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Date: 29 October 2024

PRE-TRIAL CHAMBER III

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

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

Public

Decision on the criteria for holding confirmation of charges proceedings *in absentia*

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

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Mr Peter Haynes

Legal Representatives of Victims

Legal Representatives of Applicants

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**Unrepresented Applicants for
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REGISTRY

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Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER III (the ‘Chamber’) of the International Criminal Court¹ (the ‘ICC’ or ‘Court’) issues this ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’, pursuant to articles 19(1), 61(2)(b) and 67 of the Rome Statute (the ‘Statute’) and rule 123(3) of the Rules of Procedure and Evidence (the ‘Rules’).

I. PROCEDURAL HISTORY

1. On 8 July 2005, Pre-Trial Chamber II issued an under seal warrant of arrest against Joseph Kony (‘Mr Kony’) for war crimes and crimes against humanity allegedly committed in 2003-2004 in Uganda.² The arrest warrant was amended on 27 September 2005 (the ‘Arrest Warrant’)³ and it was unsealed in October 2005.⁴
2. On 24 November 2022, the Prosecution submitted a request to hold a hearing on the confirmation of charges against Mr Kony in his absence (the ‘Request’).⁵
3. On 7 February 2023, Pre-Trial Chamber II issued a decision on procedural matters in which it instructed, *inter alia*, the Registry to submit a report on the measures taken to locate Mr Kony, to notify him of the allegations against him and to secure his arrest or appearance since the issuance of the Arrest Warrant.⁶
4. On 30 March 2023, the Registry submitted a report on the efforts taken to locate Mr Kony and secure his arrest (the ‘30 March 2023 Registry Report’).⁷

¹ On 12 March 2024, the Presidency reassigned the situation in Uganda, from Pre-Trial Chamber II to Pre-Trial Chamber III (Presidency, [Decision assigning judges to divisions and recomposing Chambers](#), ICC-02/04-01/05-485, public); on 15 March 2024, Pre-Trial Chamber III designated Judge Althea Violet Alexis-Windsor as Single Judge responsible for carrying out the functions of the Chamber in the present situation ([Decision on the designation of a Single Judge](#), ICC-02/04-01/05-487, public).

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

³ Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, ICC-02/04-01/05-28-US-Exp, under seal and *ex parte*, only available to the Prosecution.

⁴ [Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest](#), 13 October 2005, ICC-02/04-01/05-52, public; [Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005](#), 27 September 2005, ICC-02/04-01/05-53, public.

⁵ Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, ICC-02/04-01/05-446-Conf, confidential (a public redacted version was provided on the same day, [ICC-02/04-01/05-446-Red](#)).

⁶ Order on procedural matters and decision on request of a lesser redacted version of the arrest warrant, [ICC-02/04-01/05-453](#), public.

⁷ ICC-02/04-01/05-459-SECRET-Exp, secret and *ex parte*, only available to the Registry and the Prosecution, with annex secret and *ex parte*, only available to the Registry and the Prosecution.

5. On 6 April 2023, Pre-Trial Chamber II instructed the Registry, via email, to submit an amended report, including a complete and detailed account of all relevant efforts to notify Mr Kony of the allegations against him and secure his appearance before the Court.⁸

6. On 8 May 2023, the Registry submitted an amended version of its 30 March 2023 Registry Report (the ‘8 May 2023 Registry Report’).⁹

7. On 23 November 2023, Pre-Trial Chamber II issued its ‘Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence’ (the ‘First Decision’), thereby *inter alia*: (i) finding that Mr Kony qualifies as a person who ‘cannot be found’ within the meaning of article 61(2)(b) of the Statute, all reasonable steps to secure his appearance had been taken, and, under the prevailing circumstances, there would be cause to hold a confirmation of charges hearing against him, in his absence; (ii) ordering the Prosecution to submit a document containing the charges, should it wish to proceed with the Request; (iii) instructing the Registry to submit a plan indicating the outreach activities and notification efforts it would pursue to inform Mr Kony of the charges against him; and (iv) deferring the final decision on whether to proceed with a confirmation of charges hearing in the absence of Mr Kony.¹⁰

8. On 11 December 2023, Pre-Trial Chamber II rejected¹¹ the Office of Public Counsel for the Defence’s (the ‘OPCD’) request for leave to appeal the First Decision¹² on the issue as to whether Pre-Trial Chamber II had erred in law ‘*in failing to address and properly consider the primacy of Rome Statute rights of a suspect – namely Articles 55, 66 and 67 – in establishing a novel legal framework for a confirmation of charges hearing in absentia pursuant to Article 61(b)(2)*’ on the basis that this issue did not

⁸ Email from Pre-Trial Chambers II to the Registry, 6 April 2023, at 12.49; see [Annex 3 to Report on decisions and orders issued by way of email for the period November 2022 – September 2024](#), 25 October 2024, ICC-02/04-01/05-530-Anx3, public.

⁹ ICC-02/04-01/05-463-SECRET-Exp, secret and *ex parte*, only available to the Registry and the Prosecution, with annexes I, II and III, secret and *ex parte*, only available to the Registry and the Prosecution.

¹⁰ [Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence](#), ICC-02/04-01/05-466, public.

¹¹ [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’](#), ICC-02/04-01/05-470, public.

¹² [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’](#), 29 November 2023, ICC-02/04-01/05-467, public.

arise from the First Decision since it had deferred the final determination as to whether to hold a confirmation of charges hearing *in absentia*.¹³

9. On 19 December 2023, Pre-Trial Chamber II received the ‘Registry’s Proposed Plan on Outreach Activities and Notification Efforts’ (the ‘Registry Plan on Outreach and Notification’).¹⁴

10. On 19 January 2024, the Prosecution submitted the ‘Document Containing the Charges’ (the ‘DCC’).¹⁵

11. On 26 January 2024, Pre-Trial Chamber II ordered the Registry to initiate notification efforts and related outreach activities, and provided a summary of the DCC to the Registry.¹⁶ The Registry was instructed *inter alia* to: (i) take ‘all reasonable steps to inform Mr Kony of the charges as described in the DCC’; (ii) ensure that the original and the Acholi translation of the DCC are easily accessible on the Court’s website; and (iii) report on the activities undertaken (the ‘26 January 2024 Order’).

12. On 15 February 2024, Pre-Trial Chamber II rejected the OPCD request to make submissions ‘related to the notification efforts and outreach activities’.¹⁷

13. On 23 February 2024, the Chamber received the ‘Registry’s Report on the implementation of Pre-Trial Chamber II’s “Order to initiate notification efforts and

¹³ According to Pre-Trial Chamber II, whilst the OPCD had standing since counsel for Mr Kony was not yet in place and the Chamber’s findings on the Prosecution’s Request (‘the outcome of the article 61(2)(b) litigation’) ‘would have a significant impact on Mr Kony’s rights, as well as those of future defendants before the Court’, the First Decision had ‘defer[red] the final determination’ on whether or not to hold a confirmation of charges hearing against Mr Kony in his absence until the charges are submitted and all reasonable efforts to inform him are made. Since the need to set measures to ensure that Mr Kony’s rights are not unduly prejudiced would only arise if and when the Chamber would decide to grant the Prosecution’s Request, ‘in which case it will consider whether to appoint counsel to represent the interests of the suspect in the context of the *in absentia* proceedings’, Pre-Trial Chamber II concluded that ‘the OPCD’s claim in this regard is speculative’ and the issue, as phrased by the OPCD, did not arise from the First Decision.

¹⁴ [ICC-02/04-01/05-473](#), public, with annex I, confidential and annex II, under seal and *ex parte*, only available to the Registry and the Prosecution.

¹⁵ [ICC-02/04-01/05-474](#), public.

¹⁶ [Order to initiate notification efforts and related outreach activities](#), ICC-02/04-01/05-475, public, with public annex.

¹⁷ [Decision rejecting the OPCD request to make observations on the notification efforts and outreach activities](#), ICC-02/04-01/05-478, public. The Chamber found that: (i) it had ‘neither instructed the OPCD, nor granted it leave, to “raise issues on behalf” of Mr Kony’ beyond initial observations on Request; and (ii) in light of ‘its duties to protect the interests of the suspect while ensuring the normal and timely conduct of the proceedings’, it did not ‘consider it necessary to assign a role to the OPCD at the current stage of the proceedings’, also noting that, ‘[s]hould the Chamber decide to hold a confirmation hearing *in absentia*, it will, at this stage of the proceedings, appoint counsel to represent Mr Kony’s interests in the context of the confirmation of charges proceedings’.

related outreach activities” dated 26 January 2024’ (the ‘23 February 2024 Registry Report’).¹⁸

14. On 4 March 2024, Pre-Trial Chamber II issued the ‘Second Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence’ (the ‘Second Decision’), thereby *inter alia*: (i) finding ‘that all reasonable steps to inform Mr Kony of the charges against him as set out in the Document Containing the Charges have been taken, within the meaning of article 61(2)(b) of the Statute’; (ii) deciding ‘that the confirmation of charges hearing, to be held in Kony’s absence should he not appear, will commence on 15 October 2024’; (iii) instructing the Registry to initiate notification efforts and outreach activities in respect of the date for the commencement of the confirmation of charges hearing, proceeding ‘in the same manner as it recently ha[d] for the notification of the charges’, and report within four weeks of the notification of the decision.¹⁹

15. On 28 March 2024, the Registry submitted the ‘Registry’s Report on the implementation of the “Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence” dated 4 March 2024 (ICC-02/04-01/05-481)’ (the ‘28 March 2024 Registry Report’), detailing the outreach activities and the notification efforts carried out in respect of the date of the forthcoming confirmation of charges hearing as set in the Second Decision.²⁰

16. On 2 May 2024, the Single Judge, *inter alia*, authorised the Registry to start the procedure for the selection of Counsel for Mr Kony, and ordered counsel for Mr Kony, once appointed, to make observations on, *inter alia*, the First Decision (the ‘2 May 2024 Decision’).²¹

¹⁸ [ICC-02/04-01/05-479](#), public, with *inter alia*, annex I, confidential (a public redaction version was provided on 11 March 2024, [ICC-02/04-01/05-479-Anx I-Red](#)).

¹⁹ [ICC-02/04-01/05-481](#), public.

²⁰ [ICC-02/04-01/05-491](#), public, with annex I, confidential, and annex II, under seal and *ex parte*, only available to the Registry and the Prosecution (a public redacted version of annex I and II was filed on 25 June 2024, [ICC-02/04-01/05-491-AnxI-Red](#) and [ICC-02/04-01/05-491-AnxII-Red](#)).

²¹ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, public, para. 27.

17. On 21 June 2024, following a report from the Registry²² and a subsequent decision from the Single Judge,²³ Mr Peter Haynes was appointed as counsel for Mr Kony (the ‘Defence’).²⁴

18. On 5 July 2024, the Single Judge granted the ‘Defence Request for Variation of Deadlines and for a Status Conference’,²⁵ and ordered that the time limits set in the 2 May 2024 Decision start running on 15 August 2024. The status conference was held on 23 July 2024 (the ‘23 July 2024 Status Conference’).²⁶

19. On 28 August 2024, the Defence submitted the ‘Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence’ (the ‘28 August 2024 Observations’).²⁷

20. On 5 September 2024, following an order from the Single Judge,²⁸ the Prosecution replied to the Defence Observations (the ‘5 September 2024 Observations’)²⁹ and, on 9 September 2024, the Defence submitted further observations on the same matters (the ‘9 September 2024 Observations’).³⁰

²² [Registry’s Report on the implementation of “Decision on the Procedure for Appointing Counsel” dated 2 May 2024 \(ICC-02/04-01/05-499\)](#), 14 June 2024, ICC-02/04-01/05-501, public, with annex I, public, and annex II, confidential and *ex parte*, only available to the Registry (a public redacted version was provided on 24 June 2024).

