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No. ICC-02/04-01/05

Date: 28 January 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

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

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☐ Legal Representatives of the Victims

☐ Legal Representatives
of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☒ The Office of Public Counsel
for Victims

☐ The Office of Public Counsel
for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and Reparations
Section

☐ Other

PRE-TRIAL CHAMBER III of the International Criminal Court (the ‘Court’) issues this ‘Decision on the “Kony Defence request for leave to appeal [the] ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*”’, pursuant to article 82(1)(d) of the Rome Statute (the ‘Statute’), rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 65 of the Regulations of the Court.

I. PROCEDURAL HISTORY

1. On 8 July 2005, Pre-Trial Chamber II issued an under seal warrant of arrest against Joseph Kony (‘Mr Kony’) for war crimes and crimes against humanity allegedly committed in 2003-2004 in Uganda.¹ The arrest warrant was amended on 27 September 2005² and unsealed in October 2005.³

2. On 24 November 2022, the Prosecution submitted a request to hold a hearing on the confirmation of charges against Mr Kony in his absence.⁴

3. On 23 November 2023, Pre-Trial Chamber II 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 ‘First Decision’), thereby *inter alia*: (i) finding that Mr Kony qualifies as a person who ‘cannot be found’ within the meaning of article 61(2)(b) of the Statute, all reasonable steps to secure his appearance had been taken, and, under the prevailing circumstances, there would be cause to hold a confirmation of charges hearing against him in his absence; and (ii) deferring the final decision on whether to proceed with a confirmation of charges hearing in the absence of Mr Kony.⁵

4. On 4 March 2024, Pre-Trial Chamber II issued the ‘Second Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the

¹ Warrant of Arrest for Joseph Kony, 8 July 2005, ICC-02/04-01/05-2-US-Exp, under seal and *ex parte*, only available to the Prosecution.

² Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, ICC-02/04-01/05-28-US-Exp, under seal and *ex parte*, only available to the Prosecution.

³ [Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest](#), 13 October 2005, ICC-02/04-01/05-52, public; [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, public.

⁴ Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, ICC-02/04-01/05-446-Conf, confidential (a public redacted version was provided on the same day, [ICC-02/04-01/05-446-Red](#)).

⁵ [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, public.

suspect's absence' (the 'Second Decision'), thereby *inter alia*: (i) finding 'that all reasonable steps to inform Mr Kony of the charges against him as set out in the Document Containing the Charges have been taken, within the meaning of article 61(2)(b) of the Statute'; (ii) deciding 'that the confirmation of charges hearing, to be held in Mr Kony's absence should he not appear, will commence on 15 October 2024'; and (iii) instructing the Registry to initiate notification efforts and outreach activities in respect of the date for the commencement of the confirmation of charges hearing.⁶

5. Following the election of the new Presidency in March 2024 and the recomposition of Chambers, the situation in Uganda and the case were assigned to this Chamber.⁷

6. On 21 June 2024, Mr Peter Haynes was appointed as counsel for Mr Kony (the 'Defence').⁸

7. On 28 August 2024, pursuant to a decision dated 2 May 2024⁹ and a subsequent variation of deadlines,¹⁰ the Defence submitted the 'Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing in the Kony case in the suspect's absence'.¹¹ On 5 September 2024, the Prosecution replied to the Defence' Observations,¹² and, on 9 September 2024, the Defence submitted further observations on the same matters.¹³

8. On 12 September 2024, the Chamber issued the 'Decision Postponing the Confirmation of Charges Hearing', thereby vacating the 15 October 2024 date and postponing the confirmation of charges hearing until further notice pursuant to rule 121(7) of the Rules.¹⁴

⁶ [ICC-02/04-01/05-481](#), public.

⁷ [Decision assigning judges to divisions and recomposing Chambers](#), 12 March 2024, ICC-02/04-01/05-485, public.

⁸ [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, public, with annex II, confidential, and annexes I, III and IV, public.

⁹ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, public, para. 27.

¹⁰ [Decision on the 'Defence Request for Variation of Deadlines and for a Status Conference'](#), ICC-02/04-01/05-508, public.

