

Confirmation of Charges *in Absentia* at the International Criminal Court and the Right to be Present

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ABSTRACT

It is a core principle of international human rights law that criminal defendants have the right to be present in proceedings against them. This article examines the conformity of confirmation of charges proceedings *in absentia* at the International Criminal Court (ICC) under Article 61(2) ICC Statute with the right to be present in international human rights law. Drawing on the jurisprudence of regional human rights courts and the United Nations Human Rights Committee, it first establishes that the right to be present is not confined to trials, but applies with equal force to certain pre-trial procedures, including confirmation of charges before the ICC. The paper then proceeds to argue, in light of the jurisprudence of human rights bodies and the Special Tribunal for Lebanon, that the absence of a right to *de novo* confirmation of charges proceedings — a ‘retrial’ — should a suspect subsequently appear before the Court after charges are confirmed against them *in absentia* renders the framework of Article 61(2)(b) incompatible with international human rights law. On this basis, it concludes Article 21(3) ICC Statute precludes the confirmation of charges *in absentia* at the ICC under the Court’s current legal regime. It then addresses the possible procedural remedies under the Rome Statute framework, ultimately concluding that they are insufficient to mitigate against the violation of an absent suspect’s right to be present in confirmation proceedings. Finally, it suggests that an amendment to the ICC Rules of Procedure and Evidence would be necessary to hold confirmation proceedings *in absentia* in conformity with international human rights law.

1. INTRODUCTION

The necessity of the right to a fair trial before international courts and tribunals has been recognized since the nascent days of such institutions. In his opening statement before the International Military Tribunal, Justice Robert Jackson cautioned of the ‘dramatic disparity

between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate', famously adding that '[t]o pass these defendants a poisoned chalice is to put it to our own lips as well'.¹ With the institutionalization of international criminal justice that accompanied the establishment of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), followed by the creation of the International Criminal Court (ICC), the right to a fair trial has been the subject of considerable scholarly attention.² With this has come greater exploration of the legal and doctrinal aspects of the right to be present and proceedings *in absentia* before international tribunals,³ though this scholarship remains underdeveloped in large part due to the exceptional nature of proceedings in the absence of a suspect or accused in contemporary international criminal law.

But Article 61(2)(b) ICC Statute stands apart from other provisions in providing for a type of wholly *in absentia* proceeding before the ICC which has now been employed for the very first time.⁴ Over the course of three decisions, Pre-Trial Chamber (PTC) II and III held that Joseph Kony, the Court's longest at-large fugitive, is a person who cannot be found, that cause exists for holding a confirmation hearing in his absence, and that all reasonable steps had been taken to inform Mr Kony of the charges against him and of the confirmation hearing that would be taking place.⁵ The Appeals Chamber affirmed the finding that all criteria for the holding of confirmation proceedings *in absentia* had been met.⁶ The confirmation of charges hearing was accordingly held in September 2025.⁷

In November 2025, PTC III issued its decision confirming the charges against Kony⁸ following a first-of-its-kind procedure that, despite the interests of victims to finally make their

¹ Transcript of 21 November 1945, *France et al. v. Göring et al.*, 2 Trial of the Major War Criminals before the International Military Tribunal (1946) 98 ('Jackson, IMT Opening Statement'), at 101.

² For just two seminal works from a wealth of literature, see Y. McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016); A. Clooney and P. Webb, *The Right to a Fair Trial in International Law* (Oxford University Press, 2021).

³ See e.g. C.H. Wheeler, *The Right to Be Present at Trial in International Criminal Law* (Brill Nijhoff, 2019); K. Ambos, 'In Absentia Proceedings before the International Criminal Court', in P. Czarnecki et al. (eds), *Hominum Causa Omne Ius Constitutum Sit: Księga jubileuszowa Profesora Piotra Hofmańskiego* (Kluwer, 2024) 511–521; A. Schwarz, 'The Legacy of the Kenyatta Case: Trials in Absentia at the International Criminal Court and their Compatibility with Human Rights', 16 *African Human Rights Law Journal* (2016) 99–116; M.H. Zakerhossein and A.-M. de Brouwer, 'Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals', 26 *Criminal Law Forum* (2015) 181–224; G.J. Shaw, 'Convicting Inhumanity in Absentia: Holding Trials in Absentia at the International Criminal Court', 44 *George Washington International Law Review* (2012) 107–140; H. Friman, 'Trying Cases at the International Criminal Tribunals in the Absence of the Accused?', in S. Darcy and J. Powderly (eds), *Judicial Creativity at International Criminal Tribunals* (Oxford University Press, 2010) 332–352; W.A. Schabas 'In Absentia Proceedings before International Criminal Courts', in G. Sluiter and S. Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May, 2008) 335. See also literature on trials *in absentia* in the specific context of the Special Tribunal for Lebanon cited in *infra* notes 97 and 105.

⁴ Proceedings *in absentia* are those held in the absence of the concerned individual, where the latter has been notified of the proceedings and charges yet has chosen not to be present. They are distinct from default proceedings, where no measures have been taken to put the absent individual on notice of the proceedings and charges against them and they have never appeared in court. See P. Gaeta, 'Trial in Absentia Before the Special Tribunal for Lebanon', in A. Alamuddin, N.N. Jurdi, and D. Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press, 2014) 229–250, at 230–237.

⁵ Decision on the Prosecution's Request to Hold a Confirmation of Charges Hearing in the Kony Case in the Suspect's Absence, Kony (ICC-02/04-01/05-466), Pre-Trial Chamber II, 23 November 2023 ('Kony First Decision'), §§ 35, 44, 69; Second Decision on the Prosecution's Request to Hold a Confirmation of Charges Hearing in the Kony Case in the Suspect's Absence, Kony (ICC-02/04-01/05-481), Pre-Trial Chamber II, 4 March 2024 ('Kony Second Decision'), § 9; Decision on the Criteria for Holding Confirmation of Charges Proceedings in Absentia, Kony (ICC-02/04-01/05-532), Pre-Trial Chamber III, 29 October 2024 ('Kony Third Decision'), §§ 32–34, 38–41, 53–58, 62–65, 75–77.

⁶ 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", Kony (ICC-02/04-01/05-610), Appeals Chamber, 3 June 2025 ('Kony OA4 Judgment').

⁷ See Transcript, Kony (ICC-02/04-01/05-T-015-ENG), Pre-Trial Chamber III, 9 September 2025 ('Kony Transcript of 9 September 2025'); Transcript, Kony (ICC-02/04-01/05-T-016-ENG), Pre-Trial Chamber III, 10 September 2025 ('Kony Transcript of 10 September 2025').

⁸ Decision on the Confirmation of Charges *in Absentia* against Joseph Kony pursuant to Articles 61(2)(b) and 61(7) of the Rome Statute, Kony (ICC-02/04-01/05-633), Pre-Trial Chamber III, 6 November 2025 ('Kony Confirmation Decision').

voices heard in the long-inactive case,⁹ has serious ramifications for the protection of the human rights of suspects before the ICC. While the prospect of this extraordinary process's use against other high-profile suspects has been noted by some commentators,¹⁰ its potential to revive cases against suspects whose arrest cannot be foreseen in the near to mid-term future cannot justify overlooking the fundamental rights of individual suspects subjected to these *sui generis* proceedings.

Despite the absence of judicial practice prior to *Kony*, the majority of scholars have argued that such proceedings would not violate the suspect's right to be present, as they do not result in a finding on their guilt or innocence.¹¹ This article argues that while it is, of course, true that a decision by a PTC confirming the charges levelled by the Prosecutor against a suspect is not a final judgment on the charges, this is the wrong question to be asking when interrogating the compatibility of *in absentia* confirmation proceedings with the rights of suspects and accused. The procedural prerequisites for the initiation of confirmation hearings in the absence of a suspect under Article 61(2)(b) ICC Statute are rigorous and in line with the treatment of proceedings *in absentia* in international human rights law. It is not these prerequisites that put confirmation of charges *in absentia* in conflict with the rights of the suspect, but rather the deficiencies of the ICC Statute and ICC RPE.

This article argues that, as presently constructed, the holding of confirmation of charges proceedings *in absentia* violates the absent suspect's right to be present in proceedings against them. Contrary to the orthodox position, there is no basis in international human rights law to displace the right to be present at confirmation proceedings simply because they do not entail a conclusive finding of guilt. Instead, the parameters set in the jurisprudence of international human rights courts and quasi-judicial bodies for the application of this right to pre-trial proceedings are clearly met with respect to confirmation proceedings before the ICC. The paper then turns to the right to retrial under international law, the guarantee of which is integral to ensuring the legality of any proceeding *in absentia*, drawing from human rights jurisprudence and the case law of the Special Tribunal for Lebanon (STL). The absence of a right of a suspect, should they subsequently appear before the Court, to obtain a *de novo* confirmation of charges hearing renders such proceedings unlawful and non-conformant with the rights of suspects in international human rights law.

2. CONFIRMATION PROCEEDINGS IN ABSENTIA AT THE ICC

At the ad hoc tribunals, the compromise for the prohibition of trials *in absentia* took the form of unique *ex parte* proceedings under Rule 61 of the ICTY and ICTR RPE,¹² a pre-trial mechanism by which the Prosecutor presents the evidence against an accused individual who remains at large publicly in open session before a Trial Chamber. While included in the

⁹ *Kony* First Decision, *supra* note 5, § 67; *Kony* Third Decision, *supra* note 5, §§ 71, 90.

¹⁰ See e.g. Ambos, *supra* note 3, at 515; M.P. Scharf, 'Confirmation of Charges *in Absentia* for Joseph Kony: Paving the Way for Putin?', *Just Security*, 30 August 2024, available online at <https://www.justsecurity.org/99033/joseph-kony-in-absentia-putin/> (visited 15 January 2026). See also the comments of one of the Deputy Prosecutors: 'Hearings *in Absentia* 'Conceivable' for Putin and Netanyahu, ICC Says', *France 24*, 5 December 2025, available online at <https://www.france24.com/en/europe/20251205-hearing-in-absentia-conceivable-for-putin-and-netanyahu-icc-says> (visited 15 January 2026).

¹¹ See e.g. Shaw, *supra* note 3, at 129; Zakerhossein and de Brouwer, *supra* note 3, at 194; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford University Press, 2015), at 929; Schwarz, *supra* note 3, at 102. See also E. Trendafilova, 'Fairness and Expedition in the International Criminal Court's Pre-Trial Proceedings', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 441–457, at 455.

¹² M. Tieroff and E.A. Amley, 'Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61', 23 *Yale Journal of International Law* (1998) 231–274, at 244–246. The inclusion of Article 61(2)(b) in the ICC Statute represents a similar compromise. See G.S. Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations', 45 *Columbia Journal of Transnational Law* (2007) 635–710, at 683.

RPE of both ad hoc tribunals, only the ICTY ever held proceedings under the provision. Despite long being likened to the *in absentia* confirmation procedure envisioned under Article 61(2)(b) ICC Statute,¹³ such comparisons are perfunctory, only appreciating surface-level similarities in format without further inquiry into these mechanisms' distinct procedural roles, and fail to recognize the differing overall procedural contexts of the ICTY and ICC.

