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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 Document

Victims' Response to the "Kony Defence request for leave to appeal 'Decision on the criteria for holding confirmation of charges proceedings *in absentia*'"

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel of the Office of Public Counsel for Victims (the “OPCV”) appointed to represent the victims in the present case (the “Legal Representatives”)¹ hereby submit their response to the *Kony* Defence Request for Leave to Appeal² the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”³ (respectively the “Request” and the “Impugned Decision”).

2. The Legal Representatives submit that the Request should be dismissed since it does not meet the requirements of article 82(1)(d) of the Rome Statute (the “Statute”). The purported issues either fail to arise from the Impugned Decision or constitute mere disagreements with the rulings of Pre-Trial Chamber III (the “Chamber”). *Arguendo*, even if these matters effectively constitute proper appealable issues, they would not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial and the intervention by the Appeals Chamber will not materially advance the proceedings.

3. Moreover, granting the Request would be detrimental to the interests of the victims who have been waiting for justice for some 20 years and for whom the start of judicial proceedings marks an important opportunity to voice their sufferings and victimisation.

¹ See the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-101](#) and [No. ICC-02/04-01/05-252](#), 10 August 2007; the “Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-267](#), 15 February 2008; the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-125](#), 14 March 2008; and the “Decision on victim’s applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-356](#), 21 November 2008. See also the “Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-191](#), 9 March 2012.

² See the “Kony Defence request for leave to appeal ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’”, [No. ICC-02/04-01/05-533](#), 4 November 2024 (the “Request”).

³ See the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*” (Pre-Trial Chamber III), [No. ICC-02/04-01/05-532](#), 29 October 2024 (the “Impugned Decision”).

II. PROCEDURAL BACKGROUND

4. On 8 July 2005, then Pre-Trial Chamber II issued the Warrant for the Arrest for Mr Kony.⁴

5. On 24 November 2022, the Prosecution filed a Request to hold a hearing on the confirmation of charges against Mr Kony in his absence (the “Prosecution’s Request”).⁵

6. On 7 February 2023, Pre-Trial Chamber II in its previous composition (the “former Chamber”) invited, *inter alia*, the Legal Representatives to gather the views and concerns of the victims about holding *in absentia* confirmation proceedings against Mr Kony.⁶ On 30 March 2023, the Legal Representatives submitted the victims’ views and concerns on the Prosecution’s Request.⁷

7. On 23 November 2023, the former Chamber issued its Decision on the Prosecution’s Request finding, *inter alia*, that all reasonable steps to secure Mr Kony’s appearance had been taken and there would be cause to hold a confirmation of charges hearing *in absentia* (the “First Decision”).⁸

8. On 19 January 2024, the Prosecution submitted the Document Containing the Charges.⁹

⁴ See the “Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-53](#), 27 September 2005. A lesser redacted version was notified on 13 March 2023. See [No. ICC-02/04-01/05-456-Anx](#).

⁵ See the “Public Redacted Version of the ‘Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’”, [No. ICC-02/04-01/05-446-Red](#), 24 November 2022 (the “Prosecution’s Request”).

⁶ See the “Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-453](#), 7 February 2023.

⁷ See the “Victims’ Views and Concerns on the ‘Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’”, [No. ICC-02/04-01/05-457](#), 30 March 2023.

⁸ See the “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-466](#), 23 November 2023 (the “First Decision”).

⁹ See the “Document Containing the Charges”, [No. ICC-02/04-01/05-474](#), 19 January 2024.

9. On 4 March 2024, the former Chamber issued the Second Decision on the Prosecution's Request (the "Second Decision"), deciding, *inter alia*, to hold the confirmation of charges hearing on 15 October 2024.¹⁰

10. On 12 March 2024, the Presidency reassigned the situation in Uganda to Pre-Trial Chamber III.¹¹

11. On 2 May 2024, the Single Judge of Pre-Trial Chamber III (the "Single Judge"), *inter alia*, authorised the Registry to start the procedure for the selection of counsel for Mr Kony, and instructed counsel, once appointed, to make observations on the First and Second Decisions.¹² On 21 June 2024, Mr Peter Haynes was appointed as counsel for Mr Kony.¹³

12. On 28 August 2024, the Defence submitted its observation on the Prosecution's Request.¹⁴ On 5 September 2024, following an order from the Single Judge¹⁵, the Prosecution filed its response.¹⁶ On 9 September 2024, the Defence submitted further observations on the same matter.¹⁷

¹⁰ See the "Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-481](#), 4 March 2024 (the "Second Decision").