¹¹ ICC-02/04-01/05-517-Conf, confidential with a confidential annex (public redaction versions were provided on the same day, [ICC-02/04-01/05-517-Red](#) and [ICC-02/04-01/05-517-Anx1-Red](#)).

¹² Prosecution's Reply to Defence Observations, ICC-02/04-01/05-520-Conf, confidential (a public redacted version was provided on the same day, [ICC-02/04-01/05-520-Red](#)).

¹³ Kony Defence Reply to Prosecution's Submissions in Response to Defence Observations, ICC-02/04-01/05-524-Conf, confidential (a public redacted version was provided on the same day, [ICC-02/04-01/05-524-Red](#)), with annex A, public.

¹⁴ [Decision Postponing the Confirmation of Charges Hearing](#), ICC-02/04-01/05-526, public.

9. On 29 October 2024, the Chamber issued the ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’, thereby *inter alia*: (i) finding that all the requirements set forth in article 61(2)(b) of the Statute, including the notification of the date of the hearing as set in the Second Decision, were met; and (ii) instructing the Registry to undertake notification and outreach activities once a new date for the confirmation of charges hearing would be set, in accordance with the modalities specified in the decision (the ‘29 October 2024 Decision’).¹⁵

10. On 4 November 2024, the Defence for Mr Kony filed the ‘Kony Defence request for leave to appeal [the] “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”’ (the ‘Defence Request for Leave to Appeal’).¹⁶

11. On 8 November 2024, the Prosecution filed the ‘Prosecution’s Response to the Defence Request for Leave to Appeal the Decision on the criteria for holding confirmation of charges proceedings *in absentia*’ (the ‘Prosecution Response’);¹⁷ on the same day, the Office of Public Counsel for the Victims (the ‘OPCV’) filed the ‘Victims’ Response to the “Kony Defence request for leave to appeal ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*”’ (the Victims’ Response’).¹⁸

II. SUBMISSIONS

A. Defence Request for Leave to Appeal

12. The Defence is seeking leave to appeal the 29 October 2024 Decision in respect of three proposed issues:

- (i) ‘Whether the Pre-Trial Chamber erred in reviewing prior Pre-Trial Chamber II decisions without having articulated a standard of review or providing notice to the parties, in a procedure which shifted the burden of proof to the Defence’ (the ‘First Proposed Issue’);

¹⁵ [Decision on the criteria for holding confirmation of charges proceedings *in absentia*](#), ICC-02/04-01/05-532, public.

¹⁶ [ICC-02/04-01/05-533](#), public.

¹⁷ [ICC-02/04-01/05-534](#), public.

¹⁸ [ICC-02/04-01/05-535](#), public.

- (ii) *‘Whether an initial appearance by the person charged is required pursuant to Article 60(1) and Article 61(1) of the Statute before a confirmation of charges hearing can be held in absentia under Article 61(2)(b)’* (the ‘Second Proposed Issue’); and
- (iii) *‘Whether the Pre-Trial Chamber failed properly to exercise its discretion by failing to address relevant factors impacting on the utility of in absentia confirmation proceedings in the circumstances’* (the ‘Third Proposed Issue’; collectively the ‘Proposed Issues’).

13. In the Defence’s submission, each of the Proposed Issues is appealable, since: (i) they arise from the 29 October 2024 Decision; (ii) they significantly affect the fair and expeditious conduct of the proceedings, and (iii) their immediate resolution may materially advance the proceedings, including in light of the fact that ‘an immediate decision by the Appeals Chamber would serve as appellate precedent for future cases’.¹⁹

1. The First Proposed Issue

14. As to the First Proposed Issue, the Defence recalls that, when it was invited to provide observations on, *inter alia*, the First Decision and the Second Decision upon appointment of counsel for Mr Kony, there was neither an ‘indication that the new Pre-Trial Chamber would revisit and review the earlier findings’ entered into by Pre-Trial Chamber II, ‘nor, if so, on what basis’. According to the Defence, it ‘was ethically bound to draw the Pre-Trial Chamber’s attention to several fundamentally flawed findings of law and fact in the Decisions, and invite the new Pre-Trial Chamber to reconsider them’.²⁰ In the view of the Defence, by making a final determination on whether all the requirements for confirmation to proceed *in absentia* had been met, the Chamber ‘conducted an appellate-style review of another Pre-Trial Chamber’s decisions, with the Defence bearing the burden of persuading a second, differently-composed, Chamber that errors had been made by the first’,²¹ with the Chamber’s

¹⁹ [Defence Request for Leave to Appeal](#), para. 3.

