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**International
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THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Joanna Korner
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. JOSEPH KONY

Public Document

**Victims' Response to the "Defence Appeal brief against Pre-Trial Chamber III's
'Decision on the criteria for holding confirmation of charges proceedings
in absentia'" (No. ICC-02/04-01/05-557)**

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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D35

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☐ Legal Representatives of the
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☐ Unrepresented Victims

☐ Unrepresented Applicants
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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 “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’” (respectively the “Appeal”² and the “Impugned Decision”³).

2. The Legal Representatives oppose the Appeal in its entirety and argue that Pre-Trial Chamber III (the “Chamber”) did not commit any error in the Impugned Decision, and that the Defence fails to substantiate its arguments for the reversal of said ruling. In fact, the Chamber’s determination to the effect that the confirmation of charges hearing in the absence of the person who *cannot be found* does not require their first appearance before it is legally correct and firmly based on the ordinary meaning of the wording in article 61(2)(b) of the Rome Statute (the “Statute”) read in its context and in light of its object and purpose.

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; 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; and the “Decision on victim participation, legal representation, and on the OPCV’s Application for recognition of the status of victims in the *Kony* case to the victims participating in the *Ongwen* case (Pre-Trial Chamber III), [No. ICC-02/04-01/05-540](#), 13 December 2024. 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 “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings in absentia’”, [No. ICC-02/04-01/05-557 OA4](#), 7 February 2025 (the “Appeal”).

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”).

3. The Legal Representatives also underline that granting the Appeal 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.

II. PROCEDURAL BACKGROUND

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

5. On 24 November 2022, the Prosecution filed a Request to hold a confirmation of charges hearing in the absence of Mr Kony (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 The observations were submitted on 30 March 2023.⁷

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 On 4 March 2024, the former Chamber issued

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”).

the Second Decision on the Prosecution's Request ruling, *inter alia*, to hold the confirmation of charges hearing on 15 October 2024 (the "Second Decision").⁹

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

9. On 21 June 2024, Counsel for Mr Kony was appointed.¹¹

10. On 28 August 2024, the Defence submitted its observations on the First and Second Decisions.¹² On 5 September 2024, having been authorised by the Chamber,¹³ the Prosecution filed its reply to the Defence's observations.¹⁴ On 9 September 2024, the Defence submitted further observations on the same matter.¹⁵

⁹ 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").

¹⁰ See the "Decision assigning judges to divisions and recomposing Chambers" (Presidency), [No. ICC-02/04-01/05-485](#), 13 March 2024.

¹¹ See the "Decision on the Procedure for Appointing Counsel" (Pre-Trial Chamber III), [No. ICC-02/04-01/05-499](#), 2 May 2024 and the "Order to Appoint Counsel" (Pre-Trial Chamber III), [No. ICC-02/04-01/05-502](#), 19 June 2024.

¹² See 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", [No. ICC-02/04-01/05-517-Conf+Conf-Anx](#), 28 August 2024. A public redacted version was filed the same day [No. ICC-02/04-01/05-517-Red](#).

¹³ See email from the Chamber to the Prosecution sent on 3 September 2024 at 15:12 in the Report on decisions and orders issued by way of email for the period November 2022 – September 2024, [No. ICC-02/04-01/05-530-Anx26](#), 25 October 2024.

¹⁴ See the "Prosecution's Reply to Defence Observations", [No. ICC-02/04-01/05-520-Conf](#), 5 September 2024. A public redacted version was filed on the same day [No. ICC-02/04-01/05-520-Red](#).

¹⁵ See the "Kony Defence Reply to Prosecution's Submissions in Response to Defence Observations", [No. ICC-02/04-01/05-524-Conf](#), 9 September 2024. A public redacted version was filed the same day [No. ICC-02/04-01/05-524-Red](#).