¹¹ See the "Decision assigning judges to divisions and recomposing Chambers" (Presidency), [No. ICC-02/04-01/05-485](#), 13 March 2024.

¹² See the "Decision on the Procedure for Appointing Counsel" (Pre-Trial Chamber III), [No. ICC-02/04-01/05-499](#), 2 May 2024.

¹³ See the "Order to Appoint Counsel" (Pre-Trial Chamber III), [No. ICC-02/04-01/05-502](#), 19 June 2024 and the "Registry's Report on the implementation of 'Decision on the Procedure for Appointing Counsel' dated 2 May 2024 (ICC-02/04-01/05-499)", [No. ICC-02/04-01/05-501](#), 14 June 2024.

¹⁴ See the "Public Redacted Version of 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", [No. ICC-02/04-01/05-517-Red](#), 28 August 2024.

¹⁵ See email from Pre-Trial Chamber III to the Prosecution sent on 3 September 2024 at 15:12.

¹⁶ See the "Prosecution's Reply to Defence Observations", [No. ICC-02/04-01/05-520-Red](#), 5 September 2024.

¹⁷ See the "Kony Defence Reply to Prosecution's Submissions in Response to Defence Observations", [No. ICC-02/04-01/05-524-Red](#), 9 September 2024.

13. On 12 September 2024, following an order from the Single Judge,¹⁸ requesting submissions from the OPCV¹⁹, the Defence²⁰ and the Prosecution²¹, the Chamber issued the Decision Postponing the Confirmation of Charges Hearing, vacating the 15 October 2024 date.²²

14. On 29 October 2024, the Chamber issued the Impugned Decision.²³

15. On 4 November 2024, the Defence filed its Request.²⁴

III. SUBMISSIONS

A. *Applicable law*

16. Article 82(l)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. For the purposes of the first prong of said test, the Appeals Chamber defined an “issue” as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*”.²⁵ Accordingly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient

¹⁸ See Email from the Single Judge to the parties and participants sent on 4 September 2024 at 14:27.

¹⁹ See the “Victims Observations on the date of the confirmation of charges hearing”, [No. ICC-02/04-01/05-521](#), 6 September 2024.

²⁰ See the “Defence Observations on the Date of the Confirmation of Charges Hearing”, [No. ICC-02/04-01/05-522](#), 6 September 2024,

²¹ See the “Prosecution’s observations on the date of the confirmation of charges hearing”, [No. ICC-02/04-01/05-523](#), 6 September 2024.

²² See the “Decision Postponing the Confirmation of Charges Hearing” (Pre-Trial Chamber III), [No. ICC-02/04-01/05-526](#), 12 September 2024.

²³ See the Impugned Decision, *supra* note 3.

²⁴ See the Request, *supra* note 2.

²⁵ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 9.

reason to be granted leave to appeal an interlocutory decision.²⁶ Moreover, the Appeals Chamber ruled that *“the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”*.²⁷

18. In analysing whether an appealable issue would *“significantly affect”* the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of ‘fairness’ must be understood as making reference to situations *“when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”*.²⁸ In turn, “expeditiousness” must be read as *“closely linked to the concept of judicial proceedings ‘within a reasonable time’ [...], namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”*.²⁹ In order to determine whether an issue would significantly affect the “outcome of the trial”, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.³⁰

19. The Legal Representatives further recall the Dissenting Opinion of Judge Eboe-Osuji regarding mere disagreements and their impact on the fairness or expeditiousness of the proceedings, or the outcome of the trial:

“Leave is not granted to appeal decisions of Trial Chambers, out of fear of the possibility or risk of what may or may not happen in an appeal on the merits of the case. The controlling general element of article 82(1)(d) is rather that the issue sought to be appealed must be one that ‘would significantly’ affect the fair and expeditious conduct of the

²⁶ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-817](#), 18 July 2013, para. 12.

