria under article 82(1)(d) of the Statute. Accordingly, the OPCD Request is rejected.



**FOR THESE REASONS, THE CHAMBER HEREBY**

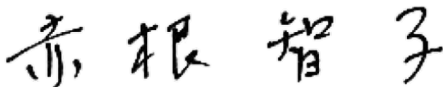
**REJECTS** the OPCD Request.

Done in English. A French translation will follow. The English version remains authoritative.



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**Judge Rosario Salvatore Aitala**  
**Presiding**



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**Judge Tomoko Akane**



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**Judge Sergio Gerardo Ugalde Godínez**

Dated this Monday, 11 December 2023

At The Hague, The Netherlands