²⁰ [Defence Request for Leave to Appeal](#), para. 20.

²¹ [Defence Request for Leave to Appeal](#), para. 21.

failure to articulate a standard of review resulting in ‘a decision which was insufficiently reasoned’.²²

15. In the Defence’s view, the First Proposed Issue is aimed at determining whether the procedure adopted by the Chamber is compatible with the Prosecution’s burden of demonstrating the requirements for *in absentia* proceedings. It adds that, since in the absence of a standard of review a party ‘is unable to adequately frame’ its submissions, or to understand how its arguments were assessed, this issue significantly affects the fairness of the proceedings.²³ The Defence further submits that the First Proposed Issue also affects the expeditiousness of the proceedings, since it may lead the Defence ‘to raise and re-litigate’ the issue of the propriety of the procedure during confirmation proceedings and in relation to any finding subsequent thereto.²⁴ Finally, its immediate resolution by the Appeals Chamber will materially advance the proceedings, by avoiding the risk that the entire confirmation proceedings be challenged and ultimately quashed at a later stage.²⁵

2. *The Second Proposed Issue*

16. As to the Second Proposed Issue, the Defence submits that the Chamber’s reading of article 61(2)(b) of the Statute, and in particular its conclusion that it is not necessary for a person to make a first appearance before the Court for him or her to qualify as ‘a person who cannot be found’, is a ‘central legal error’.²⁶ In the view of the Defence, the fair trial implications of the Second Proposed Issue are ‘obvious’, in light of the direct impact of the *in absentia* nature of the proceedings on the pre-trial rights of the suspect, including the right to counsel of one’s own choosing, the right to be informed of and to challenge the evidence relied upon by the Prosecution and to present his or her own evidence, the right to challenge the admissibility of the case, and the inability to instruct appointed counsel.²⁷

²² [Defence Request for Leave to Appeal](#), para. 22.

²³ [Defence Request for Leave to Appeal](#), para. 25.

²⁴ [Defence Request for Leave to Appeal](#), para. 26.

²⁵ [Defence Request for Leave to Appeal](#), para. 27.

²⁶ [Defence Request for Leave to Appeal](#), para. 2.

²⁷ [Defence Request for Leave to Appeal](#), para. 37.

17. Similarly to what it argued in respect of the First Proposed Issue, the Defence submits that failure to allow the Appeals Chamber to address and determine the correctness of the Chamber's reading of article 61(2)(b) of the Statute as regards the need or not for a first appearance to occur prior to confirmation to proceed *in absentia* would result in the risk of matters underlying the Second Proposed Issue being re-litigated at subsequent stages of the proceedings, thus adversely affecting their expeditiousness.²⁸ According to the Defence, an immediate determination of this issue by the Appeals Chamber would also materially advance the proceedings for two reasons: first, it would counter the risk of continuing re-litigation if a trial were to be subsequently held, in light of the right of an accused for whom charges have been confirmed *in absentia* to request that issues which are necessary for the Trial Chamber's effective and fair functioning be referred back to the Pre-Trial Chamber, pursuant to rule 126(3) of the Rules;²⁹ and, second, a definitive determination by the Appeals Chamber at this stage would be necessary, 'given that the outcome of these proceedings is likely to shape the work of the Court for the next decade, at a time when the refusal of States Parties to transfer suspects to the Court is a live and pressing issue'.³⁰

3. *The Third Proposed Issue*

18. As to the Third Proposed Issue, the Defence submits that the Chamber 'developed its own set of criteria' to determine whether there was cause to hold confirmation proceedings *in absentia* pursuant to rule 125(1) of the Rules; in light of the discretionary nature of this determination,³¹ the Chamber would have erred in law and in fact 'by failing satisfactorily, or at all, to address' four specific factors relevant to the exercise of its discretion.³² First, the Defence argues that the Chamber 'failed properly to evaluate or mitigate the likelihood' that *in absentia* confirmation proceedings against Mr Kony would subsequently be rendered inadmissible, namely as a result of Ugandan proceedings which might be held in the future against Mr Kony 'if he were ever to be arrested', and despite the current absence of such proceedings.³³ Second, the Chamber

²⁸ [Defence Request for Leave to Appeal](#), para. 40.