²³ [Order to Appoint Counsel](#), 19 June 2024, ICC-02/04-01/05-502, public.

²⁴ [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, public, with annex II, confidential, and annexes I, III and IV, public.

²⁵ [ICC-02/04-01/05-504](#), 28 June 2024, public.

²⁶ See transcript of hearing, [ICC-02/04-01/05-T-012-RED-ENG](#).

²⁷ ICC-02/04-01/05-517-Conf, confidential with a confidential annex (public redaction versions were provided on the same day, [ICC-02/04-01/05-517-Red](#) and [ICC-02/04-01/05-517-Anx1-Red](#)).

²⁸ Email from Pre-Trial Chamber III to the Prosecution, 3 September 2024, at 15:12; see [annex 26 to Report on decisions and orders issued by way of email for the period November 2022 – September 2024](#), 25 October 2024, ICC-02/04-01/05-530-Anx26, public, *adjudicating Prosecution’s Request for Leave to Reply to Defence Observations*, 2 September 2024, ICC-02/04-01/05-518, public and [Kony Defence Response to Prosecution’s Request for Leave to Reply to Defence Observations](#), 3 September 2024, ICC-02/04-01/05-519, public.

²⁹ Prosecution’s Reply to Defence Observations, ICC-02/04-01/05-520-Conf, confidential (a public redacted version was provided on the same day, [ICC-02/04-01/05-520-Red](#)).

³⁰ Kony Defence Reply to Prosecution’s Submissions in Response to Defence Observations, ICC-02/04-01/05-524-Conf, confidential (a public redacted version was provided on the same day, [ICC-02/04-01/05-524-Red](#)), with annex A, public.

21. On 12 September 2024, following a Single Judge order³¹ requesting submissions from the Prosecution,³² the Defence³³ and the OPCV,³⁴ the Chamber issued the ‘Decision Postponing the Confirmation of Charges Hearing’, vacating the 15 October 2024 date and postponing the confirmation of charges hearing until further notice pursuant to rule 121(7) of the Rules, in light of several factors, including the fact that Counsel for Mr Kony had only been appointed in June 2024 and the wide-ranging scope of the Prosecution’s allegations against Mr Kony.³⁵

II. DETERMINATION

22. Following the First and the Second Decision, as well as subsequent procedural developments, it is necessary now to make a final determination as to whether all the requirements for the confirmation of charges hearing against Mr Kony to be held *in absentia* have been met. Both the First and the Second Decision were adopted by Pre-Trial Chamber II prior to the appointment of counsel for Mr Kony; also, following the election of the new Presidency in March 2024, Pre-Trial Chamber II was recomposed and the situation in Uganda and the case were assigned to this Chamber.³⁶ In the present decision, the Chamber fully considers the Defence observations including those related to the legal and factual findings of the First and the Second Decision, conclusively reaches its own determination as to each of those requirements, and makes any additional findings which are still outstanding and necessary. Accordingly, this decision will constitute the basis for any and all subsequent steps in these proceedings.

³¹ Email from the Single Judge to the parties and participants, 4 September 2024, at 14:27; see [annex 27 to Report on decisions and orders issued by way of email for the period November 2022 – September 2024](#), 25 October 2024, ICC-02/04-01/05-530-Anx27, public.

³² [Prosecution’s observations on the date of the confirmation of charges hearing](#), 6 September 2024, ICC-02/04-01/05-523, public.

³³ [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), 6 September 2024, ICC-02/04-01/05-522, public.

³⁴ [Victims Observations on the date of the confirmation of charges hearing](#), 6 September 2024, ICC-02/04-01/05-521, public.

³⁵ [Decision Postponing the Confirmation of Charges Hearing](#), ICC-02/04-01/05-526, public.

³⁶ [Decision assigning judges to divisions and recomposing Chambers](#), 12 March 2024, ICC-02/04-01/05-485.

A. Whether article 61(2)(b) of the Statute requires a first appearance to take place for the confirmation of charges proceedings *in absentia* to be considered

1. Pre-Trial Chamber II findings

23. In the First Decision, Pre-Trial Chamber II held that, ‘[g]iven the importance of the confirmation hearing, and the impact of the outcome of that hearing on any future trial, the “default position” in the Statute is that the suspect must be present’.³⁷ It also found that ‘[a]rticle 61(2) of the Statute provides for two exceptional situations in which a Pre-Trial Chamber has the discretion to hold the confirmation hearing in the absence of the suspect’ when the person has either waived his or her right to be present (article 61(2)(a)) or fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform him or her of the charges and that a hearing to confirm those charges will be held (article 61(2)(b)).³⁸ Furthermore, Pre-Trial Chamber II determined that ‘[t]he difference between the two exceptions in article 61(2) of the Statute concerns the availability, or unavailability, of the suspect to the Court in order to take part in confirmation proceedings’. It further held that ‘the exception envisioned in article 61(2)(b) of the Statute concerns a suspect who is not available to the Court, because he or she has “fled or cannot be found”’.³⁹ Pre-Trial Chamber II additionally found that ‘[t]he use of the conjunction “or” in article 61(2)(b) of the Statute between “[f]led” and “cannot be found” indicates that the provision covers two different and independent situations: one where the suspect has fled, referring to a case where a person who was previously accessible to the Court absconded, and a second where the suspect cannot be found and he or she “has never been accessible”’.⁴⁰

24. Moreover, it determined that, in the situation where a person ‘cannot be found’, ‘an initial appearance is [...] not a requirement to hold a confirmation hearing pursuant to article 61(2)(b) of the Statute’.⁴¹ Pre-Trial Chamber II also held that ‘[t]he phrase “cannot be found” refers to the situation where: (i) the concerned person has never been available to the Court, because he or she has not been arrested, surrendered, or

³⁷ [First Decision](#), para. 26.

³⁸ [First Decision](#), para. 26.

³⁹ [First Decision](#), para. 27.

⁴⁰ [First Decision](#), para. 29 (footnote omitted).

⁴¹ [First Decision](#), para. 30.

voluntarily appeared before the Court and (ii) all efforts made to locate and arrest the person failed since his or her precise whereabouts were and remain unknown'.⁴² Lastly, Pre-Trial Chamber II considered that 'to hold a confirmation hearing in the absence of a person who "cannot be found", the Chamber does not need to be satisfied that he or she has actual knowledge of the proceedings at the Court' but only that 'all reasonable steps have been taken to inform the person of the charges and of the fact that a confirmation hearing will take place'.⁴³

25. Pre-Trial Chamber II then proceeded to determine whether: (i) Mr Kony, who was never available to the Court, qualified as a person who 'cannot be found'; (ii) since the issuance of the Arrest Warrant in 2005, all reasonable steps to secure his appearance before the Court, to giving him notice of the charges and that a hearing *in absentia* will be held have been taken; and (iii) there is cause to hold a confirmation of charges hearing in Mr Kony's absence. As regards (ii), it further held that article 61(2)(b) of the Statute 'covers three different obligations, namely: a) all reasonable steps have been taken to secure the person's appearance before the Court; b) all reasonable steps have been taken to giving notice of the charges; and c) all reasonable steps have been taken to informing the person that a hearing *in absentia* will be held' and that '[w]hile it is clear that all three obligations must be met before a confirmation hearing *in absentia* may take place, their fulfilment does not need to happen at once and can be done consecutively'.⁴⁴

26. In addition, Pre-Trial Chamber II found that Mr Kony qualified as a person who cannot be found within the meaning of article 61(2)(b) of the Statute because, 'despite substantial efforts by the Registry and other relevant stakeholders to trace him since the issuance of the Arrest Warrant', his whereabouts remained unknown.⁴⁵

27. Pre-Trial Chamber II further found that the 'charges' within the meaning and for the purposes of article 61(2)(b) of the Statute were those contained in a document containing the charges submitted pursuant to article 61(3)(a) of the Statute, and noted that: (i) essential information about the crimes attributed to Mr Kony, 'including the precise time and location of the alleged crimes for each count', had been redacted from

⁴² [First Decision](#), para. 31.

⁴³ [First Decision](#), para. 33.

⁴⁴ [First Decision](#), para. 36.

⁴⁵ [First Decision](#), para. 35.

the public version of the warrants initially made available; (ii) no information to the effect that Mr Kony had been informed of the subsequently issued lesser redacted version of the warrant was before the Chamber; and (iii) the Request had stated the Prosecution's intent 'to present *additional* charges unrelated to the allegations in the Arrest Warrant and *subsequently* inform Mr Kony of them'.⁴⁶

2. Submissions

28. In its 28 August 2024 Observations, the Defence submits that the interpretation of article 61(2)(b) of the Statute adopted by the First Decision, to the effect that 'cannot be found' means 'has never been available to the Court' and that an initial appearance is not a requirement to hold a confirmation of charges hearing, is unsupported 'by the ordinary meaning of the term [cannot be found], its context, and its object and purpose'.⁴⁷ It also asserts that Pre-Trial Chamber II did not provide any legal authority for its interpretation.⁴⁸ The Defence further avers that the drafting history of the relevant provisions establishes that 'the only way to inform an accused [sic] of the possibility that confirmation may be held *in absentia* in line with Article 61(2) is to do so at the point when they are arrested or served with a summons'.⁴⁹

29. As regards the ordinary meaning of the term, the Defence notes that the use of the present tense in the phrase 'cannot be found' would relate 'to whether the individual can, at this moment in time, be located', whereas the phrase 'has never been available' would point to a permanent and historical situation which is continuing.

30. As regards the context of the provision, the Defence avers that the interpretation adopted by Pre-Trial Chamber II is unsupported, in particular when considering articles 60 of the Statute and rule 122 of the Rules. In its view, article 60(1) of the Statute requires that '[u]pon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he

⁴⁶ [First Decision](#), para. 50. Pre-Trial Chamber II's findings relating to the DCC are also relevant to whether all reasonable steps have been taken to inform Mr Kony of the charges and will, therefore, also be considered in that context. See below, paras 43-44.

⁴⁷ [28 August 2024 Observations](#), para. 5.

⁴⁸ [28 August 2024 Observations](#), para. 7.

⁴⁹ [28 August 2024 Observations](#), para. 11.

or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial’ and no exception in respect of article 61(2)(b) of the Statute is provided, which would entail that an individual can only become a charged person once they have made an initial appearance pursuant to article 60(1) of the Statute.⁵⁰ The Defence adds that, by instead finding that it is the document containing the charges, as opposed to the initial appearance, which formally informs a suspect and provides detail of the nature, cause, and content of the charges, Pre-Trial Chamber II departed from the Court’s established jurisprudence, rendering the purpose of article 60(1) of the Statute meaningless and relieving the Pre-Trial Chamber of its statutory obligation thereunder.⁵¹

31. As regards the object and purpose of article 61(2)(b) of the Statute, the Defence asserts that Pre-Trial Chamber II’s interpretation is likewise unsupported, as its drafting history would reveal. The Defence recalls *inter alia*: (i) a 1996 proposal, explicitly making the holding of the confirmation of charges hearing in the absence of the suspect conditional upon ‘the person’s surrender or voluntary appearance’; (ii) a 1998 proposal, also referring to the person’s surrender or voluntary appearance and the wording of which (namely, the use of ‘subject to’, referring to the provision contemplating a confirmation of charges hearing *in absentia*) would signify an exception to the principle that that hearing should take place in the presence of the suspect, not to the principle that any such hearing must come after a person’s surrender or voluntary appearance;⁵² (iii) a later French proposal, clearly distinguishing the scenario of the person never having appeared, on the one hand, from the one where the person either ‘has fled or cannot be found’, on the other hand, both latter instances being linked to the person having first appeared before the Court, which was rejected; and (iv) the Spanish version of the Statute, which would support the interpretation that surrenders or voluntary appearance remains a prerequisite.⁵³

⁵⁰ [28 August 2024 Observations](#), para. 15.

