

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/05**
Date: **24 February 2025**

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 THE REPUBLIC OF UGANDA

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

Public

Request for Leave to Reply

Source: Defence for Mr Joseph Kony

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I. INTRODUCTION

1. Surprisingly, the Prosecution agrees with the Defence that the Pre-Trial Chamber erred in determining that an *in absentia* confirmation hearing without any prior initial appearance by the suspect is permissible under the Statute based solely on the “ordinary meaning” of Article 61(2)(b).¹ In its response, the Prosecution argues, contrary to the Pre-Trial Chamber’s position, that a proper interpretation of Article 61(2)(b) “requires the *joint* consideration of ordinary meaning, context, and object and purpose, since these factors are necessarily inter-related.”² It goes on to offer a series of alternative justifications for the Pre-Trial Chamber’s conclusion, embarking on an extensive discussion of the context provided by related statutory provisions,³ including Article 61(1),⁴ as well as the object and purpose of the Statute.⁵

2. The Prosecution asserts that the absence of these elements from the Impugned Decision arises merely from the fact that the Pre-Trial Chamber’s reasoning was “less detailed in some steps”⁶ than it could have been. This is incorrect. The Pre-Trial Chamber considered these factors irrelevant in light of its interpretation of the “ordinary meaning” of Article 61(2)(b). Significantly, it emerges from the Prosecution’s response that it even disagrees with the “ordinary meaning” of Article 61(2)(b) as defined by the Pre-Trial Chamber, which it describes as “somewhat anomalous.”⁷

3. Accordingly, several submissions advanced by the Prosecution in its response not only go beyond the reasoning of the Pre-Trial Chamber in the Impugned Decision but actually contradict it. The Prosecution has thereby raised new issues which could not reasonably have been anticipated by the Defence when drafting its appeal. On this basis, leave is sought to reply to five discrete issues raised in the Prosecution response. If granted leave, the Defence would submit its reply within five days of any such decision, and would limit itself to eight pages.

¹ [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, 23 November 2023 (“November Decision”), para. 30 “An initial appearance is thus not a requirement to hold a confirmation hearing pursuant to article 61(2)(b) of the Statute. If such a prerequisite were to exist, the two situations – i.e., a person having fled vs a person who cannot be found – would no longer be two separate and distinctive alternatives”; [Decision on the criteria for holding confirmation of charges proceedings in absentia](#), ICC-02/04-01/05-532, 29 October 2024, para. 32 (“Impugned Decision”).

² [Prosecution response to “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings in absentia’”](#), ICC-02/04-01/05-566, 20 February 2025, para. 11 (emphasis in original) (“Prosecution Response”).

³ [Response](#), paras 23-27.

⁴ [Response](#), paras 11, 19, 22.

⁵ [Response](#), paras 28-31.

⁶ [Response](#), para. 11.

⁷ [Response](#), para. 20.

II. APPLICABLE LAW

4. Regulation 24(5) of the Regulations of Court provides that:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

5. The Appeals Chamber may grant a request for leave to reply where these conditions are met.⁸ In addition, the Appeals Chamber has held that it may also grant leave to reply where to do so “would otherwise be necessary for the adjudication of the appeal,”⁹ “would assist in its determination of the appeal,”¹⁰ or is “otherwise warranted.”¹¹

6. The Appeals Chamber has held that a request for leave to reply must do more than “point[] to issues”, but must rather “demonstrat[e] why they are new and could not reasonably have been anticipated,” or “explain why a reply [...] is otherwise warranted.”¹²

III. SUBMISSIONS

7. Leave is sought in respect of five issues. None of these five issues could have been anticipated, given the extent to which these arguments are not only different from, but contrary to, the reasoning set out in the Impugned Decision. Not only were these arguments novel and unforeseeable, additional submissions in reply are also warranted and necessary for the full and proper adjudication of the appeal.

⁸ *Situation in the Islamic Republic of Afghanistan*, [Decision on the Prosecutor’s request for leave to reply](#), ICC-02/17-206, 23 December 2022, para. 10 granting leave to reply in respect of “new issues” raised in the LRV response (“Decision in Islamic Republic of Afghanistan”); *Situation in the Bolivarian Republic of Venezuela I*, [Decision on the Arcadia Foundation’s request for leave to reply to the “Prosecutor’s Submissions on the Request for Recusal of the Prosecutor”](#), ICC-02/18-102, 12 December 2024, para. 9 “The Appeals Chamber may grant a request for leave to reply if the above-mentioned conditions are met” (“Arcadia Foundation Decision”); *Prosecutor v. Yekatom & Ngaïssona*, [Decision on the Yekatom Defence Request for Leave to Reply to the Prosecution Response to the Request for the Introduction of D29-5010’s Prior Recorded Testimony pursuant to Rule 68\(2\) of the Rules](#), ICC-01/14-01/18-2354, 12 February 2024, para. 5.