²⁹ [Defence Request for Leave to Appeal](#), para. 41.

³⁰ [Defence Request for Leave to Appeal](#), para. 42.

³¹ [Defence Request for Leave to Appeal](#), para. 43.

³² [Defence Request for Leave to Appeal](#), para. 45.

³³ [Defence Request for Leave to Appeal](#), para. 46.

erred in omitting to give proper weight to the information indicating that Mr Kony may be dead. In the view of the Defence, the very existence of information suggesting that Mr Kony may no longer be alive required the Chamber to assess ‘the extent to which these indications further diminish the likelihood’ of his eventual appearance, rather than concluding that, in the absence of conclusive information establishing Mr Kony’s death, those indications could not decisively militate against the existence of cause for holding proceedings *in absentia*.³⁴ Third, the Chamber erred in determining that it could not consider the reparations order issued in the case of *The Prosecutor v. Dominic Ongwen* (the ‘Ongwen Case’) in assessing the cost implications of *in absentia* proceedings for Mr Kony, in particular in light of the size of the reparations expected by the victims in the Ongwen Case as well as the overall limited resources available to the Court. Fourth, the Chamber erred in failing to consider alternative mechanisms potentially available to victims of Mr Kony outside of the framework of the Statute.

19. In the view of the Defence, the Third Proposed Issue affects the fair and expeditious conduct of the proceedings: a confirmation of charges hearing conducted *in absentia* which does not satisfy the requirements of rule 125 of the Rules would unjustifiably result in depriving the suspect of the possibility to be involved in the formulation of the charges, in case a trial were to follow, and in a waste of time and resources, if Mr Kony turned out to be dead or tried in Uganda.³⁵ It adds that allowing the Appeals Chamber to determine the correctness of the criteria identified and relied upon by the Chamber in exercising its discretion under rule 125 of the Rules would ‘materially advance the proceedings by ensuring appellate review prior to the expenditure of substantial sums of money’, also in light of the fact that the issue is a novel one, yet to undergo appellate scrutiny.³⁶

B. Prosecution Response

20. The Prosecution submits that, since the three Proposed Issues ‘mischaracterise the Chamber’s approach and determinations to date and do not amount to appealable

³⁴ [Defence Request for Leave to Appeal](#), para. 47.

³⁵ [Defence Request for Leave to Appeal](#), para. 51.

³⁶ [Defence Request for Leave to Appeal](#), para. 52.

issues’ arising from the 29 October 2024 Decision, the Defence Request should be rejected.³⁷

21. As to the First Proposed Issue, the Prosecution argues, *inter alia*, that it results from a mischaracterisation of both the 29 October 2024 Decision and of the process leading to it: rather than consisting of ‘a review of PTCII’s decision’, the 29 October 2024 Decision ‘instead is a *de novo* determination’ by the Chamber, made on the basis of ‘broad and unhindered observations’ submitted by the Defence and taking into account every aspect thereof.³⁸ As to the Second Proposed Issue, the Prosecution views it as a question over which there is disagreement or conflicting opinion, consisting of and revolving around the Defence’s reiteration of arguments already raised in its observations in an attempt to re-litigate matters,³⁹ also based on an incorrect reading of the 29 October 2024 Decision.⁴⁰ Further, the Defence’s argument to the effect that appellate review of the Second Issue at this stage would be important in the event that requests for confirmation proceedings *in absentia* were brought ‘against high-profile persons’ in the future is inapposite: the consideration that an issue might be of general interest or potentially impact future cases is not relevant to the determination of a request under article 82(1)(d) of the Statute.⁴¹ As to the Third Proposed Issue, the Prosecution also considers it as ‘a compilation of mere disagreements on miscellaneous issues’ contained in the 29 October 2024 Decision, and as an attempt to relitigate them, namely in respect of four of the factors relied upon by the Chamber in the exercise of its discretion.⁴²