Firstly, unlike an *in absentia* confirmation hearing at the ICC, a Rule 61 hearing is not a procedure that ordinarily occurs in the presence of the accused, which may be held *in absentia* under certain exceptional circumstances. It is a *sui generis* incidental proceeding that only occurs upon the non-execution of an arrest warrant.¹⁴ Rather than initiating proceedings specifically designed for situations involving absent suspects, in authorizing a confirmation hearing *in absentia*, a PTC is resolving to hold proceedings where a suspect would otherwise be able to both be present and offer evidence in their defence without them effectively enjoying the right to do either.¹⁵ The *inter partes* nature of the proceedings are, in a legalistic sense, preserved through the representation of the absent suspect's interests by counsel.¹⁶ Rule 61 proceedings, on the other hand, are, without exception, held *ex parte* and in the absence of the accused, who may not benefit from legal representation.¹⁷

Rule 61 hearings and confirmation hearings *in absentia* also differ with respect to their applicable standards of proof and, accordingly, their procedural consequences. For the purposes of Rule 61 proceedings, a Trial Chamber will issue an international arrest warrant for an accused where it finds 'that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment'.¹⁸ Such proceedings thus serve the expressive purpose of making the evidence against the accused public, offering an opportunity for victims to be heard, and contributing to the establishment of a historical record.¹⁹ They are, moreover, moot upon the arrest of the accused as they result, upon the discharging of the Prosecutor's burden, in the issuance of an arrest warrant.²⁰

When comparing these features against those of confirmation hearings at the ICC, any superficial similarities between the two processes disappear. A PTC confirms charges if it believes the Prosecutor has established 'substantial grounds to believe that the person committed each of the crimes charged',²¹ which the Appeals Chamber has clearly held is a markedly higher standard of proof than that of 'reasonable grounds'.²² While Rule 61 proceedings

¹³ See e.g. Trendafilova, *supra* note 11, at 454–455; Zakerhossein and de Brouwer, *supra* note 3, at 192, 194; Schabas, *Commentary*, *supra* note 11, at 926, 929; W.A. Schabas, E. Chaitidou, and M. El Zeidy, 'Article 61', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: An Article-by-Article Commentary* (4th edn., C.H. Beck, Hart, Nomos, 2022) 1761, § 1.

¹⁴ Rule 61(A) ICTY/ICTR RPE.

¹⁵ *Kony* First Decision, *supra* note 5, § 26.

¹⁶ See Art. 61(2) ICCSt.; Rule 125(1) ICC RPE; *Kony* Second Decision, *supra* note 5, § 12. See also *infra* notes 132–133 and accompanying text.

¹⁷ See Decision Rejecting the Request Submitted by Defence Counsels Mr Medvene and Mr Hanley III for Radovan Karadžić, *Karadžić and Mladić* (IT-95-5-R61 & IT-95-18-R61), Trial Chamber, 5 July 1996; Decision Rejecting the Application Presented by Messrs. Medvene and Hanley Seeking Leave to File Briefs Challenging the Fairness of the Statute and the Rules of Procedure and Evidence, *Karadžić and Mladić* (IT-95-5-R61 & IT-95-18-R61), Trial Chamber, 24 July 1996.

¹⁸ Rule 61(C), (D) ICTY/ICTR RPE.

¹⁹ See Tieroff and Amlley, *supra* note 12, at 247–250. The Chamber may also move to report non-cooperative states to the UN Security Council. See Rule 61(E) ICTY/ICTR RPE. See e.g. Review of the Indictment, *Karadžić and Mladić* (IT-95-5-R61 & IT-95-18-R61), Trial Chamber, 11 July 1996, § 101; Review of the Indictment, *Rajić* (IT-95-12-R61), Trial Chamber, 13 September 1996 ('*Rajić* Rule 61 Decision'), § 70.

²⁰ Rule 61(D) ICTY/ICTR RPE.

²¹ Art. 61(7) ICCSt.

²² Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', *Al Bashir* (ICC-02/05-01/09-73), Appeals Chamber, 3 February 2010 ('*Al Bashir* OA Judgment'), § 30; 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', *Mbarushimana* (ICC-01/04-01/10-514), Appeals Chamber, 30 May 2012 ('*Mbarushimana* OA4 Judgment'), § 43.

may result in the issuance of an international arrest warrant, confirmation proceedings at the ICC result in the suspect's condemnation to trial on the confirmed charges upon the Prosecutor's discharge of their burden. If a case has reached the stage of confirmation, an arrest warrant or summons to appear has *already* been issued pursuant to Article 58 ICC Statute. Thus, practically and procedurally speaking, the prohibition of trials *in absentia* before the ICC means that a decision confirming charges *in absentia* has minimal, if any, effect until the suspect is apprehended or appears before the Court.²³ In reality, the closer analogue to Rule 61 proceedings before the ICC is the procedure surrounding requests for the issuance of arrest warrants, which a PTC considers on the 'reasonable basis' standard.²⁴ Such decisions are rendered under the same standard as Rule 61 decisions, and, like the latter, result in the issuance of an arrest warrant against the suspect.²⁵ Like Rule 61 proceedings, they are also conducted *ex parte* in the suspect's absence by their very nature, not only in exceptional circumstances.²⁶

Unlike trials, confirmation proceedings *in absentia* are not prohibited without exception at the ICC. Article 61(2) ICC Statute lays out two distinct modalities for the confirmation of charges in the absence of a suspect, namely those where the suspect has voluntarily waived their right to be present²⁷ and those where, despite the taking of all reasonable efforts, the physical presence of a suspect who '[f]led or cannot be found' could not be secured.²⁸ This article does not deal with the former type of proceedings, which are not truly '*in absentia*' given that the suspect has made their initial appearance.²⁹

3. THE RIGHT TO BE PRESENT AND CONFIRMATION OF CHARGES *IN ABSENTIA*

At the core of the truth-seeking enterprise of international criminal proceedings is the necessity of allowing the accused to speak.³⁰ In this sense, the ICC Appeals Chamber has observed that 'the accused person is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein,' noting the 'central role of the accused person in proceedings and the wider significance of the presence of the accused for the administration of justice.'³¹ In international human rights law, this principle is expressed in the right of a defendant to be present in proceedings against them. This right is provided in a number of human rights instruments, which the ICC may take into account as secondary sources of law when interpreting and applying provisions of the ICC Statute and ICC RPE.³² Recourse to such sources is permitted even when no *lacuna* exists in the Statute.³³

²³ C. Safferling, *International Criminal Procedure* (Oxford University Press, 2012), at 323.

²⁴ Art. 58(1)(a) ICCSt.

²⁵ Art. 58(1), (3) ICCSt.

²⁶ Reg. 23 *ter* ICC RoC; ICC, *Chambers Practice Manual* (8th edn., 2024), § 3.

²⁷ Art. 61(2)(a) ICCSt.; Rule 124 ICC RPE. See e.g. Transcript, *Katanga and Ngudjolo* (ICC-01/04-01/07-T-46-ENG), Pre-Trial Chamber I, 11 July 2008, at 23, line 23 to 24, line 10; Decision on Issues Related to the Hearing on the Confirmation of Charges, *Banda and Jerbo* (ICC-02/05-03/09-103), Pre-Trial Chamber I, 17 November 2010, §§ 1–4.

²⁸ Art. 61(2)(b) ICCSt.; Rules 125 and 126 ICC RPE.

²⁹ See *supra* note 4.

³⁰ M. Koskeniemi, *The Politics of International Law* (Hart, 2011), at 190. See also S.J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights* (Hart, 2007), at 117.

³¹ Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', *Ruto and Sang* (ICC-01/09-01/11-1066), Appeals Chamber, 25 October 2013 ('*Ruto and Sang* OAS Judgment'), § 49.

³² Art. 21(1)(b) ICCSt.

³³ Judgment on the Appeal of Mr Ntaganda against the 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, 15 June 2017', *Ntaganda* (ICC-01/04-02/06-1962), Appeals Chamber, 15 June 2017, § 53.

This article does not examine the teleological bases for the right to be present or their interactions with countervailing interests of international criminal justice in the context of proceedings held *in absentia*.³⁴ Other scholars have definitively set out the incompatibility of *in absentia* proceedings with the purposive goals of international criminal law, and the matter need not be revisited here.³⁵ The following analysis assesses the doctrinal and legal non-conformity of proceedings *in absentia* with the right of suspects and accused to be present, *arguendo* taking for granted the teleological balancing act inherent in this exercise.

A. Legal Basis of the Right to be Present

Article 14(3)(d) International Covenant on Civil and Political Rights (ICCPR) provides a criminal defendant *inter alia* the minimum guarantee to ‘be tried in his presence, and to defend himself in person or through legal assistance of his own choosing’.³⁶ In a similar vein, Article 6(3)(c) European Convention on Human Rights (ECHR) safeguards a criminal defendant’s minimum right to *inter alia* ‘defend himself in person or through legal assistance of his own choosing’.³⁷ Article 7(1)(c) African Charter of Human and Peoples’ Rights (AfrCHPR) also enshrines the right to be present as a component of the right to a defence in criminal proceedings.³⁸ Article 8(1) Directive 2016/343 of the European Parliament and the Council of the European Union further provides for the right of suspects and accused ‘to be present at their trial’.³⁹ Upon review of several of these sources and other national instruments available at the time, the ICTR Appeals Chamber concluded that the ‘accused’s right to be tried in his or her presence implies a right to be *physically present* at trial’.⁴⁰

This right is not, however, absolute.⁴¹ To carry out proceedings *in absentia*, the facts must unequivocally show that the absent individual was sufficiently aware of the opportunity to participate in the specific proceedings in question and voluntarily waived their right to be present.⁴² The establishment of such a waiver may only be based on inference if it can be determined that the suspect had *actual knowledge* of the proceedings against him.⁴³ Waiver

³⁴ cf. Gaeta, *supra* note 4, at 249–250.

³⁵ See Wheeler, *supra* note 3, at 69–102; W. Jordash and T. Parker, ‘Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law’, 8 *Journal of International Criminal Justice (JICJ)* (2010) 487–509, at 499–504.

³⁶ Art. 14(3)(d) International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (‘ICCPR’).

³⁷ Art. 6(3)(c) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (‘ECHR’).

³⁸ Art. 7(1)(c) African Charter of Human and Peoples’ Rights, 27 June 1981, 1520 UNTS 217 (‘AfrCHPR’). See *Thomas v. Tanzania*, App. No. 005/2013, African Court of Human and Peoples’ Rights, 20 November 2015, § 91; *Avocats Sans Frontières (Bwampamyé) v. Burundi*, App. No. 231/99, African Commission on Human and Peoples’ Rights (‘AfrCmHPR’), 6 November 2000, §§ 27–29.

³⁹ Art. 8(1) Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to be Present at the Trial in Criminal Proceedings, 2016 O. J. L 65/1 (‘EU Directive 2016/343’).

⁴⁰ Decision on Interlocutory Appeal, *Zigiranyirazo* (ICTR-2001-73-AR73), Appeals Chamber, 30 October 2006 (‘*Zigiranyirazo* Appeal Decision’), § 13 (emphasis added).

⁴¹ UN Human Rights Committee (HRC), *General Comment No. 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial*, UN Doc. CCPR/C/GC/32, 23 August 2007 (‘HRC, *General Comment No. 32*’), § 36; *Sejdovic v. Italy* [GC], ECHR 2006-II, § 91; *Mbenge v. Zaire*, Communication No. 16/1977, UN Doc. CCPR/C/18/D/16/1977, 25 March 1983, § 14.1.

⁴² *Zana v. Turkey* [GC], ECHR 1997-VII, § 70; *Sejdovic v. Italy*, *supra* note 41, § 86; *Idalov v. Russia* [GC], App. No. 5826/03, ECtHR, 22 May 2012, § 178; *Colozza v. Italy*, ECHR (1985) Ser. A, No. 89, § 28; *Maleki v. Italy*, Communication No. 699/1996, UN Doc. CCPR/C/66/D/699/1996, 16 July 1999, § 9.4; *Salikh v. Uzbekistan*, Communication No. 1382/2005, UN Doc. CCPR/C/95/D/1382/2005, 22 April 2009, §§ 9.4–9.5; Case C-688/18, *TX and UW*, 13 February 2020, ECLI:EU:C:2020:94, §§ 42, 49.