⁵¹ [28 August 2024 Observations](#), paras 16-17.

⁵² [28 August 2024 Observations](#), paras 18-21.

⁵³ [28 August 2024 Observations](#), paras 22-23.

3. *Determination*

32. The Chamber is not persuaded by the arguments put forward by the Defence. As regards the textual argument, weight should be assigned to the use in article 61(2)(b) of the Statute of the term ‘or’, a conjunction used to link situations, items or sets of circumstances which are typically alternative to, and hence different from, each other. The Chamber finds that the use of this conjunction requires the provision to be construed in such a way so as to clearly differentiate between the two situations set out therein. Article 61(2)(b) of the Statute ‘covers two different and independent situations: one where the suspect has fled, referring to a case where a person who was previously accessible to the Court absconded, and a second where the suspect cannot be found and he or she “has never been accessible”’.⁵⁴ Accordingly, contrary to the Defence’s assertion, Pre-Trial Chamber II did not have to provide further legal authority for its interpretation of article 61(2)(b) of the Statute because this interpretation was grounded in the ‘ordinary meaning’ of the disjunctive term ‘or’ contained in article 61(2)(b) of the Statute,⁵⁵ whereas the references to the jurisprudence of the Special Tribunal for Lebanon (the ‘STL’) served as a comparison rather than the sole basis for its interpretation.⁵⁶

33. In respect of the contextual argument put forward by the Defence, the Chamber, while mindful of the need to preserve the overall structure of confirmation of charges proceedings even when they are held *in absentia*, considers that the finding that a document containing the charges has to be submitted at this stage does not amount to either misconstruing or disrupting the structure of confirmation of charges proceedings. It rather adapts the structure to the specificities of confirmation of charges proceedings conducted *in absentia*, by focusing on the ultimate objective of the provision which requires that the suspect is provided with adequate information on the charges, and hence the scope of the case, before confirmation of charges proceedings *in absentia* can actually start. In the present case, by virtue of Pre-Trial Chamber II’s decision to order the Prosecution to submit a document containing the charges, albeit a *sui generis* one, and to make that document the subject and centre of all notification activities, more information has been provided than usually is the case, or would have been, by the

⁵⁴ [First Decision](#), para. 29.

⁵⁵ Article 31(1) of the Vienna Convention on the Law of Treaties.

⁵⁶ [First Decision](#), footnotes 40-41 (which refer to ‘[c]ompare’).

allegations as contained in the Arrest Warrant which would have been available for the purposes of the first appearance and read out in this specific context. In addition, having found that article 61(2)(b) of the Statute also applies to a situation in which the suspect has never been accessible, it further follows that, in such circumstances, a first appearance cannot constitute a requirement for conducting confirmation of charges proceedings *in absentia*.

34. As regards the arguments relying upon the preparatory work of the Statute, the Chamber observes that, according to article 32 of the Vienna Convention on the Law of Treaties (the ‘VCLT’), the preparatory work of a treaty merely constitutes a supplementary method of interpretation to which recourse may be had if the general rule of interpretation contained in article 31 of the VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. In the present case, the use of the disjunctive ‘or’ in article 61(2)(b) of the Statute clearly points to distinct circumstances as to whether the person concerned has or has never been available to the Court when proceedings *in absentia* are considered or started. As it does not lead to any of the outcomes specified in article 32 of the VCLT, there is no need to have recourse to the preparatory work. In any event, the fact that the proposals emphasised by the Defence have not ultimately been retained in the adopted version of the Statute means that they do not determinatively establish the interpretation of article 61(2)(b) of the Statute put forward by the Defence. Had that interpretation been preferred by the drafters, one of the proposals explicitly requiring a first appearance to take place in relation to a confirmation of charges procedure *in absentia* would have been inserted in the final draft of the Statute. Any other understanding would contravene the ordinary meaning to be given to the term ‘or’ in article 61(2)(b) of the Statute as understood in its context.

B. Whether all reasonable steps have been taken to secure Mr Kony's appearance, to inform him of the charges and of the date of the confirmation of charges hearing

1. Reasonable steps to secure Mr Kony's appearance

a) Pre-Trial Chamber II findings

35. When determining whether all reasonable steps to secure Mr Kony's appearance had been taken, Pre-Trial Chamber II noted that: (i) this element 'does not require positive results',⁵⁷ but rather and only to assess 'the sufficiency and adequacy of all actions taken' for those purposes,⁵⁸ 'irrespective of those actions having led to the intended result, i.e., the appearance of the suspect before the Court';⁵⁹ and (ii) '[r]easonable steps to locate and arrest the suspect may include transmission to States of the arrest warrant and a request for cooperation to locate and to surrender the person; law enforcement operations; publication of the arrest warrant in the Court's website and media outlets; public campaigns to receive information regarding the person's whereabouts', as well as '[o]utreach activities, such as the publication and broadcast of the arrest warrant and the allegations contained therein'.⁶⁰

36. Based on the information before it, Pre-Trial Chamber II noted that actions and steps taken since the issuance of the warrant in 2005 included the following: (i) the transmission of requests for arrest and surrender of Mr Kony to the authorities of those countries where he has been and is believed to have been located; (ii) attempts at apprehending Mr Kony by the government of Uganda, protracted over many years; the issuance of a request to law enforcement authorities worldwide to locate and arrest Mr Kony by way of an INTERPOL 'Red Notice' in 2006; (iii) "unprecedented cooperation" from the international community and civil society to locate and apprehend him';⁶¹ (iv) 'cooperation and diplomatic efforts with relevant States, public information campaigns, outreach activities and communication attempts through intermediaries';⁶² and (v) 'the dissemination and publication of the Arrest Warrant in

⁵⁷ [First Decision](#), para. 36.

⁵⁸ [First Decision](#), para. 39.

⁵⁹ [First Decision](#), para. 39.

⁶⁰ [First Decision](#), para. 40.

⁶¹ [First Decision](#), para. 41.

⁶² [First Decision](#), para. 42.

Acholi and in English and press releases’.⁶³ Accordingly, it found that all reasonable steps to secure Mr Kony’s appearance had been taken.⁶⁴

b) Submissions

37. In its 28 August 2024 Observations, the Defence asserts that, by relying on steps taken between 2005 and 2022, Pre-Trial Chamber II ignored that rule 123(3) of the Rules ‘requires that measures to locate and arrest the person have been taken within a reasonable period of time after the issuance of the arrest warrant’.⁶⁵ The Defence recalls that the statutory framework of the STL and the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’) required requests for *in absentia* proceedings to be brought, respectively, within 30 days of the advertisement of the indictment or ‘within a reasonable time’, thus preventing a confirmation of charges hearing *in absentia* from turning into ‘an uncertain and endless contingency, rather than a swift reaction’ following unsuccessful attempts to apprehend the person.⁶⁶ The Defence highlights that the steps relied upon by Pre-Trial Chamber II, including attempts by Uganda, occurred ‘mainly between 2005 and 2008’ and that ‘international efforts [...] have long since been abandoned’.⁶⁷

c) Determination

38. The Chamber recalls that the obligations of the Chamber set out in article 61(2)(b) of the Statute in relation to the efforts taken to secure the appearance of the suspect and, as developed below,⁶⁸ to inform him or her of the charges and the date of the hearing, do not require any positive result to be obtained. The Chamber must only ensure that the efforts undertaken to secure the appearance and inform the suspect were adequate for that purpose. The adequacy of the steps is assessed in light of the ‘all reasonable steps’ standard applicable in the present instance. It is, therefore, not necessary to demonstrate that the steps taken to secure the appearance of the suspect could have or

⁶³ [First Decision](#), para. 43 (footnote omitted).

⁶⁴ [First Decision](#), para. 44.

⁶⁵ [28 August 2024 Observations](#), para. 29.

⁶⁶ [28 August 2024 Observations](#), para. 31.

⁶⁷ [28 August 2024 Observations](#), para. 31.

⁶⁸ See below, para. 54.

would have resulted in his or her arrest in different circumstances, or that the suspect was indeed informed of the charges and the date of the hearing.

39. As to the Defence's challenge, the Chamber notes that, pursuant to rule 123(3) of the Rules, the Chamber must assess whether all reasonable measures have been taken to locate and arrest the person if a warrant of arrest has not been executed within a reasonable period of time after its issuance. This provision is formulated in broad terms. As such, a pre-trial chamber is vested with the discretion to determine the reasonableness of both the time span and of the measures taken while attempting to execute the warrant, in light of circumstances which will be specific to each situation and each case. The variety of situations which may come before the Court is so broad that those circumstances may greatly vary and therefore possibly lead to very different results when it comes to determining whether the time span and the measures can be regarded as 'reasonable'. This is the reason for the lack of a fixed time frame within which the relevant steps would have to be adopted in the legal texts of the Court, and makes the inference drawn by the Defence based on the statutory framework and practice of either the STL or the ICTY, both of which only dealt with one, specific, historical context, inapposite.

40. The Chamber notes that the Defence contention that Pre-Trial Chamber II would have relied 'on historical steps taken to locate Mr Kony, occurring mainly between 2005 and 2008' and 'including Ugandan government attempts to apprehend Mr Kony, and international efforts that have long since been abandoned',⁶⁹ is not accurate. The measures relied upon by Pre-Trial Chamber II, as detailed in the 8 May 2023 Registry Report, include steps and initiatives taken starting from immediately after the issuance of the Arrest Warrant in 2005, and extending well beyond 2008 and until the present day, including as a consequence of the increasingly strengthened institutional cooperation between the Registry and the Prosecution over the years. The reason for Pre-Trial Chamber II instructing the Registry to submit an amended report, following the one initially submitted on 30 March 2023 and focussing on steps and initiatives taken since 2020, and including all and every measure taken between the issuance of the Arrest Warrant and the moment of submission, was to ensure that a determination would take into account and be based upon the full picture of those measures.

⁶⁹ [28 August 2024 Observations](#), para. 31.

41. These measures included cooperation efforts with several States and international stakeholders aimed at locating Mr Kony,⁷⁰ regional coordinated initiatives adopted by national authorities in the relevant areas as well as the establishment and maintaining of constant interaction with authorities, individuals and other instances likely to detain information relevant to Mr Kony's whereabouts; targeted media campaigns in 2013, 2017, 2018 and 2021, also 'suitable to enhance the likelihood of getting information on Mr Kony's whereabouts'; all of these measures were pursued throughout the period and further enhanced since 2020. Considering the timeliness and the appropriateness of the measures, which emphasise the quality rather than the quantity of actions, as set out above, the Chamber is satisfied that the requirement that all reasonable steps have been taken to secure Mr Kony's appearance before the Court is met.

2. Reasonable steps to inform Mr Kony of the charges and that a confirmation of charges hearing in absentia will be held

a) Whether all reasonable steps have been taken to inform Mr Kony of the charges

(1) Pre-Trial Chamber II findings

42. As to the meaning of the standard of 'all reasonable steps', Pre-Trial Chamber II indicated that, whilst it could 'not be defined in the abstract' and 'may widely differ from one case to another',⁷¹ 'efforts to notify the suspect of the charges and that a confirmation hearing will take place may include: publication and advertisement measures in the States where the concerned person is believed to be located; formal notification attempts at the person's last known place of residence or through family members; publication of a public version of the document containing the charges on

⁷⁰ See [First Decision](#), para. 41, footnote 45 (mentioning that '[i]n 2008, the European Parliament explicitly called for the development of effective plans to execute the Arrest Warrant. In 2012 the African Union launched an international task force to locate Mr Kony, whilst the US has deployed special forces to locate him and included Mr Kony in the 'War Crimes Rewards Program' offering a reward of up to USD 5,000,000 for information leading to his arrest. In addition, civil society organisations have launched public campaigns to encourage the apprehension of Mr Kony').