²⁷ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 25, para. 20.

²⁸ See, *inter alia*, the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

²⁹ *Idem*, paras. 17-18.

³⁰ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 25, para. 13.

proceedings or the outcome of the trial. It is important to stress that the question is not whether the issue 'would' affect the fair conduct of the case or its outcome, without considering how 'significantly' so. Nor is the question whether the issue 'may' —not would— affect fair trial or the outcome, even though significantly. For leave to be granted, it needs to be seen that the issue would significantly affect the outcome of the trial or the fair and expeditious conduct of the proceedings. Both words— 'would significantly' —must be given their juristic values".³¹

B. Merits of the Request

Issue 1: Whether the Chamber erred in reviewing prior Pre-Trial Chamber II decisions without having articulated a standard of review or providing notice to the parties, in a procedure which shifted the burden of proof to the Defence

20. The Legal Representatives submit that the first issue does not arise from the Decision. In fact, the Defence argues that “[i]n the Impugned Decision, the [Chamber] professes to make a ‘final determination’ on whether ‘all the requirements’ for the confirmation of charges hearing have been met, purporting to assess each criteria anew ‘in light of [previous] Pre-Trial Chamber II’s findings. Essentially, therefore, it conducted an appellate-style review of another Pre-Trial Chamber’s decisions, with the Defence bearing the burden of persuading a second, differently-composed, Chamber that errors had been made by the first’”.³²

21. Plainly, these allegations are far removed from what the Chamber actually did. At the very beginning of its reasoning in the Impugned Decision, the Chamber clearly stated that “[f]ollowing 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. [...] 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

³¹ See the “Dissenting Opinion of Judge Eboe-Osuji”, [No. ICC-01/09-01/11-817-Anx](#), 18 July 2013, para. 3; and the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

³² See the Request, *supra* note 2, para. 21 (footnotes omitted).

*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”.*³³

22. The Chamber thus made its own legal and factual determination based on the specific circumstances of the present case, supported by the evidence presented to it at the time of the issuance of the Impugned Decision, *without resorting to the findings made by the previous Pre-Trial Chamber*. Hence, the Chamber did not conduct “*an appellate-style review of another Pre-Trial Chamber’s decisions*”,³⁴ nor did it ever claim that it had the authority to do so. Indeed, there is simply no legal venue or possibility for appellate review proceedings to take place under the Statute and the Rules of Procedure and Evidence (the “Rules”) between Pre-Trial Chambers. The Legal Representatives further underline that the Defence fails to offer any concrete example, nor did it substantiate its arguments with a shred of evidence from the Impugned Decision, thereby failing to demonstrate that the Chamber effectively conducted such “*an appellate-style review*”.

23. The Defence also claims that the Chamber did not articulate any standard of review of the decisions rendered by the former Pre-Trial Chamber.³⁵ Again, under the statutory instruments of the Court, there is no legal possibility for the Chamber to formulate such standard of review, supposedly applying to decisions issued by other Pre-Trial Chambers, nor was there a need whatsoever for the Chamber to do so since it clearly established that it “*reache[d] its own determination as to each of [the] requirements*”.³⁶

24. Lastly, the Defence alleges that the Chamber purportedly shifted the burden of proof to the Defence who bore “*the burden of persuading a second, differently-composed, Chamber that errors had been made by the first*”.³⁷ Again, no such event transpired from the present proceedings. In fact, in its Decision on the Procedure for Appointing

³³ See the Impugned Decision, *supra* note 3, para. 22 (emphasis added).

³⁴ See the Request, *supra* note 2, para. 21.

³⁵ *Ibid.*

³⁶ See the Impugned Decision, *supra* note 3, para. 22.