11. On 12 September 2024, after having received submissions from the parties and participants,¹⁶ the Chamber postponed the confirmation of charges hearing and vacated the 15 October 2024 date.¹⁷

12. On 29 October 2024, the Chamber issued the Impugned Decision.¹⁸

13. On 4 November 2024, the Defence filed a Request for leave to appeal the Impugned Decision.¹⁹ On 28 January 2025, the Chamber granted leave to appeal one of the issues, namely whether the first appearance of the suspect is a pre-requisite for holding a confirmation of charges hearing *in absentia*.²⁰

14. On 7 February 2025, the Defence filed its Appeal.²¹

III. SUBMISSIONS

A. *Applicable law*

15. The Appeals Chamber clarified that, for the standard of review concerning errors of law, it will not defer to the lower chamber's interpretation; rather, it will arrive at its own conclusions as to the applicable law and determine whether or not

¹⁶ See the "Victims Observations on the date of the confirmation of charges hearing", [No. ICC-02/04-01/05-521](#), 6 September 2024, the "Defence Observations on the Date of the Confirmation of Charges Hearing", [No. ICC-02/04-01/05-522](#), 6 September 2024 and the "Prosecution's observations on the date of the confirmation of charges hearing", [No. ICC-02/04-01/05-523](#), 6 September 2024.

¹⁷ See the "Decision Postponing the Confirmation of Charges Hearing" (Pre-Trial Chamber III), [No. ICC-02/04-01/05-526](#), 12 September 2024.

¹⁸ See the Impugned Decision, *supra* note 3.

¹⁹ 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. See also, the "Prosecution's Response to the Defence Request for Leave to Appeal the Decision on the criteria for holding confirmation of charges proceedings in absentia", [No. ICC-02/04-01/05-534](#) and the "Victims' Response to the 'Kony Defence request for leave to appeal 'Decision on the criteria for holding confirmation of charges proceedings in absentia'", [No. ICC-02/04-01/05-535](#), 8 November 2024.

²⁰ See the "Decision on the 'Kony Defence request for leave to appeal [the] 'Decision on the criteria for holding confirmation of charges proceedings in absentia'" (Pre-Trial Chamber III), [No. ICC-02/04-01/05-551](#), 28 January 2025.

²¹ See the Appeal, *supra* note 2.

said chamber misinterpreted it.²² If a lower chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the impugned decision.²³ A decision is materially affected by an error of law if the lower chamber would have rendered a ruling substantially different from the one affected by the error, had it not made such error.²⁴ On substantiation of arguments, the Appeals Chamber ruled, *inter alia*, that an appellant is required to: (i) present cogent arguments that set out the alleged error and explain how the relevant chamber erred; and (ii) demonstrate how the error materially affected the impugned decision.²⁵

B. Merits of the Appeal

16. The Defence submits that the Chamber committed an error affecting the Impugned Decision in interpreting article 61(2)(b) of the Statute as not requiring a first appearance of the suspect pursuant to article 60(1) of the Statute in order for the latter to qualify as someone who “*cannot be found*”.²⁶

17. The Legal Representatives oppose all grounds of appeal.

Ground 1: The Pre-Trial Chamber adopted an interpretation that contradicts the express requirement of “initial proceedings before the Court” in Article 60(1)

18. The Defence argues that the Chamber’s approach interpreting article 61(2)(b) of the Statute in isolation from article 60(1) was erroneous and that it should have considered whether there was an available interpretation of the two alternatives in article 61(2) that was consistent with the requirements of article 60(1) of the Statute.²⁷

²² See the “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Appeals Chamber), [No. ICC-01/04-02/06-2782 A4 A5](#), 12 September 2022, para. 29.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Idem*, paras. 36 and 37.

²⁶ See the Appeal, *supra* note 2, paras. 2-6.

²⁷ *Idem*, paras. 15-16.

19. The Legal Representatives submit that the Chamber did not commit any error. Indeed, the Defence's arguments fail to comprehend the legal framework governing the confirmation of the charges hearing, in particular, the context, object and purpose of article 61(2)(b) of the Statute. As held by the Appeals Chamber, *"the context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty"*, in accordance with the Vienna Convention on the Law of Treaties.²⁸

20. The initial proceedings before the Chamber provided in article 60(1) of the Statute are exclusively devoted to situations where the person concerned is *actually present* before the Court. This is crystal clear in the very wording of said provision which provides 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 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"*. Moreover, article 61(2)(b) explicitly states that the Pre-Trial Chamber may hold a confirmation hearing in the absence of the person who *"cannot be found"* when *"all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held"*. In other words, this means that the person concerned has never made such *"appearance"* under article 60 which deals with a defendant who is *actually present* before the Court.