⁴³ HRC, *General Comment No. 32, supra* note 41, § 36; *Sejdovic v. Italy, supra* note 41, §§ 26, 99; *Mbenge v. Zaire, supra* note 41, §§ 14.1–14.2; *Maleki v. Italy, supra* note 42, § 9.4; Art. 8(2)(a) EU Directive 2016/343; Case C-688/18, *TX and UW, supra* note 42, §§ 33, 42. See also International Bar Association, *Report on the ‘Experts’ Roundtable on Trials in Absentia in International Criminal Justice* (2016), available online at <https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia> (visited 15 January 2026) (‘IBA, *Expert Roundtable Report*’), at 5.

cannot be inferred solely from a suspect's status as a 'fugitive'.⁴⁴ These principles have been affirmed and endorsed in the jurisprudence of the STL⁴⁵ and the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁴⁶ Largely on the basis of the right to be present,⁴⁷ trials *in absentia* were prohibited before the ICTY, ICTR, and other ad hoc international and hybrid criminal courts and tribunals.⁴⁸

Article 63(1) ICC Statute explicitly prohibits trials *in absentia* before the ICC. The Appeals Chamber has affirmed the categorical nature of this prohibition with regard to defendants who have never appeared before the Court.⁴⁹ Like at the ICTY and ICTR,⁵⁰ exceptions to this prohibition at the ICC can be made in certain circumstances where an accused has appeared before the Court voluntarily and subsequently waives their right to be present or where they are disruptive.⁵¹ Moreover, in line with human rights law, the ICTR and ICC Appeals Chambers have suggested that proceedings *in absentia* may be appropriate where an accused absconds and knowingly refuses to be present at their trial.⁵² In the *Banda* proceedings, Trial Chamber IV explored the prospect of a trial *in absentia* in such a situation.⁵³ While no decision was publicly taken on the matter, with both the Prosecution and Defence opposing a trial in the accused's absence,⁵⁴ it appears the Chamber, in a new composition, later abandoned this idea.⁵⁵

⁴⁴ *Sejdovic v. Italy*, *supra* note 41, § 67; *Colozza v. Italy*, *supra* note 42, § 28; *Maleki v. Italy*, *supra* note 42, § 9.4.

⁴⁵ See e.g. Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, *Ayyash et al.* (STL-11-01/PT/AC/AR126.1/F0012-AR126.1), Appeals Chamber, 1 November 2012 ('*Ayyash et al.* Appeal Decision'), §§ 26–29, 31–33; Decision to Hold Trial *In Absentia*, *Merhi* (STL-13-04/1/TC/F0037), Trial Chamber, 20 December 2013, §§ 100–107.

⁴⁶ See Decision to Charge Meas Muth *In Absentia*, *Meas Muth* (003/07-09-2009-ECCC/OCIJ, D128), International Co-Investigating Judge, 3 March 2015, §§ 53, 59; Decision to Charge Im Chaem *In Absentia*, *Im Chaem* (004/07-09-2009-ECCC/OCIJ, D239), International Co-Investigating Judge, 3 March 2015, §§ 61–67; Opinion of Judges Beauvallet and Bwana, Consideration on Meas Muth's Appeal against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *In Absentia*, *Meas Muth* (003/07-09-2009-ECCC/OCIJ, D266/27), Pre-Trial Chamber, 30 March 2016 ('Opinion of Judges Beauvallet and Bwana, *Meas Muth*'), §§ 38–41; Opinion of Judges Beauvallet and Bwana, Consideration on Im Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her *In Absentia*, *Im Chaem* (004/01/07-09-2009-ECCC/OCIJ, D239/1/8), Pre-Trial Chamber, 1 March 2016 ('Opinion of Judges Beauvallet and Bwana, *Im Chaem*'), §§ 36–39.

⁴⁷ See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, § 101.

⁴⁸ See Art. 21(4)(d) ICTYSt.; Art. 20(4)(d) ICTRSt.; Art. 17(4)(d) SCSLSt.; Sec. 5.1 UNTAET Reg. 2000/30; Art. 35 *new* (2)(d) ECCC Law; Art. 21(4)(d) EACSt.; Art. 5(D)(d) CAR-SCC RPE; Art. 21(4)(e) KSC Law. On the application of the same prohibition to national trials for international crimes, see R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *JICJ* (2004) 735–760, at 747–752.

⁴⁹ *Ruto and Sang OAS Judgment*, *supra* note 31, § 53.

⁵⁰ See Art. 21(4)(d) ICTYSt.; Art. 20(4)(d) ICTRSt.

⁵¹ See Art. 63(2) ICCSt.; Rules 134 *ter*, 134 *quarter*, 170 ICC RPE. See also Wheeler, *supra* note 3, at 122–131, 165–181. The ICC has yet to see a case where a suspect or accused is removed for disruptive behavior, though such action was threatened with respect to Dominic Ongwen. See Transcript, *Ongwen* (ICC-02/04-01/15-T-162-Red-ENG), Trial Chamber IX, 19 March 2018, at 66, lines 24–25, to 67, lines 1–4.

⁵² Judgment, *Nahimana et al.* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, §§ 96–109; Decision on Counsel for Mr Gbagbo's Request for Reconsideration of the 'Judgment on the Prosecutor's Appeal against the Oral Decision of Trial Chamber I pursuant to Article 81(3)(c)(i) of the Statute' and on the Review of the Conditions on the Release of Mr Gbagbo and Mr Blé Goudé, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-1355-Red), Appeals Chamber, 28 May 2020, § 70. Critically, see C.H. Wheeler, 'The ICC Appeals Chamber Signals a Possible Change in Approach to the Permissibility of Trials *In Absentia*', *EJIL:Talk!*, 3 July 2020, available online at <https://www.ejiltalk.org/the-icc-appeals-chamber-signals-a-possible-change-in-approach-to-the-permissibility-of-trials-in-absentia/> (visited 15 January 2026). cf. Rule 106(A)(iii) STL RPE.

⁵³ See Order following Status Conference on 30 October 2019, *Banda* (ICC-02/05-03/09-671-Red), Trial Chamber IV, 19 November 2019, §§ 6, 11. Judge Prost considered that 'the Rome Statute and settled jurisprudence make it clear that a trial *in absentia* is not possible before the Court in these circumstances'. *Ibid.*, at 6.

⁵⁴ Prosecution's Submissions on Trials *In Absentia* in Light of the Specific Circumstances of the *Banda* Case, *Banda* (ICC-02/05-03/09-673-Red), Trial Chamber IV, 11 May 2020; Defence Submissions on *In Absentia* Proceedings pursuant to the Trial Chamber's Order of 13 November 2019, *Banda* (ICC-02/05-03/09-674-Red), Trial Chamber IV, 10 June 2020.

⁵⁵ See Decision to End Mandated Facilitation Discussions and Reports by the Registry, *Banda* (ICC-02/05-03/09-705-Red), Trial Chamber IV, 21 July 2021, §§ 12–13.

B. The Right to be Present in Pre-Trial Proceedings

The provision of *in absentia* confirmation hearings under Article 61(2) ICC Statute is often framed as a ‘compromise’ due to the fact that confirmation hearings do not form part of the defendant’s ‘trial’ within the meaning of Part 6 ICC Statute and no finding of guilt is made at this stage.⁵⁶ Some have maintained that the suspect’s right to be present is not implicated during a confirmation of charges hearing held in their absence simply because such proceedings do not result in a determination of their guilt.⁵⁷ However, this differentiation between pre-trial and trial proceedings as a basis for the differential application of the right of the defendant to be present has no basis in international human rights law. While it is true that the confirmation of charges process ‘should not be seen as a “mini trial” or a “trial before the trial”’,⁵⁸ this does not preclude the applicability of the suspect’s fair trial rights in such proceedings.

The United Nations Human Rights Committee (HRC) has repeatedly found that Article 14(3) (d) ICCPR applies during various pre-trial stages of criminal proceedings.⁵⁹ Similarly, but with more detailed reasoning, the European Court of Human Rights (ECtHR) has consistently held that the applicability of Article 6(1) ECHR is not restricted to trial proceedings but applies equally to pre-trial proceedings.⁶⁰ In *Imbrioscia v. Switzerland*, the Court concluded that while ‘the primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, ... it does not follow that the Article has no application to pre-trial proceedings.’⁶¹ The natural question thus presents itself as to when such rights begin to apply.

The HRC has held that the guarantees of Article 14 ICCPR apply ‘to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.’⁶² This formulation underscores the ‘laying of charges’ as the critical moment when the rights of the defendant become operative, qualified by the requirement that the suspect is either informed of the charges against them or are publicly named as the subject of criminal charges.⁶³ The Grand Chamber of the ECtHR has adopted a similar standard, holding that ‘the guarantees of Article 6 [ECHR] are applicable from the moment that a “criminal charge” exists within the meaning of this Court’s case-law.’⁶⁴ Such a charge is considered to exist from the point at which an individual has become ‘substantially affected’ by actions taken by the authorities as a result of a suspicion against them.⁶⁵ This interpretation is consistent with the ordinary meaning of the *chapeau* of Article 6(3), which

⁵⁶ See e.g. Zakerhossein and de Brouwer, *supra* note 3, at 193; L. Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’, in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 74–95, at 108.

⁵⁷ See *supra* note 11.

⁵⁸ Decision on the Confirmation of Charges, *Katanga and Ngudjolo* (ICC-01/04-01/07-717), Pre-Trial Chamber I, 30 September 2008 (‘*Katanga and Ngudjolo* Confirmation Decision’), § 64; Transcript, *Ntaganda* (ICC-01/04-02/06-T-7-ENG), Pre-Trial Chamber II, 10 February 2014, at 5, line 10.

⁵⁹ See e.g. *Brown v. Jamaica*, Communication No. 775/1997, UN Doc. CCPR/C/65/D/775/1997, 11 May 1999, § 6.6; *Aliyev v. Ukraine*, Communication No. 781/1997, UN Doc. CCPR/C/78/D/781/1997, 7 August 2003, § 7.2; *Smartt v. Guyana*, Communication No. 867/1999, UN Doc. CCPR/C/81/D/867/1999, 6 July 2004, § 6.3.

⁶⁰ In addition to the authorities cited in *infra* notes 61–71, see e.g. *Ribemont v. France*, ECHR (1995) Ser. A, No. 303, § 35; *Pandy v. Belgium*, App. No. 13583/02, ECtHR, 21 September 2006, § 50; *Salduz v. Turkey* [GC], App. No. 36391/02, ECtHR, 27 November 2008, §§ 54–55; *Shabelnik v. Ukraine*, App. No. 16404/03, ECtHR, 19 February 2009, § 52; *Alexandru-Radu Luca v. Romania*, App. No. 20837/18, ECtHR, 14 June 2022, § 57.

⁶¹ *Imbrioscia v. Switzerland*, ECHR (1993) Ser. A, No. 275, § 36. The AfrCtHPR has also held that the right of the accused to be present at criminal proceedings against them under Art. 7(1)(c) AfrCHPR extends to pre-trial hearings. See *Thomas v. Tanzania*, *supra* note 14, § 91.

⁶² HRC, *General Comment No. 32*, *supra* note 41, § 31.