³⁷ See the Request, *supra* note 2, para. 21.

Counsel, the Chamber instructed the Defence to provide its observations on the First and Second Decisions and on the Registry's Report on the implementation of the Second Decision and to provide responses, if any, to various submissions made by the Prosecution and the Victims on the matter.³⁸ Accordingly, the Defence was provided with ample opportunity to be heard on the issue of holding a confirmation of charges hearing *in absentia* and, in fact, was able to make comprehensive submissions.³⁹ Consequently, the Chamber *fully considered* the Defence's observations, including those related to the legal and factual findings of the First and the Second Decisions, and *conclusively reached its own determination* as to each of the requirements enshrined in article 61(2)(b) of the Statute.⁴⁰

25. Nowhere in the Impugned Decision did the Chamber rule that the Defence bears any burden of proof, nor did it ostensibly shift the burden to the Defence in practical terms. Again, the Defence fails to offer any concrete example or substantiate its arguments with a shred of evidence showing what it alleges.

26. As held by the Appeals Chamber, a properly constituted appealable issue must first and foremost arise from the Impugned Decision.⁴¹ In other words, the issue identified by the appellant must be a specific question which has been dealt in⁴² or must emanate from the Impugned Decision.⁴³ Since Issue 1 fails to arise from the Impugned Decision and form a proper appealable issue, it should be dismissed.

³⁸ See the "Decision on the Procedure for Appointing Counsel", *supra* note 12, para. 27.

³⁹ See the "Public Redacted Version of 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", *supra* note 14, the "Kony Defence Reply to Prosecution's Submissions in Response to Defence Observations", *supra* note 17, and the "Defence Observations on the Date of the Confirmation of Charges Hearing", *supra* note 20.

⁴⁰ See the Impugned Decision, *supra* note 3, para. 22.

⁴¹ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 25, para. 9.

⁴² See the "Decision on the 'Defence Application for Leave to Appeal the 'Decision on the defence request for a temporary stay of proceedings'" (Trial Chamber IV), [No. ICC-02/05-03/09-428](#), 13 December 2012, para. 7.

⁴³ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 8; and the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-207](#), 13 January 2014, para. 11.

Issue 2: Whether an initial appearance by the person charged is required pursuant to Article 60(1) and Article 61(1) of the Statute before a confirmation of charges hearing can be held in absentia under Article 61(2)(b)

27. The Legal Representatives submit that the second issue does not constitute an appealable issue under article 82(1)(d) of the Statute but instead represents a mere disagreement with the Impugned Decision. Said disagreement transpires from the Defence's attempt to re-litigate questions which were already addressed and dismissed by the Chamber. Indeed, the Defence, in its Request, merely reiterates arguments advanced, at length, before the Chamber in its observations of 28 August 2024, more specifically regarding the interpretation of article 61(2)(b) of the Statute.⁴⁴ In the Impugned Decision, the Chamber considered and expressly disagreed with said arguments.⁴⁵

28. The Legal Representatives further posits that the second issue, in addition to constituting a mere disagreement, also misconstrues the Impugned Decision. Indeed, the Defence recalls that the Chamber held that the conjunction "or" between the terms "has fled" and "cannot be found" requires the provision to be construed in such a way so as to clearly differentiate between the two situations set out therein.⁴⁶

29. Although clearly stating that "*the fact that the word 'or' in Article 61(2)(b) of the Statute denotes two separate situations is not disputed*", the Defence adds that "[w]hat is disputed, and constitutes an error, is the interpretation that a person who has 'fled' can be distinguished from a person who 'cannot be found' only by interpreting the latter as referring to a person who has never appeared before the Court at all [...]. [O]ne such alternative scenario has already arisen in at least one case before the Court. In Banda and Jerbo, following a voluntary initial appearance, Mr Banda waived his right to be present at the confirmation hearing, but was later impeded by circumstances beyond his control from appearing before the

⁴⁴ See the "Public Redacted Version of 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", *supra* note 14, paras. 5-24.

⁴⁵ See the Impugned Decision, *supra* note 3, paras. 28-34.