21. This conclusion remains the only possible interpretation of the provision read in its context and in light of its object and purpose. In particular, (i) the actual wording

²⁸ 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" (Appeals Chamber), [No. ICC-01/04-168 AO 3](#), 13 July 2006, para. 33 (the "Judgement on Extraordinary Review").

and particular placement of the relevant texts – the proceedings foreseen in article 60(1) as the main rule placed before the differing or special procedural steps provided in article 61(2)(b) of the Statute as the exception to the rule,²⁹ and (ii) reading their body of texts as a whole in conjunction with article 63 of the Statute which requires the presence of the person at trial, in accordance with the rules of treaty interpretation upheld by the Appeals Chamber.³⁰

22. As to the Defence's arguments regarding the person's fair trial rights, article 61(2)(b) of the Statute provides for the effective exercise of said rights within the context of *in absentia* proceedings ensuring the appointment of counsel in the interest of justice. In fact, the relevant preparatory works show that, during the discussions on the possibility to hold proceedings *in absentia*, the legal representation of the person concerned was not foreseen, explicitly indicating that such person *cannot* or *shall not* be represented by counsel.³¹ Nevertheless, the drafters ultimately decided to empower the Pre-Trial Chamber with the authority to afford legal representation to such persons in the interest of justice.³² Indeed, the effective exercise of the person's fair trial rights

²⁹ See *infra* paras. 36-42.

³⁰ See the Judgment on Extraordinary Review, *supra* note 28, para. 33.

³¹ See [Abbreviated Compilation of Proposals on Procedural Matters, Working Group on Procedural Matters, the Preparatory Committee](#), 4 August 1997, pp. 12-13. The provision read as follows:

Article 27 Commencement of prosecution

[Alternate paragraph 4. The Prosecutor may amend the indictment, or withdraw the indictment together with all the accompanying evidence, until the time it is considered [confirmed] by the [entity to be determined]. [...]

[4 bis. When one or more of the persons named in the indictment has fled or cannot be found, when all reasonable steps have been taken to inform the person named in the indictment, the [entity to be determined] may still hold a hearing in order to examine whether it shall confirm the indictment. In that case, the accused cannot be represented by counsel. When it confirms the indictment, in its entirety or in part, against a person who has fled or cannot be found, the [entity to be determined] shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial. [...](emphasis added).

³² See Working Paper on Article 61, Working Group on Procedural Matters, Committee of the Whole, UN Doc. [A/CONF.183/C.1/WGPM/L.75](#), 12 July 1998, p. 1. Article 61 Confirmation of the charges before trial 1. Subject to the provisions of paragraph 1 bis, within a reasonable time after the person's surrender of voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel. 1 bis. When: (a) The person has waived his right to be present; or (b) The person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held, the Pre-Trial Chamber shall hold a hearing in the absence of the accused to confirm the charges on which the Prosecutor intends to seek trial. In this case, the accused may be represented by a counsel of his or her own choosing or appointed by the Court (emphasis added). See also, the Report of the Drafting Committee to the Committee of the Whole, UN Doc. [A/CONF.183/C.1/L.87](#),

is guaranteed by the obligation upon the Chamber to appoint a Defence counsel for the purpose of the confirmation of charges hearing *in absentia*.

23. Particularly in this case, the Chamber did actually give effect to article 61(2)(b) of the Statute by appointing counsel for Mr Kony. In the Second Decision, the former Chamber held that “[it is] *first and foremost guided by the need to ensure the suspect’s right to have adequate time and facilities for the preparation of his defence under article 67(1)(b) of the Statute and rule 121(1) of [the Rules]. This is especially so in light of the fact that, should the Chamber definitively decide that there is cause to authorise a confirmation of charges in the absence of Mr Kony, a counsel will have to be appointed to represent the rights and interests of Mr Kony in the proceedings. Such counsel will require sufficient time for his or her preparation in the absence of Mr Kony. In this regard, the Chamber has taken note of 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. In light of the foregoing and given that this would be the first time the Court would hold a confirmation of charges hearing *in absentia*, the Chamber considers commencing the confirmation of charges hearing on 15 October 2024 appropriate”.*³³

24. The date for the commencement of the confirmation of charges hearing was then postponed, mainly due to the appointment of Defence counsel. In particular, the Chamber held that:

[The] Chamber observes that, in the event that it would be decided to proceed with such a hearing, the necessary arrangements must be made sufficiently in advance so as to allow the parties and participants to prepare, in particular in view of the Defence’s right to have adequate time and facilities for the preparation of its defence under article 67(1)(b) of the Statute and rule 121(1) of the Rules. [...]. In this regard, the Chamber has taken into account the following considerations. Counsel for Mr Kony has been

15 July 1998, pp. 13-14, Draft Statute for the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998, UN Doc. [A/CONF.183/C.1/L.76/Add.5](#), 16 July 1998, pp. 9-10; and Report of the Working Group on Procedural Matters, Working Group on Procedural Matters, Committee of The Whole, UN Doc. [A/CONF.183/C.1/WGPM/L.2/Add.8/Corr.1](#), 17 July 1998, p. 1.

³³ See the Second Decision, *supra* note 9, para. 12 (emphasis added).

*appointed recently, namely in June 2024 [and due to the wide-ranging charges as well as the large volume of evidentiary materials to be disclosed].*³⁴

25. Moreover, the wording of article 61(2)(b) of the Statute and rule 125(1) of the Rules of Procedure and Evidence (the “Rules”) amply provide for numerous safeguards for protecting the fair trial rights of the person concerned under article 67 of the Statute, requiring the Chamber to make a positive determination on several legal criteria, namely: (i) whether the person in question *has actually fled or cannot be found*; (ii) whether *all reasonable steps have been taken* to: (a) secure his or her appearance before the Court; (b) *inform the person of the charges*; (c) *inform the person that a hearing to confirm those charges will be held*; (iii) *whether there is cause to hold a hearing on confirmation of charges in the absence of the person concerned*; and (iv) *whether the person may be represented by counsel*. Accordingly, the Chamber also gave effect to these provisions by conducting a detailed factual analysis after having received extensive submissions by the parties and participants.³⁵ In this regard, the Legal Representatives note that the Defence does not at all challenge these findings or argue that the Chamber actually committed factual errors against these clear benchmarks.

26. It follows that the specific procedural steps provided in article 61(2)(b) of the Statute and rule 125(1) of the Rules do abundantly provide for all the practical leeway for effective legal representation, safeguarding the person’s fair trial rights in the context of *in absentia* proceedings. Therefore, the Defence’s arguments to the effect that the only way to ensure the effective exercise of the person’s fair trial rights under article 67 is to mandatorily conduct “*Initial Proceedings*” provided in article 60(1) of the Statute is without merit. This conclusion is also supported by the legislative history of the relevant provisions³⁶ and their context in light of their object and purpose, namely, the corresponding texts and the logical placements of article 61(2)(b) and rule 125(1) in

³⁴ See the “Decision Postponing the Confirmation of Charges Hearing”, *supra* note 17, para. 12 (emphasis added).

³⁵ See the Impugned Decision, *supra* note 3, paras. 35-105.

³⁶ See *infra* paras. 22 and 38.

the structure of the Statute and the Rules - read as a whole and in conjunction with article 67 of the Statute. Accordingly, Ground 1 must be rejected.

Ground 2: The Pre-Trial Chamber adopted an interpretation that is unsupported by the ordinary meaning of the terms of Article 61(2)(b)

27. The Legal Representatives submit that the Chamber did not commit any error as the ordinary meaning of the terms contained in article 61(2)(b) of the Statute has always been crystal clear. The Appeals Chamber held that, under article 21(1) of the Statute, the Court must apply firstly its own Statute and Rules and thus recourse to other sources of law is possible only if there is a lacuna in the Statute or Rules.³⁷ However, there is no such lacuna since the ordinary meaning of article 61(2)(b) of the Statute is without any ambiguity.

28. Yet, the Defence argues that the term “[*cannot be found*]” refers to “*a person who is otherwise unable to be found for any other reason, including abduction, arrest, illness or any other cause that falls short of wilful evasion of the Court’s jurisdiction*”³⁸ as held in the *Ayyash* case.³⁹ The Legal Representatives posit that the jurisprudence of the Special Tribunal of Lebanon is simply irrelevant to the issue on appeals and unhelpful for the Appeals Chamber’s determination. There exist numerous differences between the substantive law and procedural rules contained in the Statutes of said Tribunal and of the Court. Chief among them is the presence of the accused person at trial which remains one of the core features of the Statute of the latter while the former provides for trial *in absentia*. Indeed, the legal terms governing specific procedural steps in their Statutes and relevant rules (while they may appear similar at face value) are vastly different and legally incomparable, especially when it comes to the presence of the defendant at pre-trial and trial proceedings.