⁷¹ [First Decision](#), para. 56.

the Court's website and dissemination of the charges in various media outlets and official press releases'.⁷²

43. As to the requirement that all reasonable steps to inform the suspect of the 'charges' had been taken, Pre-Trial Chamber II held that '[a]rticle 61(3)(a) of the Statute and rule 121(3) of the Rules stipulate that it is the document containing the charges [...], as submitted by the Prosecution, which formally informs a suspect and provides detail of the nature, cause and content of the charges',⁷³ and that, '[a]lthough allegations against a suspect need to be clearly defined for a Pre-Trial Chamber to issue a warrant of arrest or summons to appear',⁷⁴ the term 'charges' as appearing in article 61(2)(b) of the Statute had to be read as referring 'to those formalised in the DCC'.⁷⁵ In support of this finding, Pre-Trial Chamber II reasoned that: (i) 'the word "charges" first appears in article 61 of the Statute, whilst the provisions related to the stages preceding the confirmation hearing, namely articles 58 and 59 of the Statute on arrest warrants and article 60 of the Statute on initial appearances, refer to "the crimes which [the person concerned] is alleged to have committed";⁷⁶ (ii) 'regulation 52 of the Regulations of the Court provides that a DCC shall contain, *inter alia*, "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person [...] to trial" and a legal characterisation of the facts to accord with the crimes and the modes of liability under the Statute' while, '[i]n contrast, in its application for an arrest warrant the Prosecution must only submit a "specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed", together with a "concise statement of facts which are alleged to constitute those crimes"'.⁷⁷

⁷² [First Decision](#), para. 57 referring to *Mrkšić et al.*, in which the Single Judge found that the Prosecution had taken all reasonable measures to inform the suspect of the existence of the indictment after it confirmed, among other, that the Registrar had sent, through diplomatic channels, a form of advertisement for publication in domestic newspapers to inform the accused persons of the existence of the indictment; and the indictment was publicised in several newspapers and in a television program and one of the accused acknowledged publicly that he had been indicted. See International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Mile Mrkšić et al.*, [Order for review in open court of the indictment by the Trial Chamber I \(Rule 61 of the Rules of Procedure and Evidence\)](#), 6 March 1996, IT-95-13/1, p. 3.

⁷³ [First Decision](#), para. 46.

⁷⁴ [First Decision](#), para. 47.

⁷⁵ [First Decision](#), para. 47.

⁷⁶ [First Decision](#), para. 47.

⁷⁷ [First Decision](#), para. 48.

44. Pre-Trial Chamber II, therefore, ordered the Prosecution ‘to first present the charges it seeks to have confirmed’ in a ‘fully public’,⁷⁸ ‘very concise’ document containing the charges, specifying ‘for each charge the place, time, and approximate number of victims’ and providing ‘the necessary particulars that comprise the elements of the crimes’; ‘structured in a narrative style, with all relevant facts presented in sufficient detail and in chronological order’, not containing ‘references to the evidentiary items supporting the material facts underpinning the charges’. It further clarified that a list of evidence, and ‘a document that includes [such references] and material’, would only have to be submitted if the confirmation of charges hearing *in absentia* would be ‘ultimately authorised’.⁷⁹ Once the document containing the charges was submitted, Pre-Trial Chamber II instructed the Registry and the Prosecution to make ‘their best efforts to put Mr Kony on notice of the charges for which confirmation is sought, and report to the Chamber on the measures taken’.⁸⁰

45. Pre-Trial Chamber II further clarified that both these requirements (namely, whether all the reasonable steps had been taken to inform the suspect of the charges and that a confirmation of charges hearing *in absentia* would be held) could only be assessed, respectively, once the Prosecution had submitted a document containing the charges and the Registry had been given reasonable time to carry out activities to inform the suspect of those charges and of the forthcoming hearing. Accordingly, Pre-Trial Chamber II deferred the decision on these two aspects to the moment when the relevant steps would have been taken and the information as to the relevant activities conducted by the Registry would be before it.⁸¹

46. In its Second Decision, Pre-Trial Chamber II recalled its findings from the First Decision and proceeded to address the requirement as to whether reasonable steps had been taken to inform Mr Kony of the charges, as contained in the DCC submitted by the Prosecution in accordance with the instructions given in the First Decision.

47. Pre-Trial Chamber II noted that the steps and activities undertaken by the Registry to this effect, as detailed in the 23 February 2024 Registry Report, ‘included large-scale media campaigns, both in Uganda and neighbouring countries, activities aiming at

⁷⁸ [First Decision](#), paras 51, 52.

⁷⁹ [First Decision](#), para. 53 (footnote omitted).

⁸⁰ [First Decision](#), para. 54.

⁸¹ [First Decision](#), paras 45, 49.

engaging with relevant stakeholders and communities, and the use of social media platforms as well as information provided via the website of the Court’.⁸² It also noted that ‘the summary of DCC was broadcasted in Acholi and English on different radio stations in Northern Uganda’, which reached an estimated audience ‘of eight million people per day since 6 February 2024’; that ‘the summary of the charges was also read out by Registry staff in Acholi, during interactive radio programs conducted on two community radio stations most listened to by rural communities in Northern Uganda’ and that it was ‘estimated that eight million people across the Acholi, Lango West Nile sub-regions in Northern Ugandan, as well as some part of Southern Sudan and the Democratic Republic of Congo listened to the relevant programs’.⁸³ In addition, the Chamber noted the radio campaign launched by the Registry ‘on two radio stations in the Central African Republic during which the existing charges against Mr Kony were explained in French and Sango’, which reached ‘[a]n expected audience of six million people’.⁸⁴

48. Pre-Trial Chamber II likewise noted the additional activities carried out by the Registry in the field with a view to engaging with relevant stakeholders and communities, which ‘focused on communities in Northern Uganda close to Mr Kony and included meetings attended by clan members and other persons close to him’, during which ‘the Registry provided updates on the case, the charges were read out, and copies of the summary of the DCC in Acholi shared’⁸⁵ and ‘also held an interactive dialogue with, *inter alia*, religious and cultural leaders as well as civil society, victim groups and local government leaders, during which the summary of the DCC was read’. Furthermore, the Chamber recalled that the Registry had ‘used several platforms to raise awareness on the charges against Mr Kony, including by posting a short video in English and French as well as visuals with Frequently Asked Questions’, and creating ‘a specific sub-page on the Court’s website [...] including the DCC and its summary, in English, French, and Acholi’.⁸⁶

49. Pre-Trial Chamber II clarified that, whilst most of the activities centred on the summary of the DCC as opposed to the DCC itself, the use of a summarised version of

⁸² [Second Decision](#), para. 6.

⁸³ [Second Decision](#), para. 6.

⁸⁴ [Second Decision](#), para. 6.

⁸⁵ [Second Decision](#), para. 7.

⁸⁶ [Second Decision](#), para. 7.

the charges would still ‘mean that the charged person was made aware that such charges against him or her exist’; in addition, since the summary explained that the Acholi version of the DCC was available on the Court’s website, ‘it would be incumbent on the suspect to retrieve the charges’.⁸⁷ According to Pre-Trial Chamber II, the ‘all reasonable steps’ standard required under article 61(2)(b) of the Statute ‘must also be considered as having been fulfilled as long as all efforts have been made to inform the person that charges against him or her exist and that these charges were available for consultation. In such instance, whether the person made an effort to consult the specific charges or chooses not to learn about them does not impact the Chamber’s finding on whether all reasonable steps to inform him or her of the charges have been taken’.⁸⁸

50. Based on this reading, and on the information before it, Pre-Trial Chamber II concluded that, in light of the activities and initiatives detailed in the 23 February 2024 Registry Report, it was satisfied that the Registry had ‘made its best efforts to put Mr Kony on notice of the charges for which confirmation is sought, or at least of the fact that such charges exist and that the document containing them was available for consultation in a language the suspect speaks and understands’.⁸⁹ According to Pre-Trial Chamber II, the measures adopted and the activities conducted by the Registry were ‘varied, extensive and reached a large population, including clan members and other persons close to Mr Kony’ and the adopted steps and initiatives were ‘reasonable, adequate and took into consideration the communication preferences of the local audiences’.⁹⁰ Pre-Trial Chamber II also found that, since the suspect had been at large for a significant period of time, ‘sufficient time had been provided to the Registry’ and that, accordingly, ‘the second requirement of article 61(2)(b) ha[d] been met’.⁹¹

(2) *Submissions*

51. In its 28 August 2024 Observations, the Defence avers that the standard of ‘all reasonable steps’ for notification of the charges under article 61(2)(b) of the Statute was not met. The Defence argues that the Second Decision erroneously focused on whether

⁸⁷ [Second Decision](#), para. 8.

⁸⁸ [Second Decision](#), para. 8.

⁸⁹ [Second Decision](#), para. 9.

⁹⁰ [Second Decision](#), para. 9.

⁹¹ [Second Decision](#), para. 9.

the Registry ‘made its best efforts’ to put Mr Kony on notice of the charges and found that these steps were ‘reasonable’ and ‘adequate’, meaning that it failed to give reasons as to why it was satisfied that ‘all reasonable steps’ in the present circumstances had been taken and to address what it considered ‘all reasonable steps’.⁹² In this regard, the Defence asserts that the STL properly distinguished between ‘reasonable steps’ and ‘all reasonable steps’ and that it had found some steps ‘reasonable’ but ‘still not sufficient’.

52. In addition, the Defence argues that the finding that all reasonable steps were taken to inform Mr Kony of the charges is not available to a reasonable pre-trial chamber since: (i) the Registry skipped entire countries where it is accepted Mr Kony could be living, ‘focus[ing] on northern Uganda and [Central African Republic] with radio coverage “to some parts of Southern Soudan and the [Democratic Republic of Congo]”’ and omitting information about any efforts to reach Mr Kony in Darfur;⁹³ (ii) numerically, the Registry steps had minuscule reach on social media; (iii) no reasons were given why it was reasonable not to broadcast on more stations, or more frequently, or on stations with audience shares larger than those selected by the Registry, or in languages such as Luo more widely spoken in Uganda than Acholi;⁹⁴ and (iv) the steps taken lack a nation-wide effort through a state apparatus, a high profile media coverage the ICC received in other contexts and a targeted social media campaigns to selected demographic across their own social media platforms.⁹⁵

(3) *Determination*

53. As regards the Defence’s argument that the ‘all reasonable steps’ standard was not properly defined by Pre-Trial Chamber II, the Chamber considers the Defence’s reference to the jurisprudence of the STL regarding the definition of the standard and its application to be inapt. The Chamber particularly notes that the standard applied at the STL, although worded similarly, forms part of a different legal framework and is inherently higher than the one applicable to article 61(2)(b) of the Statute since it resulted in committing a suspect to a trial *in absentia*, while article 61(2)(b) of the

⁹² [28 August 2024 Observations](#), paras 32-35.

⁹³ [28 August 2024 Observations](#), para. 36.

⁹⁴ [28 August 2024 Observations](#), paras 37-38.

⁹⁵ [28 August 2024 Observations](#), para. 39.

Statute only aims at starting confirmation of charges proceedings *in absentia*.⁹⁶ In addition, the Chamber recalls that it is not bound by other courts' interpretation of legal principles.⁹⁷

54. Therefore, in light of the nature of the obligation set under article 61(2)(b) of the Statute,⁹⁸ like Pre-Trial Chamber II, the Chamber finds that this 'standard cannot be defined in the abstract, as what is reasonable to achieve an outcome may widely differ from one case to another'⁹⁹ and that this standard must 'be considered as having been fulfilled as long as all efforts have been made to inform the person that charges against him or her exist and that these charges were available for consultation'.¹⁰⁰ On this basis, Pre-Trial Chamber II provided a list of actions that the Registry may undertake to notify the suspect of the charges in the present case.¹⁰¹ The Registry submitted an outreach and notification plan in line with this list and implemented it upon instruction of Pre-Trial Chamber II contained in its 26 January 2024 Order.

