

**Cour
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**International
Criminal
Court**



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No.: ICC-02/04-01/05 OA4

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THE APPEALS CHAMBER

Before: Judge Erdenebalsuren Damdin, Presiding Judge
Judge Solomy Balungi Bossa
Judge Kimberly Prost
Judge Joanna Korner
Judge Gocha Lordkipanidze

SITUATION IN THE REPUBLIC OF UGANDA

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

Public

Corrigendum to “Kony Defence Reply to 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)” ICC-02/04-01/05-582

Source: Defence for Mr Joseph Kony

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1. The Defence of Mr Joseph Kony submits this reply pursuant to leave granted by the Appeals Chamber in respect of two issues.¹

I. FIRST ISSUE: WHETHER ARTICLE 61(1) MUST BE INTERPRETED AS CREATING AN EXCEPTION TO THE REQUIREMENT OF AN INITIAL APPEARANCE IN ARTICLE 60(1) OF THE STATUTE

2. Article 61(1) states:

1. **Subject to the provisions of paragraph 2**, 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 person charged, as well as his or her counsel**.
2. The Pre-Trial Chamber may [...] hold **a hearing in the absence** of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
 - a) Waived his or her right to be present; or
 - b) Fled or cannot be found and 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.²

3. The Prosecution asserts that the words "subject to" in Article 61(1), "strongly suggest that there was no intention" to require an initial appearance of a suspect as a prerequisite to a confirmation hearing, as "[o]therwise there would be no need to include any kind of exclusion for Article 61(2) at all."³

4. This is incorrect; in fact, the opposite is true. The second sentence of Article 61(1) expressly requires that the confirmation hearing be held "**in the presence of the Prosecutor and the person charged**."⁴ This is separate from, and additional to, "the person's appearance" during initial proceedings, under Article 60(1). The expression "subject to" at the beginning of Article 61(1) is, accordingly, necessary to carve out an exception to this separate requirement. But for those words, the requirement of presence during the confirmation hearing would have no exceptions – not even where there had been an initial appearance – and Article 61(2) would simply contradict Article 61(1). "Subject to," therefore, creates an exception corresponding to the requirement of presence during the confirmation hearing prescribed by Article 61(1) itself.

¹ [Decision on reply](#), ICC-02/04-01/05-578. See also [Appeal brief](#), ICC-02/04-01/05-557; [Prosecution response](#), ICC-02/04-01/05-566.

² (Emphasis added).

³ [Prosecution Response](#), para. 22.

⁴ (Emphasis added).

5. This is reinforced by the symmetry of the requirement in Article 61(1) and its corresponding exception in Article 61(2): the former requires that the “**hearing to confirm the charges** [...] shall be held **in the presence of** [...] the person charged”; the latter defines exceptions to “hold a **hearing in the absence of** the person charged.”⁵ There is no ambiguity that the three exceptions specified in Article 61(2) are meant, through the words “subject to” in Article 61(1), to apply exhaustively to the confirmation hearing only. The Prosecution argues that the initial appearance and the confirmation hearing are just a single “regime”⁶ to which the words “subject to” in Article 61(1) must apply equally. Yet this ignores the wording of Articles 60 and 61, which plainly prescribes distinct and successive appearances: at “initial proceedings” (Article 60(1)), and at the confirmation hearing (Article 61(1)). An exception is created for the latter, but not the former.

6. Confining the exceptions of Article 61(2) in accordance with the plain meaning of “subject to” in Article 61(1) is not contradictory of, nor incompatible with,⁷ the requirement of presence during an initial appearance. Article 60 expressly contemplates the release of the person after their initial appearance,⁸ and even anticipates the possibility that they may not re-appear.⁹ This is precisely what happened in *Banda*.¹⁰ Article 61(2) addresses whether a confirmation hearing can be held in such a circumstance. The general rule set out in Article 61(1) is “no”, but this is made “[s]ubject to” the three exceptions in Article 61(2): the person has waived their right to be present, has fled, or cannot be found for reasons unspecified. This scheme is perfectly coherent and similar to that of some national systems which allow some form of *in absentia* proceedings, but only where the person has previously appeared.¹¹

7. The Prosecution’s inability to conceive of this interpretation is contradicted by its own previous submissions in which it argued, discussing Judge Trendafilova’s extra-judicial interpretation that “subject to” applies to the requirement of an initial appearance, that:

⁵ (Emphasis added).

⁶ [Prosecution Response](#), para. 22: “it expressly excludes from this regime article 61(2), which governs confirmations *in absentia* (‘[s]ubject to the provisions of paragraph 2’).”

⁷ *Id.*

⁸ [Rome Statute](#), Articles 60(2): “the Pre-Trial Chamber shall release the person”, 60(3), 60(4): “shall consider releasing the person”.