22. In the view of the Prosecution, as they all result from either a mischaracterisation of, or a disagreement with, the 29 October 2024 Decision, none of the Proposed Issues affects the fairness and expeditiousness of the proceedings;⁴³ furthermore, since the 29 October 2024 Decision is limited to the conduct of confirmation proceedings, ‘any projection on the impact of the [Proposed] Issues on a trial is speculative and unsupported’.⁴⁴ Finally, ‘as no unfairness arises’ from the 29 October 2024 Decision in

³⁷ [Prosecution Response](#), para. 1.

³⁸ [Prosecution Response](#), paras 4-5.

³⁹ [Prosecution Response](#), para. 6.

⁴⁰ [Prosecution Response](#), para. 9.

⁴¹ [Prosecution Response](#), para. 10.

⁴² [Prosecution Response](#), paras 11-12.

⁴³ [Prosecution Response](#), para. 18.

⁴⁴ [Prosecution Response](#), para. 19.

relation to any of the three Proposed Issues, ‘appellate intervention would do nothing to materially advance the proceedings’, including as regards the Second Proposed Issue, focussed as the latter is on ‘hypothetical interpretational disputes that have no bearing on the case at hand’.⁴⁵

C. Victims’ Response

23. As the Prosecution, the OPCV likewise considers that none of the three Proposed Issues satisfies the criteria set forth in article 82(1)(d) of the Statute.⁴⁶

24. As to the First Proposed Issue, the OPCV observes that it is based on allegations ‘far removed from what the Chamber actually did’ and therefore does not arise from the 29 October 2024 Decision. More specifically, the OPCV asserts that: (i) there is no statutory ‘legal venue or possibility for appellate review proceedings to take place between Pre-Trial Chambers’; (ii) there was neither a ‘legal possibility’ or a need for the Chamber to formulate a standard of review ‘supposedly applying to decisions issued by other Pre-Trial Chambers’; and (iii) no shifting of the burden of proof was done by the Chamber, which, rather, fully considered the Defence’s observations.⁴⁷ As to the Second Proposed Issue, the OPCV submits, *inter alia*, that it constitutes both a disagreement and a mischaracterisation of the 29 October 2024 Decision and, accordingly, it fails to meet the article 82(1)(d) threshold on two grounds. According to the OPCV: (i) first, it attempts to ‘re-litigate questions [...] already addressed and dismissed by the Chamber’, on the basis of the same arguments relied upon in its observations; and (ii) second, by insisting that the Chamber failed to assign proper weight to the fact that two different situations may be covered by article 61(2)(b) of the Statute even by considering that the first appearance is required in both such situations, the Defence ‘fails to comprehend’ that the Chamber only analysed the specific factual circumstances of the Kony case, and ‘was under no obligation [...] to provide a broad interpretation as to any future or imaginary situations which may or may not arise in other cases before the Court’.⁴⁸ Similarly, in the OPCV’s view, the Third Proposed Issue also represents to a large extent a mere disagreement with the 29 October 2024

⁴⁵ [Prosecution Response](#), para. 20.

⁴⁶ [Victims’ Response](#), para. 2.

⁴⁷ [Victims’ Response](#), paras 21-25.

⁴⁸ [Victims’ Response](#), paras 27-30.