⁶³ *Ibid.*; *Marques de Morais v. Angola*, Communication No. 1128/2002, UN Doc. CCPR/C/83/D/1128/2002, 29 March 2005, § 5.4; *Kelly v. Jamaica*, Communication No. 253/1987, UN Doc. CCPR/C/41/D/253/1987, 8 April 1991, § 5.8.

⁶⁴ *Ibrahim and Others v. United Kingdom* [GC], App. Nos 50541/08, 50571/08, 50573/08, and 40351/09, ECtHR, 13 September 2016, § 253.

⁶⁵ *Reinhardt and Slimane-Kaïd v. France* [GC], ECHR 1998-II, § 93; *McFarlane v. Ireland* [GC], App. No. 31333/06, ECtHR, 10 September 2010, § 143; *Ibrahim and Others v. United Kingdom*, *supra* note 64, § 249.

extends the rights enumerated under the provision to ‘everyone charged with a criminal offense’,⁶⁶ identifying the point of charging as the operative moment when an individual comes to enjoy the protection of the provision. The ECtHR has considered, across numerous cases, that an individual’s rights under Article 6 ECHR become operative from the point at which charges are formally levelled against them and their arrest ordered.⁶⁷

The ECtHR’s approach has been affirmed and applied by appellate benches of numerous international and hybrid criminal courts and tribunals.⁶⁸ For instance, the ICTR Appeals Chamber has considered that as soon as the individual became ‘a “suspect” within the meaning of the [RPE] ... the provisions within the Tribunal’s Statute and Rules pertaining to the rights of suspects were applicable to him.’⁶⁹ Panels of the Kosovo Specialist Chambers have also repeatedly held that Article 6 ECHR was engaged where an individual received a summons for questioning which indicated the existence of a suspicion against the latter, despite no charges having been filed against them.⁷⁰ The ECtHR’s approach crucially reflects the significant stigma that attaches to an individual upon their subjection to a criminal charge.⁷¹ Suspects ‘are tried, so to speak, by the court of popular opinion the minute they come to be indicted.’⁷² It is for this reason that even prosecutors must be particularly cautious when making public statements that may be prejudicial to the presumption of innocence enjoyed by an accused.⁷³

C. The Right to be Present at the Confirmation of Charges Hearing

Having established that a suspect before the ICC begins to enjoy fair trial rights in the pre-trial stage upon the publication of the warrant for their arrest, it is necessary to consider in what types of proceedings suspects enjoy the right to be present in this early stage. The ECtHR has held that fair trial rights under Article 6 ECHR ‘may be relevant before a case is sent for trial if and in so far as the fairness of the trial is liable to be seriously prejudiced by an initial failure to comply with its provisions.’⁷⁴ The assessment is thus prospective, not according an absent defendant fair trial rights in *all* pre-trial proceedings, but only those where failure to afford them such rights would have a prospective prejudicial effect on the trial itself. It is on this basis that defendants have been held to have, for instance, the right to

⁶⁶ Art. 6(3) ECHR.

⁶⁷ See e.g. *Pélissier and Sassi v. France* [GC], ECHR 1999-II, § 66; *Pedersen and Baadsgaard v. Denmark* [GC], ECHR 2004-XI, § 44; *Ringeisen v. Austria*, ECHR (1971), Ser. A, No. 13, § 110.

⁶⁸ See e.g. Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, *Norman et al.* (SCSL-2003-09-PT-064), Appeals Chamber, 4 November 2003, §§ 7–9; Judgment, *Kajelijeli* (ICTR-98-44A-A), Appeals Chamber, 23 May 2005 (‘*Kajelijeli* Appeal Judgment’), §§ 208–209, 217; Decision on Nuon Chea’s Appeal concerning Provisional Detention Conditions, *Nuon Chea* (002/19-09-2007-ECCC/OCIJ), Pre-Trial Chamber, 26 September 2008, § 21; Decision on Krasniqi and Selimi Appeals against ‘Decision on Prosecution Motion for Admission of Accused’s Statements’, *Thaçi et al.* (KSC-BC-2020-06/IA030/F00009), Court of Appeals Panel, 31 May 2024, § 19.

⁶⁹ *Kajelijeli* Appeal Judgment, *supra* note 68, § 217. See, similarly, Considerations of the Pre-Trial Chamber on Ao An’s Appeal against the Decision Denying His Requests to Access the Case File and Take Part in the Judicial Investigation, *Ao An* (004/07-09-2009-ECCC/OCIJ, D121/4/4), Pre-Trial Chamber, 15 January 2014, §§ 18–21.

⁷⁰ See e.g. Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018 (KSC-CC-2019-05/F00012), Constitutional Court Chamber, 20 February 2019, §§ 29–33; Decision on Defence Appeals Against Decision on Motions Challenging the Legality of the Specialist Chambers and the Specialist Prosecutor’s Office and Alleging Violations of Certain Constitutional Rights of the Accused, *Thaçi et al.* (KSC-BC-2020-06/IA013/F00012), Court of Appeals Panel, 20 May 2022, §§ 53–57; Decision on Shala’s Appeal Against Decision Concerning Prior Statements, *Shala* (KSC-BC-2020-04/IA006/F00007), Court of Appeals Panel, 5 May 2023, § 43.

⁷¹ See *Jussila v. Finland* [GC], App. No. 73053/01, ECtHR, 23 November 2006, §§ 41–43.

⁷² S. Kochhar and M. Hieramente, ‘Of Fallen Demons: Reflection on the International Criminal Court’s Defendant’, 29 *Leiden Journal of International Law (LJIL)* (2016) 223–244, at 225. See also N. Jain, ‘Atrocity’s Glass Booth’, 77 *Current Legal Problems* (2024) 127–166, at 132 (on the significant difficulty of countering the narrative of a suspect’s guilt set in motion by the Prosecutor).

⁷³ See Decision on the Request for Disqualification of the Prosecutor, *Gaddafi and Al-Senussi* (ICC-01/11-01/11-175), Appeals Chamber, 12 June 2012, § 33; *Daktaras v. Lithuania*, App. No. 42095/98, ECtHR, 10 October 2000, § 42.

⁷⁴ *Imbrioscia v. Switzerland*, *supra* note 61, § 36. Affirmed in e.g. *Öcalan v. Turkey* [GC], App. No. 46221/99, ECtHR, 12 May 2005, § 131; *Dvorski v. Croatia* [GC], App. No. 25703/11, ECtHR, 20 October 2015, § 76.

counsel in pre-trial proceedings,⁷⁵ the right to an interpreter in pre-trial hearings,⁷⁶ and the right to be present in proceedings concerning the legality of their pre-trial detention.⁷⁷

Viewed in this light, confirmation of charges proceedings under Article 61 ICC Statute are, without a doubt, proceedings where a failure to fully respect the rights of a suspect could result in serious prejudice to them in future trial proceedings. Unlike the strictly *ex parte* investigation phase leading up to the Prosecutor's request for an arrest warrant or summons for a suspect and their filing of the document containing charges, in the pre-trial stage, the crux of proceedings shifts from investigation to prosecution, necessitating a pivot away from permissive *ex parte* procedures to the robust protection of the suspect's rights. It is thus this stage of proceedings where the fairness of any future trial is liable to be seriously prejudiced by a failure to afford the suspect the full measure of their rights.

The confirmation of charges procedure primarily exists 'to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence', going beyond mere theory or suspicion.⁷⁸ To this end, confirmation proceedings promote a rigorous adversarial process at the ICC whereby the suspect has the opportunity to challenge the Prosecutor's evidence, present their own exculpatory evidence, call witnesses in their defence, and give sworn or unsworn testimony.⁷⁹ The Appeals Chamber has 'attache[d] considerable significance' to the suspect's right to 'challenge the evidence presented by the Prosecutor and to present his/her own evidence' during the confirmation hearing.⁸⁰

Preventing the suspect from suffering the undue restriction of their rights through their subjection to a trial — during which they will also likely remain in detention — on the basis of insufficiently substantiated charges is the *raison d'être* of confirmation proceedings. In filtering out cases that fail to meet the standard set forth in Article 61(7) ICC Statute, the confirmation procedure serves as a vital check on the Prosecutor. This is clearly evinced by the instances in which PTCs have declined to confirm the charges against a suspect as a whole,⁸¹ or otherwise rejected substantial portions of the Prosecutor's charges.⁸² Such a check is all the more critical in the context of Prosecutors of international courts and tribunals, who are not simply adversarial parties, but whose responsibilities include guaranteeing the rights of suspects and accused persons and searching for and disclosing exculpatory evidence.⁸³

⁷⁵ See e.g. *Öcalan v. Turkey*, *supra* note 74, § 133; *Salduz v. Turkey*, *supra* note 60, §§ 54–55; *Dvorski v. Croatia*, *supra* note 74, §§ 76–78.

⁷⁶ See e.g. *Kamasinski v. Austria*, ECHR (1989) Ser. A, No. 168, §§ 52–58; AfrCmHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, AU Doc DOC/OS(XXX)247, 2001 ('AfrCmHPR, *Right to a Fair Trial in Africa*'), § N(4)(c); *Baytar v. Turkey*, App. No. 45440/04, ECtHR, 14 October 2014, §§ 52–58.

⁷⁷ See e.g. *Idalov v. Russia*, *supra* note 42, §§ 161–164; AfrCmHPR, *Luanda Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (2014), § 11(f).

⁷⁸ *Mbarushimana* OA4 Judgment, *supra* note 22, § 39.

⁷⁹ Art. 61(6) ICCSt.; Rules 121(6), (9), 122(7) ICC RPE.

⁸⁰ *Mbarushimana* OA4 Judgment, *supra* note 22, § 40.

⁸¹ See Decision on the Confirmation of Charges, *Abu Garda* (ICC-02/05-02/09-243-Red), Pre-Trial Chamber I, 8 February 2010, § 236; Decision on the Confirmation of Charges, *Mbarushimana* (ICC-01/04-01/10-465-Red), Pre-Trial Chamber I, 16 December 2011, § 340; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Ruto et al.* (ICC-01/09-01/11-373), Pre-Trial Chamber II, 23 January 2012, §§ 293, 297; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura et al.* (ICC-01/09-02/11-382-Red), Pre-Trial Chamber II, 23 January 2012, §§ 428–427.

⁸² See Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba* (ICC-01/05-01/08-424), Pre-Trial Chamber II, 15 June 2009, §§ 209, 291, 302 (declining to confirm three out of eight charges); Decision on the Confirmation of Charges, *Yekatom and Ngaïssona* (ICC-01/14-01/18-403-Corr-Red), Pre-Trial Chamber II, 28 June 2021 ('*Yekatom and Ngaïssona* Confirmation Decision'), §§ 163, 166–239 (declining to confirm 79 out of 111 charges); Decision on the Confirmation of Charges, *Said* (ICC-01/14-01/21-218), Pre-Trial Chamber II, 9 December 2021, § 153 (declining to confirm seven out of 14 charges).

⁸³ See L. Côté, 'Independence and Impartiality', in L. Reydam, J. Wouters, and C. Ryngaert (eds), *International Prosecutors* (Oxford University Press, 2012) 319–415, at 326, 359–360.