³⁷ See the “Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’”, [No. ICC-01/09-01/11-1598 OA8](#), 09 October 2014, para. 105.

³⁸ See the Appeal, *supra* note 2, para. 18.

³⁹ *Idem*, para. 19.

29. Moreover, as mentioned *supra*, there is no lacuna necessitating the recourse to the jurisprudence of other courts since, in addition to article 61(2)(b) of the Statute, rules 125 and 126 of the Rules exclusively and extensively deal with the matter at hand. Thus, in situations like in the present case, no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject, pursuant to the hierarchy of the applicable law under article 21(1) of the Statute.⁴⁰ Respectfully, the same goes for the academic writings of Judge Trendafilova, mentioned by the Defence.⁴¹

30. The Defence also contends that “*a person may make a first appearance before the Court and yet subsequently “cannot be found” is a matter of practical and legal precedent at the ICC*”, citing allegedly similar circumstances arisen in the *Banda and Jerbo case* and the *Libya Situation*.⁴² What the Defence fails to appreciate is the strict parameters of the issue on appeal. As noted by the former Chamber, these proceedings constitute the Court’s first attempt to hold a confirmation of charges hearing *in absentia* in its history.⁴³ Thus, these allegedly related examples of other cases mentioned by the Defence are wholly irrelevant and unhelpful to the determination of the matter at hand since they *never dealt exclusively* with the interpretation of article 61(2)(b) of the Statute.

31. Moreover, the Chamber was under no obligation to read deeper into the meaning of article 61(2)(b) of the Statute and provide a broad interpretation as to any future or hypothetical situations which may or may not arise in other cases before the Court. Indeed, in the Impugned Decision, the Chamber analysed the specific factual circumstances surrounding the present case and made its determination on the core legal issue which is, 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 based on the

⁴⁰ See the “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006” (Appeals Chamber), [No. ICC-01/04-01/06-772 OA4](#), 14 December 2006, para. 34.

⁴¹ See the Appeal, *supra* note 2, paras. 23-27.

⁴² *Idem*, paras. 20-21.

⁴³ See the Second Decision, *supra* note 9, para. 12.

evidence before it. As held by the Appeals Chamber, *“it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law”*.⁴⁴

32. Nevertheless, the Defence fails to demonstrate how the Chamber erred and how the error materially affected the Impugned Decision within the context of the specific factual circumstances of the present case. Nor does the Defence argue or offer any evidence showing the opposite - meaning that Mr Kony *is not to be* considered a person who *“cannot be found”* within the meaning of article 61(2)(b) of the Statute. Rather, it argues essentially that the Chamber could have rendered a different decision if it were seized with differing facts, like the ones found in other cases.

33. Similarly, the Chamber was not obliged to interpret whether the term *“fled”* means, according to the Defence, someone who *“openly announces their whereabouts in a country that refuses to hand them over to the Court”* or *“who perfectly knowingly flouts the Court’s jurisdiction”*⁴⁵ in the Impugned Decision since Mr Kony is clearly not someone who has fled. There was and is still no dispute in this regard. As mentioned *supra*, the only legal and factual determination that the Chamber had to make within the context of these proceedings - based on the evidence available before it - was whether Mr Kony qualifies as a person who *“cannot be found”* within the meaning of article 61(2)(b) of the Statute. Consequently, the Defence’s arguments to the effect that the Impugned Decision allegedly produced manifestly absurd results is baseless.

⁴⁴ See the “Judgment on the appeals of the Defence against the decisions entitled ‘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” of Pre-Trial Chamber II” (Appeals Chamber), [No. ICC-02/04-179 OA](#), 23 February 2009, para. 36.

⁴⁵ See the Appeal, *supra* note 2, para. 30.

34. Furthermore, entertaining the Defence's arguments in this regard would ultimately lead to an academic exercise which is contrary to the corrective nature of the appeals proceedings. The Chamber did not and was not required to make any legal or factual findings in relation to any analogous cases/situations or future cases against Mr Putin or Mr Netanyahu.⁴⁶ Moreover, even if the Appeals Chamber were to address such matters, it would then analyse those issues for the first time on appeal, akin to a first instance court, which would be plainly incompatible with its mandate.⁴⁷ Accordingly, Ground 2 must be rejected.