⁹ [Rome Statute](#), Article 60(5): “If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.”

¹⁰ See [Appeal Brief](#), para. 20.

¹¹ See e.g. Canada, Criminal Code, s. 475(1) creating an exception to the constitutional on *in absentia* proceedings where an accused absconds “during the course of the trial,” which case law has interpreted as encompassing an appearance at a motion preceding the first day of trial (Canada, *R v. Cox* [2021 ONSC 6296](#), paras 17-19); UK, *R v. Jones* [\[2002\] UKHL 5](#) permitting a trial to proceed in the absence of an accused after he had appeared for an arraignment but then subsequently failed to appear for trial.

This later argument is however controversial because the phrase “subject to...” may also qualify the subsequent sentence, namely, “[...] the Pre-Trial Chamber shall hold a hearing to confirm the charges [...]”. The Spanish reading of this provision would support this interpretation: “Con sujeción a lo dispuesto en el párrafo 2 y dentro de un plazo razonable trans la entrega de la persona a la Corte o su comparecencia voluntaria ante ésta [...]”, namely, “Subject to the provisions of paragraph 2, **[and]** within a reasonable time after the person’s surrender or voluntary appearance [...]”¹²

8. The Spanish version of Article 61(1) merely makes explicit what is implicit in other languages. The phrase “within a reasonable time after the person’s surrender or voluntary appearance before the Court” is a parenthetical clause specifying the *timing* of the confirmation hearing under Article 60(1) – “*within a reasonable time after* the person’s surrender or voluntary appearance.” The words “[s]ubject to” are manifestly meant to qualify “[t]he hearing” – a meaning that is not affected by the parenthetical clause. Nothing in the wording or sentence structure implies that the words “[s]ubject to” is meant to qualify the parenthetical clause, let alone to curtail the scope of the words “surrender or voluntary appearance.”

9. If the drafters had intended the words “[s]ubject to” in Article 61(1) to create an exception to the requirement of an initial appearance in Article 60(1), then this would have been easily done by inserting the words “notwithstanding Article 60” in Article 61, or by using the words “subject to Article 61(2)” in Article 60(1). Neither these nor any similar words are used, despite their use throughout the rest of the Statute to create inter-article exceptions.¹³ Only the procedure defined in Article 61(1), the confirmation hearing, is made “[s]ubject to” the exceptions of Article 61(2).

10. The Pre-Trial Chamber failed to analyse, or even refer to, Article 61(1). The unwarranted breadth accorded to “or cannot be found” – thus turning Article 60(1) into an optional procedure – reflects its failure to read these words in the context of “[s]ubject to” in Article 61(1). Whereas the Pre-Trial Chamber’s interpretation of “or cannot be found” flatly contradicts and curtails the ordinary meaning of Article 60(1), “[s]ubject to” in Article 61(1) provides the necessary context that reconciles the ordinary meaning of both Articles 60 and 61, read in context. In no way is this

¹² [Gaddafi Prosecution’s Response on pre-confirmation phase](#), ICC-01/11-01/11-425-Red, para. 28, fn. 51. The word “and” (translating “y”) has been inserted here in square brackets as it was omitted by the Prosecution in the quotation (emphasis added).

¹³ [Rome Statute](#), Articles 36(10), 121(6), 122(1), 124 (“notwithstanding”); Article 107 (extradition or transfer of a person “[s]ubject to the provisions of article 108”); Articles 77 and 110 (penalties available under article 77(1) “[s]ubject to article 110”); Article 81 (Art. 81(4) is “subject to the provisions of paragraphs (3)(a) and (b)); Article 61(11) (powers of a Trial Chamber constituted following an initial appearance are “subject to paragraph 9 and to article 64, paragraph 4”); Article 105 (binding nature of a sentence on States Parties “[s]ubject to conditions which a State may have specified in accordance with article 103, paragraph 1(b))”.

manifestly superior textual and contextual interpretation incompatible with the Statute's object and purpose, as discussed below.