The confirmation proceedings further serve to ensure ‘that the parameters of the case are set for trial.’⁸⁴ Article 74(2) ICC Statute confines the ‘facts and circumstances’ of the trial judgment to the charges confirmed by the PTC, with Regulation 55 ICC Regulations of the Court further stipulating that while the Trial Chamber retains some liberty in altering the legal qualification of facts, it cannot go beyond the ‘facts and circumstances’ confirmed by the PTC.⁸⁵ The Appeals Chamber has stressed that the facts and charges of a case at trial are strictly confined to those confirmed by the PTC.⁸⁶ Conversely, a Trial Chamber may not ignore or otherwise nullify charges duly confirmed by the PTC.⁸⁷

Even without the PTC rendering its decision on the charges, the confirmation hearing itself can have a significant effect on the future of proceedings against a suspect. In *Mokom*, for instance, it was only after the confirmation hearing was held and the PTC was in deliberation that the Prosecutor withdrew all charges against the suspect.⁸⁸ While the Prosecution averred that charges were withdrawn because it ‘became clear ... that certain witnesses would be unlikely to testify at a potential trial’, it is difficult to discount the role the impending scrutiny of the charges and their supporting evidence by the PTC must have had on the Prosecution’s ‘consider[ation] [of] the totality of the evidence and whether further investigative efforts could produce comparable evidence’ to that which the Prosecutor claims became unavailable to it.⁸⁹

This crucial role of confirmation of charges hearings as a check is not attenuated when such hearings are held *in absentia*.⁹⁰ It is, rather, in view of these considerations that PTC II observed in *Kony* that the ‘default position’ of the ICC Statute is that a suspect is to be present at their confirmation hearings due to ‘importance of the confirmation hearing, and the impact of the outcome of that hearing on any future trial.’⁹¹ The Appeals Chamber accepted this premise in *Kony* but avoided any discussion of the suspect’s substantive rights — namely their right to be present — by recalling that, should a suspect appear before the Court after charges against them were confirmed *in absentia*, they ‘will be able to exercise in person all rights enshrined in article 67 of the Statute’ and vaguely referencing the Statute’s anti-impunity goals.⁹² Notwithstanding its insufficiencies in both rigour and comprehensiveness, the Appeals Chamber’s analysis is incorrect in its consideration that a suspect’s pre-trial rights can be guaranteed or a prospective violation thereof remedied by their enjoyment of their standard Article 67 rights at trial. Concerns for the rights of suspects during confirmation proceedings cannot be brushed aside with reference to trial-stage rights where the former proceedings have effects that cannot simply be reconsidered or reversed at trial.

⁸⁴ *Yekatom and Ngaïssona* Confirmation Decision, *supra* note 82, § 15.

⁸⁵ Judgment on the Appeal of Mr Laurent Gbagbo against the Decision of Trial Chamber I entitled ‘Decision Giving Notice pursuant to Regulation 55(2) of the Regulations of the Court’, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-369), Appeals Chamber, 18 December 2015, § 32.

⁸⁶ Decision on the Prosecutor’s Appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges pursuant to Article 61(9) of the Statute’, *Ruto and Sang* (ICC-01/09-01/11-1123), Appeals Chamber, 13 December 2013, § 29; Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s Judgment pursuant to Article 74 of the Statute, *Bemba* (ICC-01/05-01/08-3636-Red), Appeals Chamber, 8 June 2018, §§ 114–115.

⁸⁷ Decision on the Status before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decisions of the Pre-Trial Chamber in Trial Proceedings, and the Manner in which Evidence Shall be Submitted, *Lubanga* (ICC-01/04-01/06-1084), Trial Chamber I, 15 December 2007, §§ 39, 43.

⁸⁸ Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka, *Mokom* (ICC-01/14-01/22-275), Pre-Trial Chamber II, 16 October 2023.

⁸⁹ Decision on Mr Mokom’s Request for Compensation, *Mokom* (ICC-01/14-01/22-354-Red), Article 85 Chamber, 31 January 2025, § 55 (referring to *ex parte* submissions of the Prosecution).

⁹⁰ *Kony* OA4 Judgment, *supra* note 6, § 77.

⁹¹ *Kony* First Decision, *supra* note 5, § 26 (emphasis added).

⁹² *Kony* OA4 Judgment, *supra* note 6, §§ 77–78.

While Article 61(2)(b) ICC Statute speaks only of the taking of ‘reasonable steps ... to inform the person of the charges’ and PTC II and III both considered that the actual knowledge of the suspect of the proceedings against them is not required,⁹³ this plainly runs counter to established human rights law.⁹⁴ As discussed above, the inference of a suspect’s waiver of their right to be present may only be drawn where the latter has actually been informed of the proceedings against them.⁹⁵ It is also in conflict with the Appeals Chamber’s consideration — albeit *in obiter* and in the context of trial proceedings — that an individual’s failure to appear before the Court cannot be considered an implicit waiver of their right to be present.⁹⁶ The Court was able to comfortably avoid this issue in *Kony*, likely in light of evidence strongly suggesting that the suspect had become aware of the warrant for his arrest, though the same cannot be said as to whether he was ever actually made aware of the confirmation proceedings themselves.

4. THE RIGHT TO ‘RETRIAL’ AND *IN ABSENTIA* PROCEEDINGS

For the purposes of this article, it is unnecessary to delve any deeper into the above-raised question of what threshold of knowledge is required to justify *in absentia* proceedings for two reasons. Firstly, even those scholars who refute the ‘actual knowledge’ requirement in favour of the ‘all reasonable steps’ threshold agree that proceedings *in absentia* breach the rights [of the absent defendant] if the latter does not enjoy the right to retrial or other *de novo* proceedings upon their subsequent appearance.⁹⁷ Secondly, the holding of *de novo* proceedings or a ‘retrial’ serves as an effective remedy even if the original *in absentia* proceedings were held without the defendant having been properly notified.⁹⁸

Under international human rights law, proceedings *in absentia* are only permitted where the defendant has the right to *de novo* proceedings should they subsequently appear before the court in question.⁹⁹ The importance of the right to retrial *de novo* in bringing *in absentia* criminal proceedings into line with international human rights law has been noted by the HRC, which observed in *Maleki v. Italy* that the violation of an applicant’s ‘right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended’,¹⁰⁰ concluding that the ‘effective remedy’ for the State Party’s violation of Article 14(3)(d) ICCPR ‘must entail [the applicant’s] immediate release or retrial in his presence.’¹⁰¹

⁹³ *Kony* First Decision, *supra* note 5, § 33; *Kony* Third Decision, *supra* note 5, §§ 38, 63. See also *Kony* OA4 Judgment, *supra* note 6, § 75.

⁹⁴ By contrast, in order to proceed with a trial *in absentia*, the STL required that the evidence demonstrate ‘that the accused actually [became aware] of the proceedings against them’. *Ayyash et al.* Appeal Decision, *supra* note 45, § 31. Attempting to explain this divergence, see *Kony* First Decision, *supra* note 5, § 56, fn. 60; *Kony* Third Decision, *supra* note 5, § 53.

⁹⁵ See *supra* note 43.

⁹⁶ *Ruto and Sang* OAS Judgment, *supra* note 31, § 54.

⁹⁷ See e.g. Wheeler, *supra* note 3, at 148; N. Pons, ‘Some Remarks on *in absentia* Proceedings before the Special Tribunal for Lebanon in Case of a State’s Failure or Refusal to Hand Over the Accused’, 8 *JICJ* (2010) 1307–1321, at 1314–1317. See also M. Gardner, ‘Reconsidering Trials *in absentia* at the Special Tribunal for Lebanon: An Application of the Tribunal’s Early Jurisprudence’, 43 *George Washington International Law Review* (2011) 91–136, at 128 (‘[w]hichever standard is applied, ... the defendant must subsequently be able to challenge that finding’).

⁹⁸ Gaeta, *supra* note 4, at 243–244; Pons, *supra* note 97, at 1317. See also *infra* note 109 and accompanying text.

⁹⁹ While the ICC has yet to be called upon to directly address this issue, several judges have affirmatively referenced the right to retrial in separate opinions. E.g. Joint Dissenting Opinion of Judge Ibáñez Carranza and Judge Bossa, Judgment in the Jordan Referral re Al-Bashir Appeal, *Al Bashir* (ICC-02/05-01/09-397-Anx2), Appeals Chamber, 6 May 2019, § 68; Dissenting Opinion of Judge Eboe-Osuji, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, *Ruto and Sang* (ICC-01/09-01/11-817-Anx), Trial Chamber V(a), 18 July 2013, § 14. See also C. Jorda, *Report on the Operation of the International Tribunal for the Former Yugoslavia*, UN Doc. A/55/382-S/2000/865, 12 May 2000, Annex I, at 20, § 83 (indicating agreement amongst the ICTY’s judges regarding the necessity of the right to retrial in the event of trials *in absentia*).

¹⁰⁰ *Maleki v. Italy*, *supra* note 42, § 9.5.

¹⁰¹ *Ibid.*, § 11.

With respect to the right to a retrial under Article 6 ECHR, the ECtHR held in *Colozza v. Italy* that “[w]hen domestic law permits a trial to be held notwithstanding the absence of a person “charged with a criminal offence” ... that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.”¹⁰² The applicable legal principles were summarized and affirmed by the Grand Chamber of the ECtHR in the seminal case of *Sejdovic v. Italy* as follows:

[T]he duty to guarantee the right of a criminal defendant to be present in the courtroom — either during the original proceedings or in a retrial — ranks as one of the essential requirements of Article 6 ... Accordingly, the refusal to reopen proceedings conducted in the accused’s absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a “flagrant denial of justice” rendering the proceedings “manifestly contrary to the provisions of Article 6 or the principles embodied therein.”¹⁰³

Accordingly, an individual convicted *in absentia* must enjoy as a matter of right the entitlement to participate in *de novo* proceedings with the prospect of obtaining a new determination of both factual and legal issues involved in the previous decision. There remains some uncertainty as to whether *de novo* proceedings actually render the original *in absentia* proceedings legitimate or rather provide an effective remedy for someone denied their right to be present through proceedings *in absentia*, implicitly recognizing the illegitimacy of the original proceedings.¹⁰⁴ It is not, however, necessary to take a position on this question for the purposes of the present inquiry.

The compatibility of trials *in absentia* before the STL has been the subject of considerable criticism.¹⁰⁵ When upholding the legality of such proceedings, the STL Appeals Chamber gave great weight to the right to retrial *de novo* as a counterbalance against any potential infringements on the rights of the accused occasioned by a trial *in absentia*. Article 22(3) STL Statute and Rule 109 STL RPE provided that, should an individual subject to proceedings *in absentia* subsequently appear before the Tribunal, they enjoy the right to be entirely retried, so long as they had not previously appointed counsel to represent them, and they disagreed with the judgment entered against them.¹⁰⁶ The Appeals Chamber held that “[t]he right of retrial is fundamental to the use of [trials *in absentia*],”¹⁰⁷ affirming that the legal propriety of such proceedings is contingent on the availability of a right to retrial should the accused subsequently appear before the Tribunal.¹⁰⁸ Reviewing much jurisprudence from both the ECtHR and HRC, it added that this right ‘applies at *all stages* of the proceedings’ and, accordingly, ‘[i]n principle, ... any prejudice that could conceivably arise from the

¹⁰² *Colozza v. Italy*, *supra* note 42, § 29. See also Art. 9 EU Directive 2016/343.

¹⁰³ *Sejdovic v. Italy*, *supra* note 41, § 84 (internal citation omitted). See, similarly, Case C-569/20, *IR*, 19 May 2022, ECLI:EU:C:2022:401, § 59.

¹⁰⁴ Jordash and Parker, *supra* note 35, at 490.