Ground 3: nothing in the available drafting history (which was in any event deemed irrelevant by the Pre-Trial Chamber) otherwise confirms the Pre-Trial Chambers' erroneous interpretation.

35. The Legal Representatives submit that, in the circumstances, there is no need to resort to the preparatory works since the interpretation of the Chamber is supported by the ordinary meaning of the provision.⁴⁸ Therefore, they limit themselves to a few considerations on the Defence's submissions.

36. Primarily, the Defence's claim that article 61 was first included in a proposal advanced by 13 states in April 1998⁴⁹ is factually incorrect. In fact, said provision was first contained in the Report of the Informal Group on Procedural Questions, Fair Trial and Rights of the Accused of the Preparatory Committee in August 1996 as one of the options for holding a confirmation hearing *in absentia* (albeit termed differently in light of the development of the draft Statute at the time). From the titles of the relevant draft articles and their later amendments discussed *infra*, it can be concluded that the process of confirmation of charges hearings was firstly envisioned as being closely

⁴⁶ *Idem*, para. 29.

⁴⁷ 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-02/05-03/09-199) and additional instructions on translation'" (Appeals Chamber), [No. ICC-02/05-03/09-295 OA2](#), 17 February 2012, para. 20.

⁴⁸ See the Impugned Decision, *supra* note 3, paras. 34.

⁴⁹ See the Appeal, *supra* note 2, para. 34.

associated with the prospect of holding trials in person or *in absentia*. In particular, the proposal read:

Article 37. Trial in the Presence of the Accused

[...] *When the Preliminary Investigations Chamber proposes to confirm an indictment, but one or more of the persons named in the indictment has fled or cannot be found, it may still hold a hearing under the conditions provided for in article [relating to confirmation of the indictment].*

*When it confirms the indictment, in whole or in part, against a person who has fled or cannot be found, the Preliminary Investigations Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial. [...].*⁵⁰

37. It appears that, in the very beginning of the drafting process, the fact that the proceedings before an international criminal court would pertain to exceptional offenses (e.g. crimes affecting the international community), while not having its own enforcement mechanisms to ensure the presence of the defendant, was taken into account. This assumption led to discussions about the establishment of an indictment chamber in cases of the deliberate absence of the person such as the one in which the defendant deliberately flees justice and every effort to bring them to trial has proved fruitless.⁵¹

38. Subsequently, in August 1997 for the first time, the proposal was made to empower the Pre-Trial Chamber with the authority to hold confirmation of charges hearings. In that text, the possibility to proceed when the person “*has fled or cannot be found*” was still included.⁵² Only in 1998, after having decided on whether or not to

⁵⁰ See the Report of the Informal Group on Procedural Questions, Fair Trial and Rights of the Accused of the Preparatory Committee, UN Doc. [A/AC.249/CRP.14](#), 27 August 1996, pp. 17 and 61-62 (emphasis added). See also, the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, (Compilation of proposals), Supplement No. 22A, UN Doc. [A/51/22](#), 13 September 1996, p. 168.

⁵¹ See the Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume I – General Assembly Official Records · Fifty-first Session Supplement No. 22 UN Doc. [A/51/22](#), 13 September 1996, pp. 54-55, paras. 254 and 259.

⁵² See Decisions taken by the Preparatory Committee at Its Session held from 4 to 15 August 1997, UN Doc. [A/AC.249/1997/L.8/Rev.1](#), 14 August 1997, p. 24. See also Revised Abbreviated Compilation, UN Doc. [A/AC.249/1997/WG.4/CRP.6](#), 14 August 1997, p. 3. The proposal read:

Article 27 Commencement of prosecution

[4 bis When one or more of the accused has fled or cannot be found, and when all reasonable steps have been taken to inform the accused, the Pre-Trial Chamber may still hold a hearing in order to examine whether it shall confirm

include in the Statute the possibility to hold trial *in absentia*,⁵³ the drafters completed the provisions related to the initial proceedings before the Court.