55. Moreover, Pre-Trial Chamber II specifically explained what it considered to be all reasonable steps in light of specificities of the case. It noted that the steps taken by the Registry aligned with its prior instructions and were specifically designed to broadcast the information in a manner that would effectively reach Mr Kony, in that they were varied, extensive and reached a large population, including clan members and other persons close to Mr Kony, took into consideration the communication preferences of the local audiences and that sufficient time had been provided to notify Mr Kony.¹⁰² Thus, the Chamber considers that reasons were provided with regard to how the efforts deployed by the Registry satisfied the test of the second requirement of article 61(2)(b) of the Statute, i.e., that all reasonable steps had been taken to notify Mr Kony of the charges, in the specific circumstances of the case.

⁹⁶ See [First Decision](#), para. 56, footnote 60 (which emphasised that the 'standard at the STL was set high because its result was to commit an accused person to a trial *in absentia*'). See also, STL, *The Prosecutor v. Ayyash et al.*, [Decision to Hold Trial in Absentia](#), 1 February 2012, STL-11-01/I/TC, public, para. 37 (referring to the similar ICTY "all reasonable steps" standard applicable in the different context of indictment review hearing: 'The "reasonable steps" required before proceeding to conduct an *in absentia* indictment review hearing are necessarily of a lesser standard than those required before holding a trial *in absentia*').

⁹⁷ See article 21 of the Statute.

⁹⁸ See above, para. 38.

⁹⁹ [First Decision](#), para. 56.

¹⁰⁰ [Second Decision](#), para. 8.

¹⁰¹ [First Decision](#), para. 57.

¹⁰² [Second Decision](#), paras 6-8.

56. Regarding the Defence's assertion that the outreach efforts omitted entire countries and regions where it is accepted Mr Kony could be living, the Chamber notes that the Registry's efforts were undertaken in the relevant parts of Uganda, Central African Republic, Republic of Sudan and Republic of South Sudan and Democratic Republic of Congo 'in *targeted* efforts aimed at reaching out to him in countries where he is believed to [be located]', according to the information in its possession.¹⁰³ In this regard, the Chamber considers that the online article cited by the Defence suggesting that Mr Kony may be hiding in Darfur does not suffice in itself to conclude that the Registry erred in not specifically targeting this region in its outreach.¹⁰⁴ As to the purported inadequacy and insufficiency of the numbers related to the outreach efforts reported by the Registry, while admittedly the efforts on social media platforms resulted in minimal reach, the Chamber considers that these numbers should not be read in isolation but in conjunction with the overall steps taken in communicating the charges. More specifically, they should be assessed together with the large audiences reached by the radio broadcasts (namely an estimated number of eight million people per day since 6 February 2024),¹⁰⁵ the use of more traditional outreach means, such as for example newspapers, and the engagement of the Registry with the relevant stakeholders and community in the field,¹⁰⁶ all of which, taken together, point to a substantial reach of the efforts deployed to inform Mr Kony of the charges.

57. Turning to the Defence's argument related to the Registry's choice to use specific radio stations, the targeting of specific audiences, and the chosen broadcast hours, the Chamber considers that this argument is premised on the erroneous assumption that the 'Registry's aim was to reach the largest possible audience'.¹⁰⁷ Instead, the efforts were aimed at the largest possible *relevant* audience, targeting specific locations based on information available to the Registry and using specific languages known to be understood by Mr Kony. The Chamber notes that the reasons for such targeting were

¹⁰³ [Annex 1 to 23 February 2024 Registry Report](#), paras 1, 12, 16, 17-18, 25 (emphasis added); Annex 1 to Registry Plan on Outreach and Notification, paras 1, 13. See also [Second Decision](#), para. 6.

¹⁰⁴ See [28 August 2024 Observations](#), para. 36, footnote 68.

¹⁰⁵ See [28 August 2024 Observations](#), para. 38 ('The radio numbers are admittedly higher').

¹⁰⁶ See [Annex 1 to 23 February 2024 Registry Report](#), para. 10.

¹⁰⁷ [28 August 2024 Observations](#), para. 38.

illustrated in the Registry Plan on Outreach and Notification and in the 23 February 2024 Registry Report.¹⁰⁸

58. Accordingly, the Chamber concurs with Pre-Trial Chamber II's definition and application of the 'all reasonable steps' standard as recalled above,¹⁰⁹ and is satisfied that the requirement that all reasonable steps have been taken to inform Mr Kony of the charges is met.

b) Whether all reasonable steps have been taken to inform Mr Kony of the hearing

(1) Pre-Trial Chamber II findings

59. In line with its overall reading of article 61(2)(b) of the Statute and of the legal findings entered in the First and the Second Decision, Pre-Trial Chamber II also proceeded to set 15 October 2024 as the appropriate date for holding the hearing on the confirmation of charges against Mr Kony. This date was set considering 'the scope of the Prosecution's allegations as reflected in the DCC, and the potential voluminous amount of material that the Prosecution is likely to disclose in the present case', as well as of the fact that 'this would be the first time the Court would hold a confirmation of charges hearing *in absentia*'.¹¹⁰ Pre-Trial Chamber II then instructed the Registry 'to make its best efforts to inform Mr Kony' of that date, namely by proceeding in the same manner as it had for the notification of the charges.¹¹¹

(2) Submissions

60. In its 28 March 2024 Report, the Registry clarifies having proceeded in the same way as it had for the notification of the charges, on the basis of the Registry Plan for Outreach and Notification, with adaptations aimed at further enhancing the chances for the successful dissemination of the information.¹¹² More specifically, it reports having initiated and conducted, between 13 March and 11 April 2024, a wide-ranging mass-

¹⁰⁸ See, e.g., Annex 1 to Registry Plan on Outreach and Notification, paras 7-9; [Annex 1 to 23 February 2024 Registry Report](#), paras 2-3.

¹⁰⁹ See above, paras 42-50.

¹¹⁰ [Second Decision](#), para. 12.

¹¹¹ [Second Decision](#), para. 13.

¹¹² [Annex 1 to 28 March 2024 Registry Report](#), para. 2.

media campaign, utilising social media platforms and conducting targeted and informative face-to-face meetings with relevant individuals, communities and stakeholders in both northern Uganda, with a focus on strategically significant locations with strong links to Mr Kony, where his affiliates and members of his network are and/or have been known to reside, and in the Central African Republic.

61. It indicates that it: (i) used a mix of national and local radio channels (some of which potentially also reaching audiences in parts of Southern Sudan), with pre-recorded messages broadcast in relevant local languages and several interactive live programmes;¹¹³ (ii) engaged the relevant stakeholders and communities in northern Uganda through face-to-face meetings to share the information via word of mouth, as one of the most effective means to reach Mr Kony;¹¹⁴ (iii) published a Q&A paper, addressing the most frequently recurring issues gathered in the context of the interaction with relevant communities and stakeholders, in key national and local newspapers, both in their paper and online versions, and widely shared on platforms relevant to civil society, legal and academic communities, victims' associations and media groups;¹¹⁵ (iv) supplemented the dedicated page on the ICC website with the information relating to the starting date for the confirmation of charges hearing;¹¹⁶ and (v) used the ICC social media platforms to disseminate the same information.¹¹⁷ According to the Registry, both the available data relating to the attendance to and participation in the various initiatives and estimates as regards their individual and overall reach suggest that several million people were potentially able to access the information.¹¹⁸ Finally, the Registry clarifies that national newspapers in Uganda will keep the information material available for several weeks, while the information carried by the ICC website will remain available on a permanent basis and updated as proceedings progress.¹¹⁹

¹¹³ [Annex 1 to 28 March 2024 Registry Report](#), paras 12-18.

¹¹⁴ [Annex 1 to 28 March 2024 Registry Report](#), paras 27-34.

¹¹⁵ [Annex 1 to 28 March 2024 Registry Report](#), paras 19-26.

¹¹⁶ [Annex 1 to 28 March 2024 Registry Report](#), paras 37-38.

¹¹⁷ [Annex 1 to 28 March 2024 Registry Report](#), paras 35-36.

¹¹⁸ [Annex 1 to 28 March 2024 Registry Report](#), para. 11.

¹¹⁹ [Annex 1 to 28 March 2024 Registry Report](#), para. 42.

(3) *Determination*

62. The Chamber must now determine whether, based on the information detailed in the 28 March 2024 Registry Report, it is satisfied that the suspect has also been sufficiently informed of the date of the hearing.

63. The Chamber determines that the requirement that all reasonable steps have been taken to inform the suspect of the date on which the confirmation of charges hearing will be held does not mean that a positive result should be obtained. Accordingly, for the Chamber to be satisfied that the requirement has been met, it is not necessary to positively establish that the suspect has actually received the information. It suffices to assess whether the actions adopted with a view to informing the suspect of the date, in light of their objective features and taken in their entirety, can be regarded as sufficient and adequate to that purpose.

64. The Chamber considers that, similarly to what has been found by Pre-Trial Chamber II in the Second Decision in respect of the dissemination of the information relating to the charges, the notification efforts and outreach activities carried out by the Registry to ensure that Mr Kony is informed of the date set for the commencement of the confirmation of charges hearing, as detailed in the 28 March 2024 Registry Report, are adequately extensive, as well as appropriately focussed and targeted on relevant audiences and geographical areas in light of the information available to the Registry and the Chamber. The Chamber also notes the additional steps devised and taken by the Registry specifically as regards the date set for the commencement of the confirmation of charges hearing, reinforcing and expanding (vis-à-vis those taken with regard to the charges) the initiatives relying on locally preferred media, as such suitable to enhance the potential for the information to reach circles known or likely to have a close connection with, and possibly even a direct link to, Mr Kony.

65. Accordingly, the Chamber finds that all reasonable steps have been taken to inform Mr Kony of the date set for the confirmation of charges hearing and that the third and final requirement of article 61(2)(b) of the Statute has been met.

3. *Whether, following the postponement of the Confirmation of Charges Hearing, the date eventually set will have to be notified to the suspect*

a) *Submissions*

66. In its Observations, the Defence submits that, since the Registry's activities in connection with the notification of the date of the hearing related to the date originally set by Pre-Trial Chamber II, i.e., 15 October 2024, '[i]t cannot be concluded that all reasonable steps have been taken to inform Mr Kony of the date on which the hearing has been scheduled',¹²⁰ and that notification activities would have to be carried out anew once a new date will be set.

67. In response, the Prosecution submits that the postponement 'has no bearing on the fulfilment of the notification requirement set out in article 61(2)(b)': for the purposes of this provision, 'the Chamber can be satisfied [...] that all reasonable steps have been taken to inform Mr KONY of the charges, and that a hearing to confirm those charges will be held, even if the date initially set for the hearing is postponed for practical reasons'.¹²¹ In the view of the Prosecution, the 'postponement does not invalidate the notification [having] already taken place, since the protected interest (alerting that confirmation proceedings are likely to have commenced by a certain date) is satisfied' and '[i]f that date turns out to be somewhat later, there is no appreciable prejudice to Mr KONY'.¹²² The Prosecution adds that, alternatively, the Chamber could 'order further notification efforts of the same nature as implemented by the Registry previously, to be completed at least 30 days prior to the commencement of the hearing'.¹²³

68. In reply, the Defence notes, *inter alia*, that the need for the Chamber to be satisfied that Mr Kony has been sufficiently informed of the date of the hearing had been mentioned by the Single Judge at the 23 July 2024 Status Conference and that, in previous submissions, the Prosecution had expressly referred to notification of the date of the hearing as an element of article 61(2)(b) of the Statute. It submits that 'the very purpose of ensuring that the person is notified of the date of the hearing is to allow them to follow the proceedings, or attend the hearing, or to instruct lawyers to attend and

¹²⁰ [28 August 2024 Observations](#), para. 43.

¹²¹ [5 September 2024 Observations](#), para. 6.