¹⁰⁵ See e.g. C. Jenks, ‘Notice Otherwise Given: Will *in Absentia* Trials at the Special Tribunal for Lebanon Violate Human Rights?’ 33 *Fordham International Law Journal* (2009) 57–100; Jordash and Parker, *supra* note 35; Gardner, *supra* note 97, at 132–135; C.C. Jalloh, ‘Self-Representation and the Use of Assigned, Standby and *Amicus* Counsel’, in L. Carter and F. Pocar (eds), *International Criminal Procedure* (Edward Elgar, 2013) 125–165, at 155; Zakerhossein and de Brouwer, *supra* note 4, at 199–201.

¹⁰⁶ Art. 22(3) STLSt.; Rule 109(C)(ii) and (F) STL RPE.

¹⁰⁷ *Ayyash et al.* Appeal Decision, *supra* note 45, § 14, fn. 36.

¹⁰⁸ See Jenks, *supra* note 105, at 84–96; Pons, *supra* note 97, at 1317. Gaeta goes further, contending that, at the STL, the right to retrial was not a remedy for a breach of an accused’s right to be present, but a primary right in and of itself. See Gaeta, *supra* note 4, at 246–249. See also Gardner, *supra* note 97, at 130–131 (agreeing with Gaeta that the STL Statute goes further in guaranteeing a right to retrial than what is required by human rights law, but submitting that ‘there is no fundamental problem with this result’).

Trial Chamber's decision to hold a trial *in absentia* is cured by the availability of a retrial.¹⁰⁹ It should also be stressed that while the pre-trial procedure of the STL was strictly *ex parte*,¹¹⁰ with the accused having no opportunity to object to charges, challenge the Prosecutor's evidence, or introduce their own evidence as they do before the ICC,¹¹¹ the right to *de novo* proceedings would apply even at such an early stage.¹¹²

The STL's jurisprudence on the right to retrial is valuable, notwithstanding the temporary nature of the Tribunal, meaning that the right to retrial failed in its curative function in the case of an accused who may be convicted *in absentia*, then subsequently apprehended after the Tribunal has ceased operation.¹¹³ In light of the procedural differences between the STL and ICC, when extrapolating the above findings to the ICC framework, they should be considered as providing that the right to a retrial applies at all stages of the proceedings that would ordinarily be held *inter partes*. Applied *mutatis mutandis* to proceedings before the ICC, a suspect against whom charges were confirmed *in absentia*, notwithstanding any evidence that they have waived their right to be present,¹¹⁴ should enjoy the right to 'retrial', even where the proceeding in question is not actually a 'trial' within the meaning of the ICC Statute.¹¹⁵

Since the right to retrial preconditions the compatibility of proceedings *in absentia* with the right to be present, the scope of the latter necessarily determines the scope of the former.¹¹⁶ Thus, the inclusion of pre-trial proceedings within the scope of the right to be present has the necessary consequence of mandating the provision of the right to retrial where such proceedings are held *in absentia*. Since the right to be present arises in confirmation proceedings at the ICC, as established above, so must the right to retrial where a decision in such proceedings is rendered *in absentia*.

5. HUMAN RIGHTS UNDER ARTICLE 21(3) ICC STATUTE

It is now well-established jurisprudence of the ICC Appeals Chamber that 'human rights underpin the Statute; every aspect of it' and that its provisions thus must 'be interpreted and more importantly applied in accordance with internationally recognized human rights.'¹¹⁷ The cardinal place of human rights in the ICC framework is indicative of the progressively more central role the protection of such rights has come to occupy before international courts and tribunals.¹¹⁸ The ICC is directly bound to centre human rights in its proceedings by virtue of Article 21(3) ICC Statute, which provides that '[t]he application and

¹⁰⁹ *Ayyash et al.* Appeal Decision, *supra* note 45, § 14 (emphasis added).

¹¹⁰ See Art. 18(1) STLSt.; Rule 68 STL RPE.

¹¹¹ See Art. 61(6) ICCSt. See also *Mbarushimana* OA4 Judgment, *supra* note 22, § 40.

¹¹² *Ayyash et al.* Appeal Decision, *supra* note 45, § 14.

¹¹³ See Schabas, 'In Absentia Proceedings', *supra* note 3, at 379; Jenks, *supra* note 10, at 84–85, 94–96; Jordash and Parker, *supra* note 35, at 498; Wheeler, *supra* note 3, at 145–148; IBA, *Expert Roundtable Report*, *supra* note 43, at 6.

¹¹⁴ *Sejdovic v. Italy*, *supra* note 41, § 84.

¹¹⁵ The term 'retrial' is used with reference to *de novo* consideration of confirmation of charges despite the fact that such proceedings are separate from the 'trial' *strictu sensu* under Part 6 ICCSt.

¹¹⁶ The author does not believe that this conclusion is dependent on if one views the right to retrial as a primary or remedial right. Cf. Gaeta, *supra* note 4, at 246–249.

¹¹⁷ Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, *Lubanga* (ICC-01/04-01/06-772), Appeals Chamber, 14 December 2006 ('*Lubanga* OA4 Judgment'), § 37.

¹¹⁸ See K. Zeegers, *International Criminal Tribunals and Human Rights Law* (T.M.C. Asser Press, 2016); A. Skander Galand, 'The Systemic Effect of International Human Rights Law on International Criminal Law', in M. Scheinin (ed.), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press, 2019) 87–131.

interpretation of law pursuant to this article must be consistent with internationally recognized human rights.¹¹⁹

The Appeals Chamber regularly cites or defers to the jurisprudence of international and regional human rights bodies and courts in defining the content and scope of internationally recognized human rights norms falling within the ambit of Article 21(3).¹²⁰ It has, furthermore, been cogently argued that the rights of suspects and accused at the ICC have come to doctrinally mirror regional human rights jurisprudence, particularly that of the ECtHR.¹²¹ This approach extends to pre-trial proceedings with, for instance, the Appeals Chamber and PTCs having consistently adopted the ECtHR's construction of the 'reasonable suspicion' standard in interpreting the meaning of 'reasonable grounds' necessary for the issuance of an arrest warrant or summons under Article 58(1)(a) ICC Statute.¹²²

In holding human rights in general as a hierarchically supreme class of *lex superior* norms and as a substantive rather than subsidiary source of law, Article 21(3) precludes the application of any provision of the ICC Statute or ICC RPE where inconsistent with human rights norms — a 'standard against which all the law applied by the court should be tested.'¹²³ This progressive interpretation enjoys support in the jurisprudence of the Appeals Chamber.¹²⁴ Importantly, while the Court will not lightly accept that Article 21(3) requires the non-implementation of another provision of the Statute,¹²⁵ in *Katanga and Ngudjolo*, Trial Chamber II twice invoked Article 21(3) in suspending the application of another provision which it considered could not be applied in a manner consistent with internationally recognized human rights.¹²⁶ Article 21(3) has even served as a basis for the Court to

¹¹⁹ Art. 21(3) ICCSt.

¹²⁰ From an extensive body of jurisprudence, see e.g. Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', *Katanga* (ICC-01/04-01/07-475), Appeals Chamber, 13 May 2008, §§ 57–58; Judgment in the Appeal of the Prosecutor against Trial Chamber I's Decision on the No Case to Answer Motions, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-1400), Appeals Chamber, 31 March 2021, §§ 169, 178–179; Judgment on the Appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's 'Decision on the Defence "Exception d'incompétence"', *Abd-Al-Rahman* (ICC-02/05-01/20-503), Appeals Chamber, 1 November 2021 ('*Abd-Al-Rahman* OAS Judgment'), §§ 84, 85.

¹²¹ N.A.J. Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?', 11 *Human Rights Law Review* (2011) 91–131.

¹²² See e.g. *Al Bashir* OA Judgment, *supra* note 22, § 31; Decision on the Prosecutor's Application under Article 58, *Ntaganda* (ICC-01/04-02/06-36-Red), Pre-Trial Chamber II, 13 July 2012, § 16.

¹²³ M.H. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *American Journal of International Law* (1999) 22–43, at 29. See also, e.g. A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2nd edn., Oxford University Press, 2002) 1051, at 1077; D. Akande, 'Sources of International Criminal Law', in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 41–53, at 46–47; L. Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court', 21 *European Journal of International Law* (2010) 543–583, at 558–563; G. Hochmayr, 'Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute', 12 *JICJ* (2014) 655–679, at 677–678; G. Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 411–443, at 437–442; J.-P. Pérez-León-Acevedo, 'Human Rights at the Reparations System of the International Criminal Court', in Scheinin (ed.), *supra* note 118, 162–197, at 169; G. Werle and F. Jeßberger, *Principles of International Criminal Law* (4th edn., Oxford University Press, 2020), § 250; M.M. deGuzman, 'Article 21', in Ambos (ed.), *supra* note 13, at 1129, §§ 63–65.

¹²⁴ See e.g. *Lubanga* OA4 Judgment, *supra* note 117, §§ 36–37; Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the Admissibility of the Case against Abdullah Al-Senussi', *Gaddafi and Al-Senussi* (ICC-01/11-01/11-565), Appeals Chamber, 24 July 2014, §§ 229–230; *Abd-Al-Rahman* OAS Judgment, *supra* note 120, § 87.

¹²⁵ See Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo, *Ngudjolo* (ICC-01/04-02/12-158), Appeals Chamber, 20 January 2014, § 26.

¹²⁶ Decision on an *Amicus Curiae* Application and on the 'Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile', *Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), Trial Chamber II, 9 June 2011, § 73; Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Katanga and Ngudjolo* (ICC-01/04-01/07-3405-tENG), Trial Chamber II, 1 October 2013, § 30.

consider the legality of its own constitution.¹²⁷ Most strikingly, in *Lubanga*, the Appeals Chamber relied on Article 21(3) in imposing a stay of proceedings — effectively suspending the application of the Statute and the RPE — where the continuation of proceedings would be incompatible with the rights of the accused.¹²⁸

The Court's jurisprudence thus illustrates that, while exceptional, Article 21(3) provides a valid basis for the suspension of provisions of the ICC Statute and ICC RPE where they would produce a result that does not conform to internationally recognized human rights.¹²⁹ Article 61(2)(b) ICC Statute is not exempt from such a deployment of Article 21(3), with the Appeals Chamber having recognized the non-appearance of a defendant to have significant human rights implications¹³⁰ and confirmation proceedings forming part of the core of the ICC's activities and judicial competence.¹³¹

6. POTENTIAL AVENUES OF REMEDY

A. Legal Representation of the Absent Suspect

As a matter of human rights law, an individual subject to proceedings *in absentia* must be represented by counsel to safeguard their interests, even if their absence is considered unjustified.¹³² At the ICC, PTC II ordered the appointment of counsel to represent the interests of Joseph Kony in his absence.¹³³ It also suggested that such representation may mitigate against any prejudice to the absent suspect's rights occasioned by a confirmation hearing *in absentia*.¹³⁴ This is untrue. An absent defendant's representation by counsel cannot remedy a violation of their right to be present under human rights law.¹³⁵ This was affirmed by the ICTR Appeals Chamber in *Zigiranyirazo*.¹³⁶ Legal representation is a *minimum* guarantee in proceedings held *in absentia*, not a cure for other prejudices to an absent defendant's fair trial rights.¹³⁷ The right to retrial must be preserved where an absent suspect is defended by counsel appointed to represent their interests. Moreover, even beyond the manifold practical difficulties faced by counsel charged with defending an absent suspect,¹³⁸ as two seasoned scholar-practitioners observed, 'to conduct a trial without the defendant is to stage *Hamlet*

¹²⁷ Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, *Gicheru* (ICC-01/09-01/15-61), Pre-Trial Chamber A, 10 December 2020, §§ 32–35.

¹²⁸ Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled 'Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008', *Lubanga* (ICC-01/04-01/06-1486), Appeals Chamber, 21 October 2008, §§ 75–80.