⁴⁶ See the Request, *supra* note 2, para. 29.

Chamber [...]. *An analogous situation may clearly arise, where the person who has made an initial appearance is rendered incommunicado and is unable explicitly to waive their right to be present under Article 61(2)(a) [...]*".⁴⁷

30. What the Defence fails to comprehend is the strict parameters of the Impugned Decision. In fact, the Chamber, in reaching its own determination of facts and law, analysed the specific factual circumstances surrounding the *Kony* case, namely and *only*: whether Mr Kony qualifies as a person who "*cannot be found*" within the meaning of article 61(2)(b) of the Statute. The Chamber was under no obligation to read deeper into the meaning of said article and to provide a broad interpretation as to any *future or imaginary* situations which *may or may not* arise in other cases before the Court. Indeed, the Defence *does not dispute* the fact that Mr Kony *is* a person who "*cannot be found*", which is the core finding of the Chamber in the Impugned Decision, nor does it argue or offer any evidence to the contrary.

31. Entertaining the second issue would ultimately lead to an academic exercise which is contrary to the corrective nature of the appeals proceedings. An appeal is conducted with the specific purpose of reviewing the proceedings that actually took place before a lower chamber.⁴⁸ Yet, as mentioned *supra*, the Chamber did not and was not required to make any legal or factual findings in relation to any "*analogous situation*" which may or may not arise, such as the situation where a person who has made an initial appearance is rendered incommunicado and is unable explicitly to waive their right to be present under article 61(2)(a)) as fictionalised by the Defence. Moreover, even if the Appeals Chamber were to address this matter, it would then analyse such issues for the first time on appeal, akin to a first instance court, which is also against its corrective function (not *de novo*),⁴⁹ requiring it to engage in a theoretical exercise.

⁴⁷ *Ibid.* (emphasis added).

⁴⁸ See the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'" (Appeals Chamber), [No. ICC-01/09-02/11-202 OA](#), 28 July 2011, para. 11.

⁴⁹ See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-

32. Furthermore, the Defence argues that various proposals made during the drafting process of article 61 of the Statute show that a first appearance is required in relation to a confirmation of charges procedure *in absentia*.⁵⁰ In dismissing the Defence's observations in this regard, the Chamber found that:

*"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".*⁵¹

33. Yet, the Defence contends that *"in arriving at this conclusion, the [Chamber] overlooked the fact that the drafters explicitly considered including the term 'has never been available' in the Court's legal framework and ultimately chose to exclude it"*.⁵² In other words, the Defence agrees with the Chamber's reasoning that the drafters of the Statute did consider various proposals over the exact wording of the article in question and ultimately made a conscious decision not to retain or *"chose to exclude"* the version requiring a first appearance to take place in relation to a confirmation of charges *in absentia*. So the fact that various proposals made during the drafting process of the Statute *"do not determinatively establish the interpretation of article 61(2)(b)"*⁵³ is not in dispute since the Defence acknowledges that the Chamber interpreted and applied the final and adopted version of the Statute in the present case. Therefore, the second issue fails to arise from the Impugned Decision and, accordingly, it should be dismissed.

03/09-199) and additional instructions on translation"" (Appeals Chamber), [No. ICC-02/05-03/09-295 OA2](#), 17 February 2012, para. 20.

⁵⁰ See the Request, *supra* note 2, para. 32.

⁵¹ See the Impugned Decision, *supra* note 3, para. 34 (emphasis added).

⁵² See the Request, *supra* note 2, para. 33 (emphasis added).

⁵³ See the Impugned Decision, *supra* note 3, para. 34.

Issue 3: Whether the Chamber failed properly to exercise its discretion by failing to address relevant factors impacting on the utility of in absentia confirmation proceedings in the circumstances

34. The Legal Representatives submit that, the third issue as well does not constitute an appealable issue under article 82(1)(d) of the Statute, but similarly represents a mere disagreement with the Impugned Decision, which transpires from the Defence's attempt to re-litigate questions that were already addressed and dismissed by the Chamber in the Impugned Decision.