¹²² [5 September 2024 Observations](#), para. 8.

¹²³ [5 September 2024 Observations](#), para. 10.

represent them’ and that ‘[i]f the person has been given the wrong date, that is impossible, and the safeguard ceases to exist’.¹²⁴

b) Determination

69. The Chamber notes that the assessment of the requirement that all reasonable steps have been taken to inform the person that a hearing will be held can only be meaningful if conducted against the actual date of the hearing, as set by the Pre-Trial Chamber. The Prosecutor’s contention that ‘a postponement of the hearing – due to fairness considerations and procedural necessity – has no bearing on the fulfilment of the notification requirement set out in article 61(2)(b)’¹²⁵ is, thus, inapposite.

70. Accordingly, following the postponement, as needed and unless otherwise directed, the Registry shall undertake and carry out notification efforts and outreach activities of the same nature, variety and range as the ones carried out in respect of the date of 15 October 2024, initially set by Pre-Trial Chamber II for the commencement of the confirmation of charges hearing, and to subsequently report to the Chamber. These activities shall start as soon as the Chamber sets the new date for the confirmation of charges hearing and shall be concluded within 30 days, with a report to be submitted to the Chamber within one week of their completion. Since it is not necessary to confirm that the information has actually reached the suspect, and these activities will have the same features and be conducted along modalities already found adequate by the Chamber, it will not be necessary for the Chamber to address this legal requirement anew, but only to consider the measures taken, unless specific issues arising from the Registry report require otherwise. Accordingly, this pending assessment constitutes no obstacle to the continuation of these proceedings in the meantime, so as to allow for the preparation of the confirmation of charges hearing to advance.

¹²⁴ [9 September 2024 Observations](#), paras 5-6.

¹²⁵ [5 September 2024 Observations](#), para. 6.

C. Whether there is cause to hold a confirmation of charges hearing *in absentia*

1. Pre-Trial Chamber II findings

71. Finally, Pre-Trial Chamber II stressed that, ‘[e]ven if the legal requirements [...] are met, the decision to hold a confirmation of charges hearing *in absentia* is discretionary’.¹²⁶ It found that, in light of the current circumstances of the case, there was cause to hold a confirmation of charges hearing *in absentia*. In support of this finding, Pre-Trial Chamber II relied on the following factors: (i) the final conviction of Dominic Ongwen (‘Mr Ongwen’), one of the original co-suspects in the case, in 2021, indicating the potential availability of evidence in relation to crimes allegedly committed by the Lord’s Resistance Army (the ‘LRA’), the armed group allegedly founded and led by Mr Kony;¹²⁷ (ii) the termination of proceedings against Mr Kony’s three other original co-suspects following their deaths, leaving Mr Kony as the only suspect still at large and the ensuing absence of risk that other suspects’ rights might be prejudiced;¹²⁸ (iii) the fact that, after almost two decades from the commission of the alleged crimes, confirmation of charges proceedings *in absentia* would provide victims, including those who did not participate in the case of Mr Ongwen, with an opportunity to voice their views and concerns, albeit within the limited framework of pre-trial proceedings;¹²⁹ and (iv) the fact that the holding of the hearing *in absentia* ‘will remind the international community that [Mr Kony] is a wanted fugitive and may reinvigorate efforts to locate him and bring him before the Court’.¹³⁰ Furthermore, Pre-Trial Chamber II considered ‘(i) that the rights of Mr Kony would not be unduly prejudiced if a confirmation hearing takes place in his absence; (ii) the scale of the alleged crimes and the centrality of the suspect’s alleged participation in their perpetration; and (iii) that at present holding a confirmation hearing *in absentia* would not have a detrimental impact on the effectiveness and efficiency by which the Court must [manage] its resources’.¹³¹

¹²⁶ [First Decision](#), para. 58.

¹²⁷ [First Decision](#), para. 62.

¹²⁸ [First Decision](#), para. 63.

¹²⁹ [First Decision](#), paras 65-66.

¹³⁰ [First Decision](#), para. 67.

¹³¹ [First Decision](#), para. 68.

2. *Whether Mr Kony is alive*

a) *Submissions*

72. In its 28 August 2024 Observations, the Defence submits that Pre-Trial Chamber II erred by failing to address whether Mr Kony is still alive when finding that whether there is cause to hold an *in absentia* hearing requires the existence of a realistic expectation that the suspect will appear before the Court, and that a hearing may reinvigorate the efforts to locate Mr Kony, since these findings are manifestly unsound if Mr Kony is not alive.¹³² In this regard, the Defence argues that: (i) there is a ‘plethora of credible reports suggest[ing] he is not’ alive; (ii) the complete lack of open source information about his location supports these reports and the last known video footage of him dates back to 2006; (iii) the United States Government reward remains unclaimed; (iv) Mr Kony remained silent since the 2023 *in absentia* announcement, suggesting that he is either unaware or not alive anymore, which is likely considering the Uganda male life expectancy of 61-63 years; and (v) the ‘Registry’s March 2023 assessment that Mr Kony was still alive’ is undermined by conflicting information about his health condition and the alleged unreliability of the Registry’s intermediaries.¹³³

73. The Prosecution argues that, according to well-established case law, a fugitive suspect is presumed alive unless there is adequate proof to the contrary and that requiring ongoing proof of continued life would impose a substantial burden on the Court and risk creating a situation where arrest warrants are quashed and reinstated.¹³⁴ The Prosecution adds that, contrary to the Defence’s assertion, intelligence received to date provides proof that Mr Kony is still alive.¹³⁵

74. The Defence replies that the Prosecution: (i) does not offer new evidence or information on whether Mr Kony is still alive; (ii) misdirects its response insofar as the issue rests on the criteria for an *in absentia* confirmation of charges hearing and the spectre of arrest warrants being quashed and reinstated does not arise; and (iii) cites case law related to a termination of proceedings, which is not authority for the proposition of a purported presumption that a fugitive is alive in the absence of contrary

¹³² [28 August 2024 Observations](#), para. 27.

¹³³ [28 August 2024 Observations](#), para. 26.

¹³⁴ [5 September 2024 Observations](#), para. 3.

¹³⁵ [5 September 2024 Observations](#), para. 4.

proof.¹³⁶ It adds that, to the contrary, there exist legal presumptions concerning the death of missing persons in most national systems, including in Uganda.¹³⁷

b) Determination

75. The Chamber recalls that Pre-Trial Chamber II held that the decision to hold a confirmation of charges hearing *in absentia* is discretionary and that it had to determine ‘if the circumstances *prevailing at the time of its assessment* justify a departure from the general rule of holding confirmation hearings in the presence of the charged person’.¹³⁸ The Chamber observes that, at the time of the First Decision, Pre-Trial Chamber II was not in the possession of any conclusive information emanating from the Prosecution or the Registry that Mr Kony was deceased. To the contrary, in March 2023, the Registry reported that, in light of the information it had compiled, including some information that Mr Kony was ill, it had ‘assesse[d] that Mr Kony is still alive’.¹³⁹ Therefore, the Chamber considers that there is no conclusive information establishing Mr Kony’s death and further notes that the Court’s legal framework does not contain any presumption of death regarding missing persons similar to what may exist in certain national systems.

76. As to the Defence’s specific argument challenging the ‘Registry’s March 2023 assessment that Mr Kony [is] still alive’, the Chamber considers that the existence of conflicting information as to Mr Kony’s health condition does not indicate that Mr Kony is deceased, but that Mr Kony was allegedly observed at different points in time in different health conditions. Furthermore, while the Defence rightfully remarks that the Registry has evoked the unreliability of some intermediaries that were cited in its reports, the Chamber notes that the Registry’s statement that Mr Kony is still alive did not only rely on the information provided by the intermediaries but also on ‘credible sources’ including informants providing first-hand accounts.¹⁴⁰

77. Even if, *arguendo*, the Chamber had to consider whether Mr Kony is still alive for the purposes of this decision, it considers that the Defence’s information regarding

¹³⁶ [9 September 2024 Observations](#), paras 1-2.

¹³⁷ [9 September 2024 Observations](#), para. 3.

¹³⁸ [First Decision](#), para. 59 (emphasis added).

¹³⁹ 30 March 2023 Registry Report, para. 13.

¹⁴⁰ See 30 March 2023 Registry Report, para. 10; Annex to 30 March 2023 Registry Report.

Mr Kony's death is speculative and insufficient to question the fact that Mr Kony is still alive. First, the Chamber notes that the open-source information cited by the Defence in that regard rely on '*unconfirmed* reports claim[ing that] Mr Kony might have died', '*rumors* that he [is] no longer alive', personal opinions to the same effect, or simply the personal opinion of interviewees that '[n]obody knows if [he] is alive'.¹⁴¹ As regards the specific argument that Mr Kony may have died from Covid-19, the two newspaper articles cited in support mention reports that Mr Kony had died from Covid-19 that are accompanied by statements calling these reports into question.¹⁴² As such, the Chamber finds that these articles do not constitute credible reports suggesting that Mr Kony is not alive. Conversely, the Registry statement that Mr Kony is still alive is based on first-hand accounts from, and interactions with, relevant stakeholders. Second, the Chamber is not persuaded by the Defence's argument that the fact that the reward for Mr Kony's arrest has not been collected, Mr Kony's absence from public attention for almost 20 years, or his lack of reaction to the *in absentia* announcement in 2023 adequately support the proposition that Mr Kony is not alive. All these elements could also be explained by, *inter alia*, the fact that he has been a wanted fugitive in hiding for more than a decade. As to the argument centred on the average Ugandan male life expectancy, the Chamber notes that this is a purely statistical element which, without more, does not provide any information as to the specific status of Mr Kony.

3. Admissibility

a) Submissions

78. According to the Defence, Pre-Trial Chamber II failed to consider the likelihood that the proceedings against Mr Kony are now, or will become, inadmissible.¹⁴³

¹⁴¹ See [28 August 2024 Observations](#), para. 26, footnote 35 (emphasis added).

¹⁴² See [28 August 2024 Observations](#), para. 26, footnote 36, *referring to* Risdell Kasasira, '[108 children in LRA hands](#)' on The Daily Monitor (4 February 2021), reading that 'there were reports from Central African Republic last week that the Kony had died of Covid-19 but Mr Paul Ronan, the Director of Research with Invisible Children doubts the reports. "I don't think it would be very easy for Kony to contract Covid-19 in his isolated camp. Finally, the reports that his last words were 'Forgive me' seemed too good to be true," he told Daily Monitor', and *referring to* '[Uganda's fugitive warlord Joseph Kony is reportedly dead after COVID-19 infection](#)' on Sudan Post (24 January 2021) reading that '[s]ome sections of the Ugandan media is reporting that Ugandan warlord Joseph Roa Kony [...] has reportedly dies (sic) following infection by the deadly coronavirus disease. The Ugandan media however reported – quoting senior army commanders in the UPDF – that the army command is "yet to get any information regarding death of LRA leader, Joseph Kony [...]"

¹⁴³ [28 August 2024 Observations](#), para. 44.