II. SECOND ISSUE: WHETHER THE OBJECT AND PURPOSE OF THE STATUTE DEMANDS THAT THE REQUIREMENT OF AN INITIAL APPEARANCE UNDER ARTICLE 60(1) BE DISREGARDED

11. The Pre-Trial Chamber did not refer to the object and purpose of the ICC Statute in the impugned decision. Nevertheless, the Prosecution submits that the object and purpose of ensuring the most serious crimes must not go unpunished justifies a reading of Article 61(2) that results in the nullity of Article 60(1), contrary to established jurisprudence on statutory interpretation.¹⁴

12. An interpretative approach that injects the statutory text with broad purposive meaning not only risks disrespecting the Statute, but also overlooks another equally important and fundamental purpose: to create an institution of limited jurisdiction endowed by States with specific powers and procedures.¹⁵ The purpose of ending impunity is achieved "through strict adherence to the provisions of the Rome Statute."¹⁶ This purpose is reinforced, not impaired, by adhering to statutory limits that are the bedrock of the legitimacy and credibility of any judicial institution. Accountability and the rule of law must not be sacrificed at the altar of symbolism.¹⁷

13. The Prosecution further submits that the object and purpose of the Statute permits the Court to proceed in the unprecedented manner proposed, because it would provide an opportunity to "air the evidence, allow the victims to speak, [and] increase public awareness", but statements from victim communities call these assumptions into question.¹⁸

14. Insisting on the requirement of an initial appearance does not result in impunity. As the International Court of Justice emphasised in recognising personal immunity from arrest, "the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean

¹⁴ [Katanga Trial Judgment](#), ICC-01/04-01/07-3436-tENG, para. 46: "interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions." See also [Ongwen Trial Judgment](#), ICC-02/04-01/15-1762-Red, para. 2722; [Kenyatta Decision on Continuous Presence at Trial](#), ICC-01/09-02/11-830, para. 91.

¹⁵ [Dissenting Opinion of Judge Perrin de Brichambaut and Judge Lordkipanidze](#), ICC-01/21-77-OPI, para. 29: "The Statute... provides for limitations to this power of the Court. Without such limitations, the Court's jurisdiction would stretch to an extent that would defy the assurances and guarantees to the States embedded in the Statute."

¹⁶ [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. See also J. Powderly, *Judges and the Making of International Criminal Law* (Brill, 2020), 454-541.

¹⁷ See N. Milaninia, "[Time to Revisit the ICC's Position on Head-of-State Immunity?](#)", *Just Security*, 27 March 2025: "When the Court asserts far-reaching legal interpretations without... the doctrinal support necessary to implement them, it undermines the very authority it seeks to project."

¹⁸ "[Mixed reaction as ICC prosecutor seeks to confirm Kony charges](#)", *The Monitor*, 29 November 2022; "[LRA war victims task ICC on charges against Kony](#)", *The Monitor*, 21 September 2023.

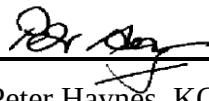
that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity.”¹⁹ The initial appearance, the crucial moment at which the suspect submits to the Court’s jurisdiction,²⁰ is an equally important procedural safeguard. The correct interpretation of the Statute would not create a “gap”²¹ or unduly limit the application of the Statute. Many legal systems, equally committed to the punishment of serious crimes, require an initial appearance.²²

15. Far from engendering international cooperation and helping to “galvanise cooperative efforts to bring fugitives to justice before the Court”,²³ permitting an *in absentia* confirmation hearing without respecting the requirement of an initial appearance may impair State cooperation and undermine the institutional credibility of the Court. For the many states for whom *in absentia* proceedings are unfamiliar, proceeding where the person has never appeared before the Court could detract from the gravitas of the Court’s proceedings,²⁴ and reduce, rather than encourage, state cooperation in the execution of arrest warrants.²⁵ Practically, why would states be motivated to comply with requests for arrest and surrender, if they know that proceedings can carry on to the next stage regardless? Suspects for whom a summons to appear has been issued could be similarly discouraged from appearing voluntarily.

III. CONCLUSION

16. In states’ commitment to ending impunity for international crimes, many “delicate compromises”²⁶ were reached in the drafting of the ICC Statute. By recognising the limits of that statutory framework, which includes interpreting the terms in their statutory context, the Court can reinforce its credibility and foster international support in seeking justice for the victims.

The whole respectfully submitted



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Dated this 4 April 2025

At The Hague, Netherlands

¹⁹ [ICJ Arrest Warrant judgment](#), para. 60 (italics in original).

²⁰ [Ruto and Sang Excusal](#), ICC-01/09-01/11-777, para. 46; [Gbagbo Reconsideration Decision](#), ICC-02/11-01/15-1355-Red, para. 68.

²¹ [Prosecution Response](#), para. 30.

²² See *supra* paragraph 7.

²³ [Prosecution Response](#), para. 29.

²⁴ [Ruto Joint Separate Opinion of Judges Kourula and Ušacka](#), ICC-01/09-01/11-1066-Anx, para. 8.

²⁵ See [Banda Prosecution’s submissions on trials in absentia](#), ICC-02/05-03/09-673-Red, para. 51.

²⁶ B. Broomhall, “Article 51”, in K. Ambos (ed.), *The Rome Statute of the International Criminal Court* (Beck/Hart, 4th edn., 2021) 1584, at 1588.