⁹ [Arcadia Foundation Decision](#), para. 9 “or if it considers that a reply would otherwise be necessary for the adjudication of the appeal”; [Decision in Islamic Republic of Afghanistan](#), paras 8-9 “or if it considers that a reply would otherwise be necessary for the adjudication of the appeal”.

¹⁰ *Situation in the Republic of the Philippines*, [Decision on the Republic of the Philippines’ request for leave to reply to the “Prosecution’s response to the Philippine Government’s Appeal Brief against ‘Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation’ \(ICC-01/21-65 OA\)”](#), ICC-01/21-72, 2 May 2023, para. 9 granting leave to reply in respect of issues where it “would assist in its determination of the appeal”.

¹¹ *Prosecutor v. Ntaganda*, [Decision on Mr. Ntaganda’s request for leave to reply](#), ICC-01/04-02/06-1994, 17 July 2017, para. 14.

¹² *Id.*, paras 13-14 “Mr Ntaganda merely points to issues arising [...] without demonstrating why they are new and could not reasonably have been anticipated by him [...] Mr. Ntaganda does not explain why a reply to the aforementioned issues is otherwise warranted.”

8. Firstly, leave is requested to address the issue of whether the Pre-Trial Chamber's interpretation of the phrase "cannot be found" as excluding persons whose whereabouts are known but who are inaccessible to the Court is, as argued by the Prosecution, a mere "*obiter dictum*"¹³ concerning "hypotheticals"¹⁴ that constitutes "harmless error."¹⁵ The Prosecution's submissions are an attempt to avoid a necessary consequence of the Pre-Trial Chamber's interpretation that it acknowledges to be "somewhat anomalous."¹⁶ If granted leave, the Defence will show that these are not hypotheticals, but rather directly implicit and intrinsic to, the Pre-Trial Chamber's interpretation of Article 61(2)(b), which are relevant to the correctness of that interpretation. The source of the "anomaly" is not a misinterpretation of the words "cannot be found" in contradistinction from "fled", but rather the Pre-Trial Chamber's failure to take into account the broader textual context of Articles 60(1) and 61(1).

9. Secondly, leave is requested to address the Prosecution's specific argument that the phrase "subject to" in Article 61(1) must¹⁷ be interpreted as creating an exception to the requirement of an initial appearance in Article 60(1). Importantly, the Prosecution never addressed – or even referred to – Article 61(1) in its submissions seeking an *in absentia* confirmation hearing before Pre-Trial Chamber II,¹⁸ nor prior to the Impugned Decision.¹⁹ Despite this omission and the absence of any reference to Article 61(1) in the Impugned Decision itself, the Prosecution now acknowledges the importance of Article 61(1) and advances new arguments concerning its proper interpretation. The Defence did recognise the importance of Article 61(1) in its appeal brief and had anticipated some of the arguments now advanced by the Prosecution; however, in the absence of any prior reasoning of the Pre-Trial Chamber or submissions by the Prosecution on this point, the Defence was unable to address directly all of those arguments adequately. The Defence requests leave specifically to address the validity of the Prosecution's arguments that the words "subject to" must, or even should, be interpreted as creating an exception to the textual requirement of an initial appearance in Article 60(1). The Defence respectfully submits that a reply on this issue would assist the Appeals Chamber in its adjudication of the appeal.

¹³ [Response](#), para. 20.

¹⁴ [Response](#), para. 18.

¹⁵ [Response](#), para. 20.

¹⁶ [Response](#), para. 20.

¹⁷ [Response](#), para. 22. "This strongly suggests that there was no intention to make confirmation *in absentia* proceedings conditional upon a suspect's initial appearance before the Pre-Trial Chamber pursuant to article 60(1). Otherwise there would be no need to include any kind of exclusion for article 61(2) at all." See also, para. 23.

¹⁸ [November Decision; Public Redacted Version of the Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence](#), ICC-02/04-01/05-446-Red, 14 November 2022.

¹⁹ See [Prosecution's Reply to Defence Observations](#), ICC-02/04-01/05-520-Conf, 5 September 2024.