35. The Defence makes four arguments which purportedly demonstrate that the Chamber failed properly to exercise its discretion. First, the Defence posits that the Chamber *"failed properly to evaluate or mitigate the likelihood that the confirmation proceedings against Mr Kony would subsequently be rendered pointless by Ugandan proceedings against Mr Kony if he were ever to be arrested. Such proceedings, if they mirror those of the ICC, would lead to the case against Mr Kony being inadmissible before the ICC [...]"*.⁵⁴

36. Yet, the Chamber addressed this argument and concluded that: (i) *"the warrant of arrest issued by the Ugandan authorities does not specify the conduct alleged against Mr Kony"*, and that, *"[a]s 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"*; (ii) the status of Mr Kony's arrest warrant in Uganda is unsettled given that the Ugandan authorities appear to have discontinued the proceedings against him; (iii) the situation of Mr Kony is specific and must be assessed separately from the fact that the Ugandan authorities have tried another person; and (iv) 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 as they have no bearing on its determination within the context of the Statute.⁵⁵ Consequently, the Chamber declined to exercise its discretion under

⁵⁴ See the Request, *supra* note 2, para. 46 (emphasis added).

⁵⁵ See the Impugned Decision, *supra* note 3, para. 83-84.

article 19(1) of the Statute to determine the admissibility of a case at this juncture. Moreover, the Appeals Chamber had already determined previously that the case against Mr Kony is admissible.⁵⁶

37. In repeating the arguments already analysed and addressed in the Impugned Decision, the Defence merely disagrees with said ruling.⁵⁷ Expressing nothing more than a mere disagreement with the Chamber's conclusions does not constitute an "*appealable issue*" within the meaning of article 82(1)(d) of the Statute.⁵⁸ Indeed, when a party challenges a judicial decision, more is needed than simply expressing a difference of opinion regarding the question *sub judice*.⁵⁹

38. Moreover, the Defence arguments as to some future possibility of the confirmation proceedings against Mr Kony being "*rendered pointless*" by Ugandan proceedings "*if he were ever to be arrested*" and "*if they mirror those of the ICC*" are extremely speculative and highly unsubstantiated. Again, the Chamber is only authorised to make legal and factual findings based on the current state of affairs and the evidence available to it at the time of its determination.

39. Second, the Defence argues that the Chamber committed an error in respect of its evaluation of information indicating that Mr Kony may be dead.⁶⁰ Instead, according to the Defence, the Chamber should have examined the available information to assess the indications which further diminish the likelihood of his

⁵⁶ See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", [No. ICC-02/04-01/05-408 OA3](#), 16 September 2009, p. 3.

⁵⁷ See the "Decision on the 'Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'" (Pre-Trial Chamber I), [No. ICC-01/11-01/11-490](#), 1 December 2013, para. 31; and the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), [No. ICC-02/11-01/15-117](#), 2 July 2015, para. 22.

⁵⁸ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 25, para. 9.

⁵⁹ See the "Decision on the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-322](#), 4 July 2014, para. 33.

⁶⁰ See the Request, *supra* note 2, para. 47.

eventual appearance.⁶¹ Yet, this is exactly what the Chamber did in the Impugned Decision. Indeed, the Chamber reached its conclusion after having assessed various conflicting information, including news reports and the reports filed by the Registry containing credible sources such as informants providing first-hand accounts.⁶² Thus, in essence, the Defence simply disagrees with the Chamber's factual findings on the matter since the latter did not favour the version of the events – the likelihood that Mr Kony is dead, rather than alive – as advocated by the former. Hence, such disagreement does not constitute an appealable issue, according to the jurisprudence of the Court.