The Defence is of the view that the trial of a third person before the International Crimes Division of the High Court of Uganda demonstrates that Uganda is now capable of putting Mr Kony on trial.¹⁴⁴ It adds that Uganda's position from the beginning of its interactions with the Court has been that it was willing and able to investigate and prosecute Mr Kony, but that it was incapable of arresting him.¹⁴⁵ The Defence also avers that a Ugandan court has issued a warrant for Mr Kony's arrest.¹⁴⁶ It further asserts that this approach does not reflect a genuine application of the principle of complementarity.¹⁴⁷ Lastly, the Defence indicates that, while Counsel appointed to represent Mr Kony's interests has no instructions to elect to challenge admissibility on his behalf, it alerts the Chamber to the fact that Mr Kony is being deprived of the prerogative to challenge the admissibility of the confirmation of charges hearing, and the fact that Mr Kony's rights are prejudiced insofar as he could not be subject to an *in absentia* confirmation of charges hearing before a Ugandan court.¹⁴⁸

79. The Prosecution avers that the admissibility of the proceedings is neither relevant nor in doubt.¹⁴⁹ It submits that the Chamber's *proprio motu* determination of admissibility under article 19(1) of the Statute is discretionary and the Appeals Chamber has held that it should be exercised with restraint at preliminary stages of the proceedings.¹⁵⁰ It adds that, even if the Chamber were to consider it necessary to determine admissibility at this stage, it may join the question to the confirmation of charges proceedings.¹⁵¹ The Prosecution is further of the view that there is no material change in the circumstances regarding the admissibility of the case as it has no knowledge of a pending warrant of arrest in Uganda for Mr Kony, and Uganda has neither challenged the admissibility of the case, nor expressed any intention of doing so.¹⁵² Lastly, the Prosecution contends that domestic proceedings against a person other than Mr Kony are irrelevant since they do not fulfil the 'same person' prong of the 'same conduct, same person' complementarity test.¹⁵³

¹⁴⁴ [28 August 2024 Observations](#), paras 47-49.

¹⁴⁵ [28 August 2024 Observations](#), para. 49.

¹⁴⁶ [28 August 2024 Observations](#), para. 50.

¹⁴⁷ [28 August 2024 Observations](#), para. 52.

¹⁴⁸ [28 August 2024 Observations](#), para. 53.

¹⁴⁹ [5 September 2024 Observations](#), para. 11.

¹⁵⁰ [5 September 2024 Observations](#), para. 11.

¹⁵¹ [5 September 2024 Observations](#), para. 11.

¹⁵² [5 September 2024 Observations](#), para. 12.

¹⁵³ [5 September 2024 Observations](#), para. 12.

80. The Defence additionally avers that the Appeals Chamber decision invoked by the Prosecution concerns the arrest warrant stage.¹⁵⁴ It adds that the Prosecution's suggestion of 'join[ing] the question to the confirmation hearings' reflects a profligate disregard of Court resources.¹⁵⁵ The Defence further asserts that the Prosecution's submission that 'it has no knowledge' concerning a Ugandan arrest warrant against Mr Kony appears to be based on information that is now seventeen years out of date.¹⁵⁶ The Defence has also obtained a 2001 'Withdrawal Form' from Uganda, which states that 'the Director of Public Prosecutions has decided to discontinue proceedings against the accused persons in the cases listed on the attached certified list pending re-arrest'.¹⁵⁷ It requests the Chamber to require the Prosecution to make further inquiries confirming that Uganda will not seek to put Mr Kony, if he is ever arrested, on trial for the matters that are the subject of the ICC case.¹⁵⁸

b) *Determination*

81. Article 19(1) of the Statute stipulates that '[t]he Court may, on its own motion, determine the admissibility of a case in accordance with article 17'. The use of the word 'may' denotes that the Chamber's power to review the admissibility of a case on its own motion is discretionary in nature.¹⁵⁹

82. The Chamber observes that Pre-Trial Chamber II did not review the admissibility of the case against Mr Kony in assessing whether there was cause to conduct a confirmation of charges procedure *in absentia*. In this regard, it is recalled that the case against Mr Kony was found to be admissible by Pre-Trial Chamber II, in a previous composition, which addressed this issue *proprio motu* pursuant to article 19(1) of the Statute in light of the information and prospects for investigations and prosecution of the crimes committed by the LRA at the national level as available at that time.¹⁶⁰ As

¹⁵⁴ [9 September 2024 Observations](#), para. 9.

¹⁵⁵ [9 September 2024 Observations](#), para. 10.

¹⁵⁶ [9 September 2024 Observations](#), para. 11.

¹⁵⁷ [9 September 2024 Observations](#), para. 12.

¹⁵⁸ [9 September 2024 Observations](#), para. 13.

¹⁵⁹ Appeals Chamber, *Situation in the Democratic Republic of Congo*, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"](#), 13 July 2006, ICC-01/04-169, public, para. 48.

¹⁶⁰ Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, [Decision on the admissibility of the case under article 19\(1\) of the Statute](#), 10 March 2009, ICC-02/04-01/05-377, public.

the matter of admissibility did not arise in the present proceedings conducted before Pre-Trial Chamber II since the Request, it was not addressed.

83. The Chamber further finds that the Defence has failed to establish that it should assess the admissibility of the case against Mr Kony at present. The warrant of arrest issued by the Ugandan authorities does not specify the conduct alleged against Mr Kony.¹⁶¹ As such, it cannot be assessed whether that warrant of arrest concerns ‘substantially the same conduct’ in comparison with the allegations levelled against Mr Kony by the Prosecution.¹⁶² In addition, in view of the fact that the Ugandan authorities appear to have discontinued the proceedings against Mr Kony pending re-arrest,¹⁶³ the status of the warrant of arrest in Uganda is unsettled.

84. Furthermore, the Chamber is not persuaded that the fact that the Ugandan authorities have tried another person signals their intention to proceed against Mr Kony on the basis of the domestic warrant of arrest. The situation of Mr Kony is specific and must be assessed separately. In addition, neither the preferences of a third person as to the place of the trial against him nor the absence of *in absentia* proceedings under Ugandan law are pertinent to the matter under consideration by this Chamber. These matters have no bearing on the particular question whether the Chamber, within the context of the Court’s legal framework, should avail itself of its discretion to review the admissibility of the case against Mr Kony in the particular circumstances of the present proceedings.

85. Accordingly, the Chamber considers that, in these circumstances, the right of Mr Kony to raise any challenge under article 19(2) of the Statute at an appropriate stage of the proceedings is best preserved by the Chamber declining to exercise its discretion under article 19(1) of the Statute at present. For these reasons, the Chamber also declines to order the Prosecution to enquire further with the Ugandan authorities.

¹⁶¹ [Annex A to 9 September 2024 Observations](#), p. 2.

¹⁶² Appeals Chamber, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute”](#), 30 August 2011, ICC-01/09-01/11-307, para. 40.

¹⁶³ [Annex A to 9 September 2024 Observations](#), p. 6.

4. Victims

a) Pre-Trial Chamber II findings

86. Pre-Trial Chamber II held that

[i]n assessing whether to trigger the exceptional procedure envisaged in article 61(2)(b) of the Statute, the Chamber has placed substantial weight on the facts that the victims of his alleged crimes have been waiting for justice for over 18 years and that Mr Kony is the only remaining suspect in the Uganda situation. Although the passing of time in and on itself cannot justify holding a confirmation hearing *in absentia*, the stagnation of this case is due to the persistent attempts of Mr Kony to evade justice. The Chamber is also mindful that, at the moment, a confirmation hearing *in absentia* may be the only way for the victims of Mr Kony's alleged crimes to voice their views and concerns.¹⁶⁴

b) Submissions

87. The Defence contends that Pre-Trial Chamber II failed to consider the impact of the Ongwen Reparations Order on the Court's resources and expectations of victims.¹⁶⁵ According to the Defence, the Ongwen Reparations Order now represents a concrete promise to victims that should be given priority over the expense of a confirmation of charges hearing.¹⁶⁶ The Defence adds that victims may well wonder why money is being spent on an expensive *in absentia* confirmation of charges hearing that cannot result in reparations and that may directly or indirectly siphon resources away from the money to which they are entitled, especially given the overlap in victims from the Ongwen case with the Kony case.¹⁶⁷

88. Furthermore, the Defence asserts that Pre-Trial Chamber II's assertion that a confirmation of charges hearing is the 'only way for the victims of Mr Kony's alleged crimes to voice their views and concerns' ignores numerous other options that may be better suited to this purpose since a confirmation of charges process is not primarily a fact-finding exercise and any 'truths' that may result from such a proceeding based on the 'substantial grounds to believe' standard are not much less tentative than the 'reasonable grounds to believe' standard applied for the arrest warrant decision.¹⁶⁸

¹⁶⁴ [First Decision](#), para. 67.

¹⁶⁵ [28 August 2024 Observations](#), para. 44.

¹⁶⁶ [28 August 2024 Observations](#), paras 55-57.

¹⁶⁷ [28 August 2024 Observations](#), para. 58.

¹⁶⁸ [28 August 2024 Observations](#), para. 59.

It, therefore, requests the Chamber to invite *amicus curiae* submissions under rule 103 of the Rules, as well as victims' submissions, to canvass a broader range of views as to what alternatives outside the 'judicialised' approach might there be to ensure that the voices of victims are heard.¹⁶⁹

c) *Determination*

89. The Chamber finds that the Defence's assertion that a confirmation of charges procedure in the absence of Mr Kony would be conducted at the expense of the implementation of the Ongwen Reparations Order misunderstands that this specific matter falls outside the mandate of the Chamber. This Chamber is tasked with assessing whether, also in light of the findings contained in the previous decisions issued by Pre-Trial Chamber II, all relevant criteria for conducting a confirmation of charges procedure in the absence of Mr Kony have been fulfilled under the legal texts of the Court. This assessment leaves no room for considering whether or not orders or decisions arising from other cases will or will not be implemented as a result of a possible finding that a confirmation of charges procedure *in absentia* should be held. It follows that the Defence's assertion must be dismissed.

90. In addition, the Chamber is not persuaded by the Defence's submission that Pre-Trial Chamber II failed to consider whether there are other ways to give victims a voice. This submission fails to appreciate that Pre-Trial Chamber II's finding that a confirmation of charges procedure *in absentia* 'may be the only way for the victims of Mr Kony's alleged crimes to voice their views and concerns' reflects the scope of the specific rights available to victims under the Statute. In light of the fact that Mr Kony remains inaccessible, victims may, in view of the passage of time, not or no longer be in a position to express their views and concerns in the context of the ICC proceedings against Mr Kony if a confirmation of charges procedure in the absence of Mr Kony is not conducted. Contrary to the Defence's contention, this finding, which is confined to the legal position of victims under the Statute, does not affect any other avenues available to victims under international or domestic law to ensure that their voices are heard. In any event, the Chamber's mandate does not extend to canvassing matters that

¹⁶⁹ [28 August 2024 Observations](#), para. 60.

are extraneous to the Court's legal framework. On this basis, the Defence's argument, including its request to invite *amici curiae* submissions, is dismissed.

5. Fairness Considerations

a) Submissions

91. The Defence argues that the extent to which the confirmation of charges proceedings were allowed to progress without input from Counsel representing Mr Kony's interests, and the resulting procedural uncertainty and unpredictability, provides ample reason to consider that there is no cause to hold a confirmation of charges hearing *in absentia*.¹⁷⁰

b) Determination

92. Whereas the Defence did not raise its argument regarding the fairness of the present proceedings in its filing dedicated to the criteria for conducting a confirmation of charges procedure *in absentia* in keeping with the Chamber's instructions,¹⁷¹ the Chamber notes that the argument is raised as a further challenge to the existence or non-existence of cause to conduct a confirmation of charges hearing *in absentia*. Accordingly, it will also address this matter for the sake of completeness.

93. As conceded by the Defence,¹⁷² the Chamber ensured that Counsel for Mr Kony, following completion of the process of appointment, would be allowed to submit observations on matters decided by Pre-Trial Chamber II or matters pending before the Chamber with a view to guaranteeing the fairness of the present proceedings.¹⁷³ In the present decision, the Chamber has fully assessed Counsel's observations. On that basis, it has, on the one hand, addressed anew whether the requirements for conducting a confirmation of charges procedure *in absentia* have been met in light of Pre-Trial Chamber II's findings and, on the other hand, set forth its determination regarding

¹⁷⁰ [Kony Defence Response to Prosecution's Observations and Victims' response on the conduct of the confirmation proceedings in absentia and Requests for the adoption of certain protocols and an in situ hearing in Uganda](#), 11 September 2024, ICC-02/04-01/05-525, public ('Defence Conduct of Proceedings Response'), paras 2-5, 45.