10. Thirdly, leave is requested to address the Prosecution's assertion that the requirement in Article 61(2) of taking reasonable steps to inform a person of the charges "would be redundant and unnecessary if the suspect's initial appearance before the Pre-Trial Chamber under article 60(1) was a prerequisite for confirmation *in absentia* under article 61(2)." This presumes that a suspect is informed of the charges during the initial appearance. This is false. On the contrary, Rule 121(3) specifies that the charges are to be notified to the suspect subsequently, "no later than 30 days before the date of the confirmation hearing." Article 60(1) conspicuously uses the expression "crimes", not "charges", to describe the allegations of which the suspect is informed at the initial appearance. Accordingly, no redundancy arises. The Prosecution's failure to distinguish between "crimes" and "charges" in the Court's legal framework, and the resultant need to argue against the alleged "redundancy" of informing a person under Article 61(2), is a new issue that the Defence could not reasonably have anticipated.

11. Fourthly, leave is requested to address certain quotations offered by the Prosecution from academic commentary that, as the Defence would show, are incomplete, taken out of context, or otherwise misleading as cited. For example, the Prosecution omits a crucial sentence in its citation of Håkan Friman's commentary to the drafting history of the Rules of Procedure and Evidence when it claims that "[i]f anything, the drafting history of the Rules tends to suggest that prior presence was not considered a requirement for a confirmation *in absentia* under Article 61(2), consistent with the statutory framework set out above."²⁰ If granted leave to reply on this issue, the Defence would show that an omitted sentence immediately following the quoted passage in fact states the polar opposite to the "understanding" presented by the Prosecution. Again, the Prosecution's position could not have been anticipated. Furthermore, the Defence seeks an opportunity to demonstrate that the Prosecution is wrong to assert that the overwhelming preponderance of academic opinion supports its position. Rather, the academic commentary taken as a whole merely confirms that there is substantial controversy and disagreement regarding the interpretation of these provisions, particularly amongst the most eminent commentators.

12. Fifthly, leave is requested to address whether the Pre-Trial Chamber's interpretation is, as argued by the Prosecution,²¹ supported by the object and purpose of the Statute. As noted at the outset, the object and purpose of the Statute was not addressed in the Impugned Decision, and

²⁰ [Response](#), para. 42.

²¹ [Response](#), paras 28-31.

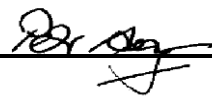
only fleetingly referenced in the preceding decision of Pre-Trial Chamber II,²² since both Chambers deemed this method of statutory interpretation to be irrelevant and unnecessary.²³ The Prosecution in its Response now agrees that this was erroneous, and presents its own interpretation of the object and purpose of the Rome Statute. If granted leave to reply, the Defence will submit that the object and purpose of the Rome Statute is neutral, if not overtly contrary, to such a procedure.²⁴ There is no “gap”²⁵ in the overall statutory framework arising from the absence of any provision expressly permitting *in absentia* confirmation hearings without an initial appearance. Many legal systems, that are equally committed to the punishment of the gravest crimes as the ICC, do not permit *in absentia* proceedings similar to those now proposed. On the contrary, the notion of the participation of a suspect or accused in proceedings is a sacred principle in many legal systems, also reflected in the Rome Statute. The requirement of an initial appearance is in no way inconsistent with the high and universalist purposes of the ICC Statute.

13. The Defence underscores the circumscribed nature of the present request, which does not extend to all of the unforeseeably erroneous submissions that have been advanced in the Prosecution Response. The limited nature of the present request for leave to reply in no way reflects agreement with, or acceptance of, the remainder of the Prosecution Response.

IV. RELIEF REQUESTED

14. Leave is requested to submit a reply in respect of each of the above issues in a filing not to exceed eight pages, within five days of any decision issued by Appeals Chamber.

The whole respectfully submitted.



Peter Haynes, KC
Counsel for Joseph Kony

Dated this 24 February 2025

At The Hague, Netherlands

²² [November Decision](#), para. 66. Notably, this reference to the object and purpose of the Rome Statute was not in relation to the proper statutory interpretation of article 61(2)(b), but rather whether the Pre-Trial Chamber should exercise its discretion to hold an *in absentia* confirmation hearing in this particular case.

²³ [Impugned Decision](#), para. 32; [November Decision](#), para. 29.

²⁴ See e.g. [Statement of ICC President Judge Tomoko Akane following the issuance of US Executive Order seeking to impose sanctions on the International Criminal Court](#), 7 February 2025 “Today, the ICC is dealing with proceedings arising from different Situations across the world, in strict adherence to the provisions of the Rome Statute.”

²⁵ [Response](#), para. 30.