39. At the time, the draft read:

Article 60 Initial proceedings before the Court

1. Upon the [surrender][extradition] 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 he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

[...]

Article 61 Confirmation of the charges before trial

1. Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel[, unless -

(a) the person has waived his right to be present; or

(b) the person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held, in which case the person shall not be represented by counsel].⁵⁴

40. It can be reasonably inferred that the drafters' intention was to envision the presence of the suspect during the confirmation of charges hearing as the rule just as the presence of the accused is required at trial as a matter of rule. Therefore, the formulation "*has fled or cannot be found*" was then chosen to be the exception to this rule.

41. The excursus of the legislative history confirms the correctness of the Chamber's reasoning regarding the interpretation of article 61(2)(b) of the Statute. Indeed, as the

the indictment. In that case, the accused cannot be represented by counsel. When it confirms the indictment, in its entirety or in part, against an accused who has fled or cannot be found, the Pre-Trial Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial.]

⁵³ See the Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. [A/AC.249/1998/L.13](#), 4 February 1998, p. 97, footnote 163. See also, the Text of the Draft Statute for the International Criminal Court, Preparatory Committee on the Establishment of an International Criminal Court, 16 March-3 April 1998, UN Doc. [A/AC.249/1998/CRP.11](#), 1 April 1998, pp. 11-12.

⁵⁴ See the Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. [A/CONF.183/2/Add.1](#), 14 April 1998, p. 85 and 95-98 (emphasis added).

Chamber held in the Impugned Decision, there is no ambiguity as to the clear wording of the provision.⁵⁵ As shown *supra*, the drafters always had a clear intention regarding exceptions to the presence of the person concerned at confirmation hearings from the very beginning of the drafting process of the Statute. Hence, the legislators did intentionally require the presence of the person, except when the person *has fled* or *cannot be found* under article 61(2)(b) of the Statute. As the Chamber held in the Impugned Decision, “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. [This] requires the provision to be construed in such a way so as to clearly differentiate between the two situations [covering] 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’”.⁵⁶ Indeed, the drafters of the Statute consciously and consistently employed throughout the legislative process the term or conjunction “or” (not “and”) in order to differentiate between the two situations envisaged in article 61(2)(b) of the Statute.

42. Concerning the Defence’s assumption that, in the context of the drafting of the Rules by the Preparatory Commission, there was a clear distinction to be drawn between a situation where a person “*has never appeared*” before the Court, and one where they “*have fled or cannot be found*”,⁵⁷ a closer scrutiny of the document in question calls for a different conclusion. In fact, said proposal essentially offers the same two options for holding confirmation hearings *in absentia*, including: (i) where the person concerned has never appeared; and (ii) where said person, after having appeared, then has fled or cannot be found. In other words, the confirmation hearing *in absentia* will still proceed even if the person never appeared before the Court. As a result, the fact that the person never appeared before a Pre-Trial Chamber will not prevent it from

⁵⁵ See the Impugned Decision, *supra* note 3, para. 32.

⁵⁶ *Ibid.*

⁵⁷ See the Appeal, *supra* note 2, para. 38.

holding a confirmation hearing *in absentia* under the conditions set forth in article 61(2)(b) of the Statute. Therefore, this proposal would not have created a third legally distinct situation since its practical effect and ultimate outcome will have been the same as in the situation in which the person “*cannot be found*.” In conclusion, even if it were adopted in the Rules, this proposal would have added nothing new to the meaning of article 61(2)(b) of the Statute since its proposed wording was largely repetitive of the original intent of the drafters to allow a chamber to hold confirmation of charges hearing *in absentia* where the person concerned has fled *or* where the person cannot be found.

43. In any event, as underlined by the Chamber, the fact that these proposals had not ultimately been adopted in the Rules mean that they do not determinatively establish the proper interpretation of article 61(2)(b) of the Statute.⁵⁸ As the Appeals Chamber held, such dismissal of proposals is considered to be *deliberate*.⁵⁹ Consequently, Ground 3 must be rejected.

44. Finally, the Legal Representatives underline that granting the Appeal 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.

⁵⁸ See the Impugned Decision, *supra* note 3, para. 34.

⁵⁹ See the Judgment on Extraordinary Review, *supra* note 28, para. 40.

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



Paolina Massidda



Sarah Pellet

Dated this 20th day of February 2025

At The Hague (The Netherlands)