¹²⁹ See, further, D. Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute', 10 *International Criminal Law Review* (2010) 43–71, at 57–63.

¹³⁰ *Ruto and Sang* OAS Judgment, *supra* note 31, § 51, fn. 97.

¹³¹ See E. Irving, 'The Other Side of the Article 21(3) Coin: Human Rights in the Rome Statute and the Limits of Article 21(3)', 32 *LJIL* (2019) 837–850, at 850 (arguing that the 'protective potential' of Art. 21(3) is greatest with respect to the 'core' of the Court's activities, that is, the 'essence of the ICC's competence, namely the conduct of criminal proceedings').

¹³² See e.g. *Van Geyselghem v. Belgium* [GC], ECHR 1999-I, § 33; *Sejdovic v. Italy*, *supra* note 41, § 93; *Poitrinol v. France*, ECHR (1993) Ser. A, No. 277-A, § 41.

¹³³ Decision on the Procedure for Appointing Counsel, *Kony* (ICC-02/04-01/05-499), Pre-Trial Chamber III, 2 May 2024, § 26; Order to Appoint Counsel, *Kony* (ICC-02/04-01/05-502), Pre-Trial Chamber III, 19 June 2024.

¹³⁴ 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', *Kony* (ICC-02/04-01/05-470), Pre-Trial Chamber II, 11 December 2023, § 22. See, similarly, Decision on the Referral of the Application to Appoint Defence Counsel, *Kayishema* (ICTR-2001-67-1), Referral Chamber, 2 May 2008, §§ 9, 11.

¹³⁵ See e.g. *Maleki v. Italy*, *supra* note 42, § 6.4; *Zana v. Turkey*, *supra* note 42, § 72; *Medenica v. Switzerland*, ECHR 2001-VI, §§ 57–59; *Aliyev v. Ukraine*, *supra* note 59, §§ 7.2–7.3. See also Jenks, *supra* note 10, at 84, 94; Jordash and Parker, *supra* note 35, at 499–504; IBA, *Expert Roundtable Report*, *supra* note 43, at 6.

¹³⁶ *Zigiranyirazo* Appeal Decision, *supra* note 40, § 21.

¹³⁷ Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaskić* (IT-95-14-AR108bis), Appeals Chamber, 29 October 1997, § 59.

¹³⁸ See e.g. *Kony* Transcript of 10 September 2025, *supra* note 7, at 41, line 10 to 45, line 15 (P. Haynes); Safferling, *supra* note 23, at 397; IBA, *Expert Roundtable Report*, *supra* note 43, at 8–10.

without the Prince; even with the finest actors in supporting roles (such as defence counsel) it cannot be billed as an original or accurate narrative.¹³⁹

A exception to the above principle exists where a defendant has themselves appointed counsel to represent them in proceedings *in absentia*. The appointment of counsel in such circumstances by an absent defendant may be considered a tacit confirmation that they are aware of and purposely evading the proceedings, thus constituting a waiver of their right to be present.¹⁴⁰ Accordingly, at the STL, an accused who was absent during proceedings *in absentia* against them did not enjoy the right to retrial if they appointed counsel of their choosing to represent them or accepted in writing counsel appointed to them by the Tribunal.¹⁴¹ At the ECCC, the fact that two at-large accused had designated counsel to represent them in proceedings *in absentia* constituted acknowledgment that they were aware of the proceedings and confirmation that their respective absences were purposeful and deliberate.¹⁴² But this is an exception rather than the norm. Without a procedural guarantee of retrial, representation by counsel *in absentia* fails to address the fundamental rights of absent suspects.

B. *De Novo* Confirmation Proceedings

On the basis of the foregoing discussions, the only sufficient remedy to the infringement upon a suspect's right to be present occasioned by confirmation proceedings *in absentia* would be the opportunity for the accused to request and obtain *de novo* confirmation of charges proceedings should they subsequently be surrendered to or voluntarily appear before the Court.¹⁴³ The Defence explicitly referred to such a procedure in *Kony*, with lead counsel abstaining from fulsome arguments on the merits of the charges as to avoid 'prejudicing [Mr Kony's] position for any possible re-run of this confirmation of charges'.¹⁴⁴ Defence counsel expanded that to deny Mr Kony a *de novo* confirmation hearing if he were to be subsequently apprehended would be 'in apparent contravention of well-established human rights case law and, therefore, Article 21(3) of the Statute'.¹⁴⁵ While this is what human rights law, as reviewed above, would demand, there is no clear path to such a remedy under the procedural framework of the ICC.

If a PTC confirms charges against a suspect *in absentia*,¹⁴⁶ it commits them to trial before a Trial Chamber.¹⁴⁷ While a suspect in such a situation may, under Rule 126(3) ICC RPE, request that the Trial Chamber refer issues necessary for the trial's 'effective and fair functioning' back to the PTC,¹⁴⁸ this does not constitute nor is it an adequate substitute for the right to a *de novo* confirmation hearing. Firstly, the text of Rule 126(3) refers only to a 'person who has fled' who is subsequently apprehended, while Article 61(2)(b) provides for the confirmation of charges *in absentia* against a person who has '[f]led or cannot be found'. This apparent *lacuna* may preclude

¹³⁹ Jordash and Parker, *supra* note 35, at 499–504, quoted text at 500. See also Pons, *supra* note 97, at 1319; Gardner, *supra* note 97, at 133; Jalloh, *supra* note 105, at 155.

¹⁴⁰ See e.g. *Mbenge v. Zaire*, *supra* note 41, § 14.1; *Maleki v. Italy*, *supra* note 135, § 9.4; *Sejdovic v. Italy*, *supra* note 41, § 86; *Medenica v. Switzerland*, *supra* note 102, §§ 56, 59; AfrCmHPR, *Right to a Fair Trial in Africa*, *supra* note 76, § (N)(6)(c)(iii); Art. 8(2)(b) EU Directive 2016/343.

¹⁴¹ Rule 108(A) STL RPE. See also Rule 104 STL RPE.

¹⁴² Opinion of Judges Beauvallet and Bwana, *Meas Muth*, *supra* note 46, §§ 18–19, 46; Opinion of Judges Beauvallet and Bwana, *Im Chaem*, *supra* note 46, §§ 16–17, 43.

¹⁴³ For one of the few, if not only, scholars to argue as such, see Safferling, *supra* note 23, at 323.

¹⁴⁴ *Kony* Transcript of 9 September 2025, *supra* note 7, at 40, line 20 (P. Haynes). See also *ibid.*, at 33, lines 19–21 (G. B. Anyuru).

¹⁴⁵ *Kony* Transcript of 10 September 2025, *supra* note 7, at 53, lines 10–12 (P. Haynes). The Prosecution, for its part, dismissed such submissions as speculative. *Ibid.*, at 58, lines 14–18 (L. von Braun).

¹⁴⁶ In *Kony*, PTC III firmly rejected the possibility of holding confirmation hearings but staying the proceedings prior to issuing a confirmation decision; the issuance of such a decision upon the completion of hearings constitutes, in the Chamber's view, 'an integral and essential part of confirmation proceedings.' *Kony* Confirmation Decision, *supra* note 8, § 27.

¹⁴⁷ Arts. 61(7)(a), 61(11), 64(4) ICCSt.; Rule 126(3) ICC RPE.

¹⁴⁸ Rule 126(3) ICC RPE.

persons falling under the second alternative of Article 61(2)(b) against whom confirmation proceedings have been held *in absentia*, such as Joseph Kony,¹⁴⁹ from seeking relief under Rule 126(3).¹⁵⁰ At the very least, this uncertainty suggests that the referral procedure under Rule 126(3) cannot serve as a remedy for suspects in such circumstances.

In *Kony*, PTC III dismissed this concern with reference to the Appeals Chamber's finding that 'the distinction between a person who "has fled" and one who "cannot be found" is not critical to the interpretation of article 61(2)(b)'.¹⁵¹ Notwithstanding its merits, the Appeals Chamber's conclusion in this regard is not relevant to the construction of Rule 126(3). The latter contains only one of the two phrases joined by an 'inclusive disjunction' in Article 61(2)(b) ICC Statute; the relationship between the two phrases — and whether or not they are mutually exclusive — is simply not at issue relation to Rule 126(3) as it was in the context of Article 61(2)(b). PTC III's reliance on the Appeals Chamber's consideration of the use of both 'fled' and 'cannot be found' in Article 61(2)(b) to alleviate concerns regarding the inclusion of only 'fled' in Rule 126(3) is, therefore, misplaced and unconvincing.

Secondly, even with respect to a 'person who has fled', the procedure under Rule 126(3) is subject to the discretion of the Trial Chamber and would demand considerable judicial creativity on the part of its judges to adequately empower the PTC to render a *de novo* confirmation decision through this limited remedy. Accordingly, in granting leave to appeal its decision on the fulfilment of the conditions of Article 62(1)(b) ICC Statute in *Kony*, PTC III observed that '[t]he Trial Chamber's discretion to thus filter the suspect's requests results in potentially ... curtailing the suspect's chance to ever have a meaningful say in the determination of those issues' relating to the propriety of the *in absentia* nature of the confirmation proceedings.¹⁵² Consequently, even ignoring its *lacuna* concerning persons who 'cannot be found', Rule 126(3) cannot remedy the violation of a suspect's right to be present resulting from the confirmation of charges against them *in absentia*.

A decision confirming charges in a suspect's absence may be subject to interlocutory appeal under Article 82(1)(d) ICC Statute. This provision provides a catch-all ground for the appeal of any decision where none is otherwise provided, which 'involves an issue that would significantly affect' either 'the fair and expeditious conduct of the proceedings ... or the outcome of the trial', and where 'an immediate resolution by the Appeals Chamber may materially advance the proceedings'.¹⁵³ Appeals under Article 82(1)(d) are not restricted to matters arising out of trial proceedings¹⁵⁴ with several PTCs accepting the amenability of confirmation decisions to appeal under this provision.¹⁵⁵ Moreover, the Appeals Chamber's consideration of the Prosecutor's appeal of the *Mbarushimana* confirmation decision

¹⁴⁹ *Kony* Third Decision, *supra* note 5, § 95, affirmed in *Kony* OA4 Judgment, *supra* note 6, § 49.

¹⁵⁰ See *Kony* Transcript of 10 September 2025, *supra* note 7, at 52, line 15 to 53, line 1 (P. Haynes). The Prosecution argued that persons who 'cannot be found' may also seek relief under Rule 126(3) but identified no legal basis for this position in light of the specific wording of the provision. *Ibid.*, at 58, lines 11–13 (L. von Braun).

¹⁵¹ *Kony* Confirmation Decision, *supra* note 8, § 30, referring to *Kony* OA4 Judgment, *supra* note 6, § 41.

¹⁵² Decision on the 'Kony Defence Request for Leave to Appeal [the] "Decision on the Criteria for Holding Confirmation of Charges Proceedings *in Absentia*"', *Kony* (ICC-02/04-01/05-551), Pre-Trial Chamber III, 28 January 2025 ('*Kony* Decision on Leave to Appeal'), § 34.

¹⁵³ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo* (ICC-01/04-168), Appeals Chamber, 24 July 2006 ('DRC OA3 Judgment'), §§ 8–10, 14.

¹⁵⁴ *Ibid.*, §§ 14–15; Judgment on the Appeal of Mr Maxime Jeoffroy Eli Mokom Gawaka against the "Decision on Mr Mokom's Request for Compensation", *Mokom* (ICC-01/14-01/22-366-Red), Appeals Chamber, 2 September 2025, §§ 21–22.