Decision, revolving around arguments already addressed by the Chamber, on the one hand, and on ‘speculative’ and ‘unsubstantiated’ arguments on the other, such as those relating to the effect of hypothetical proceedings against Mr Kony being conducted in Uganda in the future, or the likelihood that Mr Kony be dead.⁴⁹

25. The OPCV maintains that none of the Proposed Issues affects the fair and expeditious conduct of the proceedings and that the intervention by the Appeals Chamber would not materially advance the proceedings at this stage;⁵⁰ to the contrary, ‘granting the Request would also be detrimental to the interests of the victims who have been waiting for justice for some 20 years and for whom the start of judicial proceedings marks an important opportunity to voice their sufferings and victimisation’.⁵¹

III. DETERMINATION

26. The Chamber recalls the exceptional character of the remedy of interlocutory appeal and that, in order for leave to appeal to be granted, the following requirements must be met: (a) the decision must involve an issue that would significantly affect (i) both the ‘fair’ and ‘expeditious’ conduct of the proceedings; or (ii) the outcome of the trial; and (b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.⁵² According to established jurisprudence, an ‘issue’ is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.⁵³ Most importantly, the ‘issue’ identified by the

⁴⁹ [Victims’ Response](#), paras 34-42.

⁵⁰ [Victims’ Response](#), para. 44.

⁵¹ [Victims’ Response](#), paras 3, 47.

⁵² See Appeals Chamber, *Situation in the Democratic Republic of the 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, public (‘DRC Leave to Appeal Judgment’), paras 7-8; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’](#), 24 May 2019, ICC-01/14-01/18-206, public (‘Yekatom and Ngaïssona Request for Leave to Appeal Decision’), para. 12.

⁵³ [DRC Leave to Appeal Judgment](#), para. 9.

appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.⁵⁴

A. First Proposed Issue

27. With regard to the First Proposed Issue, the Chamber notes that it is premised on the assumption that the 29 October 2024 Decision constitutes the result of the Chamber having ‘revisited and reviewed’ the findings entered into in the First and the Second Decision, thus ‘[e]ssentially [...] conduct[ing] an appellate-style review of another Pre-Trial Chamber’s decisions, with the Defence bearing the burden of persuading a second, differently-composed, Chamber that errors had been made by the first’. However, the language of the 29 October 2024 Decision makes it apparent that the exercise conducted therein by the Chamber was of a very different nature. The Chamber neither ‘reviewed’ the findings of the First and the Second Decision, nor otherwise engaged in ‘an appellate-style’ type of exercise. First, the Defence was provided with the opportunity to make observations on all matters decided by Pre-Trial Chamber II at the first possible juncture following the appointment of counsel, with a view to guaranteeing the fairness of the proceedings. Second, once those observations were available, the exercise conducted by the Chamber was aimed at ‘fully consider[ing]’ them,⁵⁵ before making anew its own determination on each of the requirements of article 61(2)(b) of the Statute.⁵⁶ In this regard, the 29 October 2024 Decision clearly states that the Chamber ‘set out its specific reasoning pertaining to each criterion in light of Pre-Trial Chamber II’s findings, the information in the record, and the Defence’s submissions’, and does not make any reference to a review of Pre-Trial Chamber’s II findings. Otherwise stated, the Defence’s observations, rather than either the First or the Second Decision or their reasoning, were at the centre of the 29 October 2024 Decision. The corrective nature inherent in any appellate review was therefore absent from the exercise conducted by the Chamber in the 29 October 2024 Decision.

⁵⁴ [Yekatom and Ngaïssona Request for Leave to Appeal Decision](#), para. 12. See also Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges](#), 31 July 2013, ICC-02/11-01/11-464, public, para. 8; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014”](#), 4 July 2014, ICC-01/04-02/06-322, public, para. 10.

⁵⁵ [29 October 2024 Decision](#), para. 22.

⁵⁶ [29 October 2024 Decision](#), paras 22, 94.

28. Accordingly, in the absence of any appellate style review conducted by the Chamber, there was neither a need for the Chamber to articulate a specific standard of review, nor any impact on the burden of proof at stake.

29. Since it results from the Defence's mischaracterisation of the 29 October 2024 Decision, the Chamber finds that the First Proposed Issue does not constitute 'an identifiable subject or topic requiring a decision for its resolution' emanating from that Decision; accordingly, the Chamber considers that the First Proposed Issue is not an appealable issue within the meaning of article 82(1)(d) of the Statute. Having found that the first criterion for granting leave to appeal in respect of the First Proposed Issue has not been fulfilled, there is no need for the Chamber to address the remainder of the applicable criteria.