¹⁷¹ [2 May 2024 Decision](#), para. 27(a).

¹⁷² [Defence Conduct of Proceedings Response](#), paras 2, 45.

¹⁷³ [2 May 2024 Decision](#), para. 27.

outstanding matters. The Chamber considers that, in these circumstances, the rights of Mr Kony have been fully respected and, accordingly, dismisses the Defence's argument.

D. Conclusion

94. In light of the above considerations, and the information before it, the Chamber is satisfied that all the requirements for holding a confirmation of charges hearing *in absentia* in this case are now met. In this section, the Chamber will set out its specific reasoning pertaining to each criterion in light of Pre-Trial Chamber II's findings, the information in the record, and the Defence's submissions.

95. First, the Chamber is satisfied that Mr Kony, whose whereabouts remain currently unknown despite steps to secure his appearance having been undertaken by the Registry and other relevant stakeholders since the issuance of the warrant and continuing to be undertaken, qualifies as a person who 'cannot be found' within the meaning of article 61(2)(b) of the Statute.¹⁷⁴

96. The Chamber, as a matter of law, finds that: (i) the use of the conjunction 'or' in article 61(2)(b) of the Statute between 'fled' and 'cannot be found' indicates that the provision covers two different and independent situations: one where the suspect has fled, referring to a case where a person absconded,¹⁷⁵ and the other where the suspect 'cannot be found' because he or she has not been arrested, surrendered, or voluntarily appeared before the Court, and all efforts made to locate and arrest the person failed since his or her precise whereabouts were and remain unknown;¹⁷⁶ (ii) in the situation where a person 'cannot be found', an initial appearance is not a requirement to hold a confirmation of charges hearing pursuant to article 61(2)(b) of the Statute;¹⁷⁷ and (iii) the phrase 'cannot be found' does not cover a situation in which the approximate whereabouts of the person are known but the Court is unable to have an arrest warrant executed due to reasons unrelated to the identification of the suspect's location, for instance due to lack of cooperation from relevant States.¹⁷⁸

¹⁷⁴ [First Decision](#), para. 35.

¹⁷⁵ [First Decision](#), para. 29.

¹⁷⁶ [First Decision](#), para. 31.

¹⁷⁷ [First Decision](#), para. 30.

¹⁷⁸ [First Decision](#), para. 32.

97. Second, the Chamber is satisfied that all reasonable steps to secure the appearance of Mr Kony and to inform him of the charges and the date of the confirmation of charges hearing have been taken.

98. The obligations of the Chamber set out in article 61(2)(b) of the Statute in relation to the efforts taken to secure the appearance of the suspect and to inform him or her of the charges and the date of the hearing, do not require any positive result to be obtained.¹⁷⁹ The Chamber must only ensure that the efforts undertaken to secure the appearance and inform the suspect were adequate for that purpose.¹⁸⁰ The adequacy of the steps is assessed in light of the ‘all reasonable steps’ standard applicable in the present instance. It is, therefore, not necessary to demonstrate that the steps taken to secure the appearance of the suspect could have or would have led to his or her the arrest in different circumstances, or that the suspect was indeed informed of the charges and the date of the hearing.

99. As to the steps to secure his appearance, the Chamber finds that, under rule 123(3) of the Rules, a pre-trial chamber is vested with the discretion to determine the reasonableness of both the time span and of the measures taken while attempting to execute a warrant of arrest, in light of circumstances which will be specific to each situation and each case. As a consequence, the Chamber finds that all reasonable steps have been taken to secure Mr Kony’s appearance in light of the following actions undertaken since the issuance of the Arrest Warrant in 2005: (i) the transmission of requests for arrest and surrender of Mr Kony to the authorities of those countries where he has been and is believed to have been located;¹⁸¹ (ii) the attempts at apprehending Mr Kony by the government of Uganda, protracted over many years;¹⁸² (iii) the issuance of a request to law enforcement authorities worldwide to locate and arrest Mr Kony by way of an INTERPOL ‘Red Notice’ in 2006;¹⁸³ (iv) the unprecedented cooperation from the international community and civil society to locate and apprehend him;¹⁸⁴ (v) the cooperation and diplomatic efforts with relevant States, public information campaigns, outreach activities and communication attempts through

¹⁷⁹ See [First Decision](#), para. 36.

¹⁸⁰ See [First Decision](#), para. 39.

¹⁸¹ [First Decision](#), para. 41.

¹⁸² [First Decision](#), para. 41.

¹⁸³ [First Decision](#), para. 41.

¹⁸⁴ [First Decision](#), para. 41.

intermediaries;¹⁸⁵ and (vi) the dissemination and publication of the Arrest Warrant in Acholi and English, as well as press releases.¹⁸⁶

100. With regard to the steps taken to inform Mr Kony of the charges, the Chamber finds that this standard cannot be defined in the abstract, as what is reasonable to achieve an outcome may widely differ from one case to another¹⁸⁷ and that this standard must be considered as having been fulfilled as long as all efforts have been made to inform the person that charges against him or her exist and that these charges were available for consultation.¹⁸⁸ The efforts to notify the suspect of the charges and that a confirmation hearing will take place may include: publication and advertisement measures in the States where the concerned person is believed to be located; formal notification attempts at the person's last known place of residence or through family members; publication of a public version of the document containing the charges on the Court's website and dissemination of the charges in various media outlets and official press releases.¹⁸⁹

101. Consequently, the Chamber finds that all reasonable steps have been taken to inform Mr Kony of the charges levelled against him in light of the steps and activities detailed in the 23 February 2024 Registry Report. More specifically, the Chamber notes the large-scale media campaigns both in Uganda and neighbouring countries, activities aiming at engaging with relevant stakeholders and communities, and the use of social media platforms as well as information provided via the website of the Court.¹⁹⁰ Furthermore, a summary of the DCC was broadcasted in Acholi and English on different radio stations in Northern Uganda, reaching an estimated audience of eight million people per day since 6 February 2024.¹⁹¹ This summary was also read out by Registry staff in Acholi, during interactive radio programmes conducted on two community radio stations most listened to by rural communities in Northern Uganda, with an estimate that eight million people across the Acholi, Lango West Nile

¹⁸⁵ [First Decision](#), para. 42.

¹⁸⁶ [First Decision](#), para. 43.

¹⁸⁷ [First Decision](#), para. 56.

¹⁸⁸ [Second Decision](#), para. 8.

¹⁸⁹ [First Decision](#), para. 57.

¹⁹⁰ [Second Decision](#), para. 6.

¹⁹¹ [Second Decision](#), para. 6.

sub-regions in Northern Ugandan, as well as some parts of Southern Sudan and the Democratic Republic of Congo listened to the relevant programs.¹⁹²

102. In addition, the Chamber observes the radio campaign launched by the Registry on two radio stations in the Central African Republic during which the existing charges against Mr Kony were explained in French and Sango, which reached an expected audience of six million people.¹⁹³ The Chamber also notes the activities carried out by the Registry in the field with a view to engaging with relevant stakeholders and communities, which focused on communities in Northern Uganda close to Mr Kony and included meetings attended by clan members and other persons close to him,¹⁹⁴ as well as the Registry's interactive dialogue with, *inter alia*, religious and cultural leaders as well as civil society, victim groups and local government leaders, during which a summary of the DCC was read.¹⁹⁵

103. The Chamber finally notes the Registry's use of several platforms to raise awareness on the charges against Mr Kony, including by posting a short video in English and French as well as visuals with Frequently Asked Questions, and creating a specific sub-page on the Court's website, including the DCC and its summary, in English, French, and Acholi.¹⁹⁶ In this regard, the Chamber rejects the Defence's assertion as regards the geographical and numerical limitations of the Registry's outreach since the Registry's efforts to inform Mr Kony were varied, deployed to the largest relevant audience possible based on the information in its possession and the results exposed in the 23 February 2024 Registry Report point to a substantial reach of these efforts.

104. As concerns the notification of the date of the confirmation of charges hearing, the Chamber finds that all reasonable steps have been taken to inform Mr Kony, considering that the notification efforts and outreach activities carried out by the Registry in this regard, as detailed in the 28 March 2024 Registry Report, are adequately extensive, as well as appropriately focussed and targeted to relevant audiences and geographical areas in light of the information available to the Registry and the Chamber. The Chamber also notes the additional steps devised and taken by

¹⁹² [Second Decision](#), para. 6.

¹⁹³ [Second Decision](#), para. 6.

¹⁹⁴ [Second Decision](#), para. 7.

¹⁹⁵ [Second Decision](#), para. 7.

¹⁹⁶ [Second Decision](#), para. 7.

the Registry specifically as regards the date set for the commencement of the confirmation of charges hearing, reinforcing and expanding (*vis-à-vis* those taken with regard to the charges) the initiatives relying on locally preferred media, as such suitable to enhance the potential for the information to reach circles known or likely to have a close connection with, and possibly even a direct link to, Mr Kony. Furthermore, following the postponement, as soon as the new date for the confirmation of charges hearing will be set, the Registry shall undertake and carry out notification efforts and outreach activities that are equally sufficient and adequate as those carried out in respect of the date of 15 October 2024, conclude them within 30 days, and report to the Chamber within one week of their completion. The Chamber will not address this legal requirement anew, but only consider and validate the measures taken, unless specific issues arising from the Registry report will require otherwise.

105. Lastly, the Chamber finds that the arguments raised by the Defence, namely the question whether Mr Kony is alive, the admissibility of the case, the rights and interests of victims, and considerations of fairness, are not capable of affecting the conclusion that there is cause to hold a confirmation of charges hearing in the absence of Mr Kony. In this regard, the Chamber further notes that the Defence has not provided any submissions in respect of a number of other factors underpinning that conclusion. As a result, the Chamber, in line with the findings of Pre-Trial Chamber II, finds that there is cause to hold a confirmation of charges hearing in the absence of Mr Kony on the basis that: (i) Mr Ongwen's final conviction points to the availability of evidence in relation to crimes allegedly committed by the LRA, an armed group reportedly founded and led by Mr Kony, and, as such, to some of the charges against him;¹⁹⁷ (ii) there is no prejudice to any other suspects;¹⁹⁸ (iii) victims will have an opportunity to express their views and concerns in accordance with article 68(3) of the Statute;¹⁹⁹ (iv) efforts to bring Mr Kony before the Court may be renewed and sustained;²⁰⁰ (v) the rights of Mr Kony will not be unduly prejudiced;²⁰¹ (vi) the Prosecution alleges that the purported crimes were perpetrated on a large scale and that Mr Kony would have played a central role in these crimes;²⁰² and (vii) there is no indication that a confirmation of

¹⁹⁷ [First Decision](#), para. 62.

¹⁹⁸ [First Decision](#), para. 63.

¹⁹⁹ [First Decision](#), paras 65-67.

²⁰⁰ [First Decision](#), paras 65, 67.

²⁰¹ [First Decision](#), para. 68.

²⁰² [First Decision](#), para. 68.

charges hearing *in absentia* would affect the effective administration of justice at the Court.²⁰³

FOR THE ABOVE REASONS, THE CHAMBER HEREBY

FINDS that all the requirements set forth in article 61(2)(b) of the Statute are met;

DECIDES that the confirmation of charges hearing will be held in Mr Kony's absence; and

INSTRUCTS the Registry, once a new date for the confirmation of charges hearing will be set, to immediately undertake notification and outreach activities of the same nature, variety and range as the ones carried out in respect of the date initially set, to complete them within 30 days and to report to the Chamber within one week of their completion.

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



Judge Althea Violet Alexis-Windsor

Presiding Judge



Judge Iulia Antoanella Motoc



Judge Haykel Ben Mahfoudh

Dated this Tuesday, 29 October 2024

At The Hague, The Netherlands

²⁰³ [First Decision](#), para. 68.