¹⁵⁵ See e.g. Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", *Bemba* (ICC-01/05-01/08-532), Pre-Trial Chamber II, 18 September 2009, § 12; Decision on the Prosecutor's Request for Reconsideration or, in the Alternative, Leave to Appeal the 'Decision on the Confirmation of Charges', *Yekatom and Ngaïssona* (ICC-01/14-01/18-447), Pre-Trial Chamber II, 11 March 2020, § 26; *Kony* Confirmation Decision, *supra* note 8, § 258.

implicitly establishes the admissibility, in principle, of an appeal of a decision on the confirmation of charges under Article 82(1)(d).¹⁵⁶ As the nature of its review is corrective,¹⁵⁷ for the Appeals Chamber to remedy the impact a confirmation decision *in absentia* would have on the fairness of proceedings following the appearance of an absent suspect, it would need to remand the matter back to the PTC for it to conduct a *de novo* confirmation hearing.¹⁵⁸

However, Article 82(1)(d) ‘does not confer a *right* to appeal interlocutory or intermediate decisions’, with the leave of the first-instance chamber ‘constitut[ing] the definitive element for the genesis of the right to appeal.’¹⁵⁹ Such appeals ‘are meant to be admissible only under limited and very specific circumstances’.¹⁶⁰ Accordingly, the extraordinary ground of appeal under Article 82(1)(d) cannot actualize a suspect’s *right* to retrial or remedy the violation of their *right* to be present as it provides a remedy which is *discretionary* and, as such, does not vindicate these rights.¹⁶¹

Yet the procedural difficulty of the right to retrial in confirmation proceedings at the ICC, given the absence in the ICC Statute and ICC RPE of provisions comparable to Article 22 (3) STL Statute or Rule 109(C)(ii) STL RPE, cannot deprive the accused of their right to retrial under human rights law. In this regard, the ECtHR has rejected arguments from states that the lack of a procedural avenue to set aside an *in absentia* conviction and conduct *de novo* proceedings absolves them of their obligation to respect the right to retrial.¹⁶² A contrary state of affairs would amount to the punishment of a criminal defendant for their non-appearance by depriving them of aspects of their fundamental fair trial rights.¹⁶³ It would thus be impermissible under Article 21(3) ICC Statute for confirmation proceedings *in absentia* to be conducted in such a manner where the right to retrial is procedurally unavailable.

If the States Parties¹⁶⁴ seriously believe that the holding of confirmation proceedings *in absentia* is beneficial to the mission and goals of the Court and international criminal justice, which remains doubtful for a host of reasons discussed in greater depth elsewhere,¹⁶⁵ an amendment to the ICC RPE is required to make them permissible before the Court. Such an amendment would need to provide for the quashing of a decision rendered *in absentia* and the holding of *de novo* confirmation proceedings if a suspect who previously fulfilled the requirements of Article 61(2)(b) subsequently becomes available, either by arrest or voluntary appearance. It would be optimal in this regard for paragraph 3 of Rule 126 ICC RPE to be amended and paragraphs 4 and 5 be added as follows:

¹⁵⁶ *Mbarushimana* OA4 Judgment, *supra* note 22. While the Appeals Chamber did not explicitly consider the admissibility of the appeal *de novo*—despite having the power to do so, even where the Chamber granted leave has found the appeal admissible—its consideration of the merits of the Prosecutor’s appeal indicates that it did not consider the appeal of a confirmation decision under Article 83(1)(d) to be admissible as a matter of principle.

¹⁵⁷ See e.g. Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on Translation of Witness Statements (ICC-02/05-03/09-199) and Additional Instructions on Translation’, *Banda and Jerbo* (ICC-02/05-03/09-295), Appeals Chamber, 17 February 2012, § 20.

¹⁵⁸ The Appeals Chamber’s power to remand follows from its power to reverse a decision. See Judgment on the Appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala, and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled ‘Decision on Sentence pursuant to Article 76 of the Statute’, *Bemba et al.* (ICC-01/05-01/13-2276-Red), Appeals Chamber, 8 March 2018, § 362.

¹⁵⁹ *DRC* OA3 Judgment, *supra* note 153, § 20 (emphasis added).

¹⁶⁰ Decision on Mongolia’s Requests for Leave to Appeal, Temporary Stay of the Proceedings and Related Matters, *Situation in Ukraine* (ICC-01/22-111), Pre-Trial Chamber II, 29 November 2024, § 23, and references cited therein.

¹⁶¹ See *Kony* Decision on Leave to Appeal, *supra* note 152, § 34.

¹⁶² See e.g. *Van Geyselhem v. Belgium*, *supra* note 132, §§ 34–35; *Krombach v. France*, ECHR 2001-II, §§ 85–86.

¹⁶³ Cf. *Omar v. France* [GC], ECHR 1998-V, §§ 41–42, 44; *Khalifaoui v. France*, ECHR 1999-IX, §§ 35–37.

¹⁶⁴ Amendments to the ICC RPE may be proposed either by a State Party, an absolute majority of the judges of the Court, or the Prosecutor but must ultimately be adopted by a two-thirds majority vote in the Assembly of States Parties: Art. 51(2) ICCSt.

¹⁶⁵ See Wheeler, *supra* note 3, at 69–102; Zakerhossein and de Brouwer, *supra* note 3, at 198–209; Jordash and Parker, *supra* note 35, at 499–504.

- 3) When the person who has fled or could not be found is subsequently arrested and the Court has confirmed the charges upon which the Prosecutor intends to pursue the trial in his or her absence, the person charged may:
 - i) Request in writing that the Pre-Trial Chamber quash a previous decision under article 61, paragraph 7, and hold a *de novo* hearing to confirm the charges on which the Prosecutor intends to seek trial; or
 - ii) Accept in writing the Pre-Trial Chamber's previous decision under article 61, paragraph 7, without prejudice to his or her right to seek leave to appeal in accordance with paragraph 5 below.
- 4) Upon a request under paragraph 3(i) above, the Pre-Trial Chamber shall quash its previous decision under article 61, paragraph 7, and hold, within a reasonable time, a *de novo* hearing on the confirmation of charges with respect to which rules 121, 122, and 124 shall apply *mutatis mutandis*.
- 5) Upon lodging an acceptance under paragraph 3(ii) above, the charged person may seek leave to appeal the previous decision on the confirmation of charges in accordance with article 82, paragraph 1(d). The time limit within which to seek such leave shall run from the date of his or her acceptance under paragraph 3(ii). Upon the lapsing of this time limit without the charged person seeking leave to appeal or upon the resolution of an appeal for which leave is granted, the charged person 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.

This amendment is loosely modelled on Rule 109(C) STL RPE and ensures both the right to *de novo* confirmation proceedings and, if an accused waives this right, the opportunity to seek leave to appeal the confirmation decision. The latter avenue¹⁶⁶ may be preferable for an accused in certain situations, such as where the *in absentia* confirmation decision declined to confirm certain charges and the accused does not wish to open the door for them to be confirmed in *de novo* proceedings. To do so may have the prejudicial effect of allowing the Prosecutor to circumvent the procedure of Rule 182 ICC RPE for seeking confirmation of previously rejected charges. Such considerations would be particularly relevant if a considerable period of time has passed between the confirmation of charges *in absentia* and the accused's arrest or surrender, in which time the Prosecutor may have gathered new evidence. Finally, it should be noted that, due to the permanent nature of the ICC, any effort to provide for a right to *de novo* confirmation proceedings before the Court will not be met by the same concerns as the right to retrial before the STL generated due to the latter's temporary nature.¹⁶⁷

7. CONCLUSION

An ICC suspect possesses the right to be present in criminal proceedings against him, which, under the ICCPR and ECHR, applies to pre-trial proceedings, including confirmation of charges hearings. For *in absentia* proceedings to comply with the rights of suspects and accused, the defendant must enjoy the right to a retrial in the event that they appear before a tribunal following the conclusions of proceedings in their absence. However, Joseph Kony,

¹⁶⁶ Cf. *Kony Confirmation Decision*, *supra* note 8, § 258; *Decision on the Request for Leave to Appeal the Confirmation Decision, Kony* (ICC-02/04-01/05-639), Pre-Trial Chamber III, 4 December 2025, §§ 7–8.

¹⁶⁷ See *supra* note 113.

the first suspect against whom charges have been confirmed in their absence, lacks a right to retrial with respect to the decision on the confirmation of charges under Article 61 ICC Statute rendered against him *in absentia*, as no such procedure is offered either in the ICC Statute or the ICC RPE. This is in stark contrast to the right to retrial in the STL Statute and STL RPE, the provision of which the STL Appeals Chamber found mitigated potential prejudice to an absent defendant's right to be present.

Moreover, the jurisprudence of the ECtHR has established that the procedural unavailability of an avenue to secure retrial does not abrogate the enjoyment of this right by a person previously subject to criminal proceedings *in absentia*. A defendant does not cease to enjoy the right to retrial simply because no explicit procedure for a retrial is provided within the ICC's legal framework. Accordingly, confirmation of charges proceedings *in absentia* would be incompatible with the absent suspect's right to retrial and thus, the holding of such proceedings would result in an interpretation and application of Article 61(2) ICC Statute that conflicts with internationally recognized human rights, which is impermissible under Article 21(3). Such a procedure can only be brought into compliance with the relevant human rights standards through an amendment of the ICC RPE to enshrine a right to *de novo* confirmation proceedings.

The holding of confirmation proceedings *in absentia* may seem an attractive tool to revive long-moribund cases and deliver some — albeit incomplete — measure of justice for victims who have yearned for accountability, oftentimes for decades. Yet the pursuit of justice for victims cannot come at the price of the fundamental rights of alleged perpetrators.¹⁶⁸ It is on this premise that the entire modern enterprise of international criminal justice rests. It is this principle that prevented British Prime Minister David Lloyd George's campaign slogan 'Hang the Kaiser!' from coming to fruition¹⁶⁹ and which overrode the instincts of some Allied officials after the Second World War to execute rather than try Nazi Germany's political and military leadership.¹⁷⁰ It was for its deference to cardinal principles of fairness and justice that Justice Jackson hailed the latter decision as 'the greatest tribute that Power has ever paid to Reason'.¹⁷¹ It is imperative that the ICC does not resort to *in absentia* proceedings that deprive absent suspects of their rights as 'an apology for [its] helplessness in not being able to effectively carry out its duties, because of the attitude of certain States that do not want to arrest or surrender [suspects], or even to recognise or cooperate with the [Court]'.¹⁷² While the holding of confirmation proceedings *in absentia* has been framed as a repudiation of impunity, in truth, it constitutes a capitulation to it by sacrificing one of the most hallowed cornerstones of international criminal justice — fair trial rights — on the altar of 'effectiveness' as a misguided and unsustainable solution to the far deeper issues of States Parties' non-cooperation with the Court and non-States Parties' efforts to obstruct its mandate.

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¹⁶⁸ See S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', 8 *JICJ* (2010) 137–164, at 143–145.

¹⁶⁹ W.A. Schabas, *The Trial of the Kaiser* (Oxford University Press, 2018), at 55–67.

¹⁷⁰ T. Taylor, *The Anatomy of the Nuremberg Trials* (Skyhorse, 2013), at 29–35; H.L. Stimson, 'The Nuremberg Trial: Landmark in Law', in G. Méttraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford University Press, 2008) 617–625, at 622–623.

¹⁷¹ Jackson, IMT Opening Statement, *supra* note 1, at 101.

¹⁷² Separate Opinion of Judge Sidhwa, *Rajić* Rule 61 Decision, *supra* note 19, § 7 (speaking in regard to the limited utility of Rule 61 proceedings at the ICTY).

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