B. Second Proposed Issue

30. Judge Ben Mahfoudh dissents from the present decision in so far as it relates to the determination of the Second Proposed Issue for the reasons set out in his Partially Dissenting Opinion. Accordingly, the following findings have been adopted by the majority consisting of Judge Alexis-Windsor and Judge Motoc (the 'Majority').

31. The Majority will first address whether the Second Proposed Issue, as formulated by the Defence, amounts to an identifiable subject or topic requiring a decision for its resolution, or whether it is a mere disagreement or conflict of opinion. The Second Proposed Issue concerns a fundamental, determinative legal finding made by the Chamber in authorising the confirmation of charges proceedings in Mr Kony's absence. Accordingly, it directly emanates from the 29 October 2024 Decision; it does not concern a mere disagreement between the parties, nor a hypothetical concern or an abstract legal question. As a result, the Majority concludes that the Second Proposed Issue amounts to an 'issue' within the meaning afforded to it by the Appeals Chamber.

32. Regarding the impact of Second Proposed Issue on the fairness and expeditiousness of the proceedings, the Majority considers the following. By challenging the interpretation of article 61 of the Statute, the Defence raises an issue which puts directly into question the foundation of the proceedings in this case. In other words, should the Chamber be erroneous in its interpretation of this provision of the Statute, this error would affect the whole confirmation proceedings *in absentia*.

33. The decision to hold confirmation proceedings *in absentia* without requiring that the suspect make a first appearance (and, therefore, without him being able to exercise, at this initial stage of the proceedings, various rights) has a significant impact on the procedure before the Chamber. The following rights are directly affected: (i) the right to choose, and to communicate with, one's own counsel; (ii) the right to challenge the evidence relied upon the Prosecution, and to submit one's own evidence, prior to the determination as to whether the standard for the charges to be confirmed is met; (iii) the right to advance reasons for excluding individual criminal responsibility; and (iv) the right to submit admissibility and jurisdictional challenges, and to determine, in consultation with counsel, the most suitable timing to raise those challenges, including in light of the limitations to the exercise of that right as enshrined in article 19(4) of the Statute. Whether article 61(2)(b) of the Statute requires, or not, that the suspect has made an appearance before the Court before confirmation of charges proceedings can be held *in absentia*, albeit in the limited context of the hearing of first appearance, is bound to significantly affect and shape his or her ability to concretely influence the pre-trial chamber's crucial and foundational determination: namely, the decision whether a trial will take place and, if the determination is in the affirmative, the boundaries within which that trial will be held.

34. The impact on the fairness of the proceedings is further demonstrated by the fact that rule 126(3) of the Rules provides that, if a suspect against whom charges have been confirmed *in absentia* were to be subsequently arrested and appear at trial, his or her ability to refer issues back to the pre-trial chamber would be limited to those 'that are necessary for the Chamber's effective and fair functioning in accordance with article 64, paragraph 4'. The Trial Chamber's discretion to thus filter the suspect's requests results in potentially further curtailing the suspect's chance to ever have a meaningful say in the determination of those issues.

35. In respect of the effect on the expeditiousness of the proceedings, the Majority considers that, in the absence of a resolution of the issue by the Appeals Chamber at the present stage of the proceedings, this matter is likely to be raised at a later stage and to generate more procedural arguments, motions and decisions. In addition, in the absence of a final determination by the Appeals Chamber on this issue, and should the charges be confirmed and the suspect apprehended, the suspect would likely re-open

litigation on this very same matter, pursuant to rule 126(3) of the Rules, thereby further delaying the proceedings.

36. Accordingly, the Majority considers that the Second Proposed Issue significantly affects the fair and expeditious conduct of the proceedings.

37. Lastly, the Majority turns to the question whether the immediate resolution of the Second Proposed Issue by the Appeals Chamber would materially advance the proceedings. A decision by the Appeals Chamber would ensure legal certainty vis-à-vis the foundation of the present proceedings. If deferred to a later stage, a finding that confirmation of charges proceedings were held *in absentia* on the basis of an incorrect reading of article 61(2)(b) of the Statute would render all the acts and procedural steps taken in between invalid, with a major detrimental effect on judicial economy and the overall need to ensure that the resources of the Court are used effectively and impactfully. As a result, the Majority finds that an immediate resolution by the Appeals Chamber of the Second Proposed Issue would materially advance the proceedings.