40. Third, the Defence argues that the Chamber erred in determining that it could not consider the *Ongwen* reparations order in assessing the cost implications of *in absentia* proceedings against Mr Kony.⁶³ The Defence cites paragraph 60 of the First Decision in order to claim that resource considerations for the Court as a whole have been taken into account in previous determinations as to whether to hold *in absentia* proceedings.⁶⁴ The Defence plainly misrepresents the ruling contained in the First Decision. In fact, Pre-Trial Chamber II merely recalled the fact that pre-trial chambers previously dismissed holding confirmation of charges proceedings against absent co-suspects based on its manifest inconveniences, including, *inter alia*, the availability of Court resources and cited decisions dealing with *severance of cases* concerning absent co-suspects.⁶⁵ Evidently, these decisions did not exclusively deal with the specific issue of holding confirmation of charges *in absentia* under article 61(2)(b) of the Statute. Therefore, these rulings are irrelevant to the determination of the matter at hand.

41. Indeed, the Chamber held 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

⁶¹ *Ibid.*

⁶² See the Impugned Decision, *supra* note 3, paras. 76 and 77.

⁶³ See the Request, *supra* note 2, para. 48.

⁶⁴ *Ibid.*

⁶⁵ See the First Decision, *supra* note 8, para. 60, footnotes 64 and 65.

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".⁶⁶ Therefore, the Defence's arguments in this regard, which were previously analysed and addressed by the Chamber, constitute again mere disagreements with the conclusions reached in the Impugned Decision.

42. Lastly, the Defence adds that the Chamber erred in concluding that holding an *in absentia* confirmation hearing would be the most effective means of allowing victims to voice their views and concerns, and in making this evaluation only by reference to the Statute, without any regard whatsoever to alternative mechanisms.⁶⁷ Yet, nowhere in the Statute and the Rules is stated that the Court is required to assess whether there exist alternative mechanisms when making a determination to hold confirmation of charges hearings *in absentia*. In fact, the Defence fails to offer any legal authority to support its arguments. Indeed, the Chamber was not persuaded by the Defence's arguments, holding that its determination to conduct the confirmation of charges proceedings under article 61(2)(b) of the Statute "*does not affect any other avenues available to victims under international or domestic law to ensure that their voices are heard*" and that "*the Chamber's mandate does not extend to canvassing matters that are extraneous to the Court's legal framework*".⁶⁸

43. Accordingly, the third issues does not constitute a proper appealable matter and should be dismissed.

⁶⁶ See the Impugned Decision, *supra* note 3, para. 89.

⁶⁷ See the Request, *supra* note 2, para. 49.

⁶⁸ See the Impugned Decision, *supra* note 3, para. 90.

The issues do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial and the intervention by the Appeals Chamber would not materially advance the proceedings

44. Even if these purported issues are considered to constitute appealable issues, granting the Request would not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial and the intervention by the Appeals Chamber would not materially advance the proceedings.

45. As developed *supra*, the Chamber made its own legal and factual determination based on the specific circumstances of the case, supported by the evidence presented to it at the time of the issuance of the Impugned Decision. There exist no appellate rulings in the Impugned Decision over the decisions made by another Pre-Trial Chamber. Lastly, the Defence's arguments about the improper exercise of the Chamber's discretion are: (i) particularly speculative and unsubstantiated; (ii) unrepresentative of the Court's jurisprudence and; (iii) extraneous to the Court's legal framework.

46. Moreover, an immediate intervention by the Appeals Chamber at this juncture will not materially advance the proceedings since the Defence fails to define an issue or an identifiable subject or topic requiring an appellate decision for its resolution. Even if the Appeals Chamber were to address these matters, it would then be engaging in a hollow academic exercise reviewing non-existent rulings, undisputed findings, speculative and unsubstantiated claims, misrepresented facts and matters falling outside of the scope of statutory instruments of the Court. These are plainly incompatible with the corrective function of the Appeals Chamber.

47. Finally, granting the Request would also be detrimental to the interests of the victims who have been waiting for justice for some 20 years and for whom the start of judicial proceedings marks an important opportunity to voice their sufferings and victimisation.

FOR THE FOREGOING REASONS, the Legal Representatives respectfully request the Chamber to dismiss the Request in its entirety.



Paolina Massidda



Sarah Pellet

Dated this 8th day of November 2024

At The Hague (The Netherlands)