38. Based on the above, the Chamber, by majority, Judge Ben Mahfoudh dissenting, finds that the Second Proposed Issue fulfils all requirements under article 82(1)(d) of the Statute as consistently construed by the Appeals Chamber and the other chambers of the Court over the years.

C. Third Proposed Issue

39. With regard to the Third Proposed Issue, the Chamber notes that it revolves around the Defence's claim regarding the Chamber's exercise of discretion as enshrined in the 29 October 2024 Decision and pursuant to rule 125 of the Rules. More specifically, the Defence submits that the Chamber failed to satisfactorily, or at all, address four factors relevant to the determination whether there is cause to hold confirmation of charges proceedings *in absentia* for Mr Kony. The Chamber will not entertain the Defence's submissions as regards the merits of the Defence's claim, as these are extraneous to the nature and purpose of proceedings under article 82(1)(d) of the Statute. It will nonetheless touch upon specific aspects raised by the Defence in so far as this is necessary for its reasoning regarding the adjudication of the Defence Request for Leave to Appeal.

40. The Chamber recalls that rule 125 of the Rules provides the Chamber with the discretion to determine if the circumstances prevailing at the time of its assessment justify proceeding *in absentia*. In this regard, the Chamber notes that the Defence argues that the Chamber failed to consider all relevant considerations or to give adequate weight to Defence's arguments regarding: (i) the likelihood of the case against Mr Kony being inadmissible; (ii) the likelihood of Mr Kony being deceased; (iii) the need to consider the reparations order issued in the Ongwen Case; and (iv) the need to consider other facts relevant to the ability of victims to be heard, aside from the *in absentia* proceedings.

41. The Chamber, however, observes that, in the 29 October 2024 Decision, in addition to Pre-Trial Chamber II's findings regarding the cause to hold *in absentia* proceedings, it considered the same arguments as raised in the Defence Request for Leave to Appeal, and rejected them in turn, providing detailed reasoning. More specifically, the Chamber considered that the Defence had failed to establish that the Chamber should take into consideration the likelihood of the inadmissibility of the case against Mr Kony,⁵⁷ or that there were no indications suggesting the need to consider the likelihood of Mr Kony being deceased.⁵⁸ Regarding the two remaining factors, the Chamber notes that both the findings regarding the reparations order issued in the Ongwen Case⁵⁹ and the other possible avenues to allow the victims to provide their views and concerns⁶⁰ were based on the Court's applicable legal framework and not solely on its discretion to reject such arguments, as suggested by the Defence.

42. Therefore, the Chamber finds that, in respect of the Third Proposed Issue, the Defence both reiterates previously made arguments and mischaracterises the related Chamber's findings. As a result, the Defence merely expresses its disagreement with the Chamber's conclusion. The Defence has, thus, failed to demonstrate the existence of a subject or topic requiring a decision for its resolution.

43. Accordingly, the Chamber considers that the Third Proposed Issue is not an appealable issue within the meaning of article 82(1)(d) of the Statute. Having found that the first criterion for granting leave to appeal in respect of the Third Proposed Issue

⁵⁷ [29 October 2024 Decision](#), para. 83.

⁵⁸ [29 October 2024 Decision](#), para. 77.

⁵⁹ [29 October 2024 Decision](#), para. 89.

⁶⁰ [29 October 2024 Decision](#), para. 90.

has not been fulfilled, there is no need for the Chamber to address the remainder of the applicable criteria.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS by majority, Judge Ben Mahfoudh dissenting, the Defence Request for Leave to Appeal in so far as the Second Proposed Issue is concerned; and

REJECTS the remainder of the Defence Request for Leave to Appeal.

Judge Ben Mahfoudh appends a Partly Dissenting Opinion to the present decision.

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



Judge Althea Violet Alexis-Windsor

Presiding Judge



Judge Iulia Antoanella Motoc



Judge Haykel Ben Mahfoudh

Dated this Tuesday, 28 January 2025

At The Hague, The Netherlands.