

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Uganda
4 In the case of The Prosecutor v. Joseph Kony - ICC-02/04-01/05
5 Presiding Judge Erdenebalsuren Damdin
6 Appeals Chamber Judgment - Courtroom 3
7 Tuesday, 3 June 2025
8 (The hearing starts in open session at 10.29 a.m.)
9 THE COURT USHER: [10:29:47] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE DAMDIN: [10:30:40] Good morning, everyone.
13 Would the court officer please call the case.
14 THE COURT OFFICER: [10:30:50] Good morning, Mr President.
15 Situation in the Republic of Uganda, in the case of The Prosecutor versus Joseph Kony,
16 case reference ICC-02/04-01/05.
17 And for the record, we are in open session.
18 PRESIDING JUDGE DAMDIN: [10:31:04] I am Judge Erdenebalsuren Damdin,
19 presiding in this appeal arising from the case of The Prosecutor v. Joseph Kony. My
20 fellow Judges in this appeal are Judge Solomy Balungi Bossa, Judge Kimberly Prost,
21 Judge Joanna Korner and Judge Gocha Lordkipanidze.
22 I note for this record the presence of the Defence team and the Office of Public
23 Counsel for Victims and the Office of the Prosecutor. I take it that the attendees are
24 the same as the ones that are appearing in the list which the court officer kindly
25 provided to the Appeals Chamber before the hearing. If the composition of any

1 teams has changed, please notify the court officer by email.

2 Today, the Appeals Chamber will deliver its judgment in the appeal of the Defence
3 for Mr Kony against the decision of Pre-Trial Chamber III of 29 October 2024 entitled
4 "Decision on the criteria for holding confirmation of charges proceedings *in absentia*",
5 which I will hereinafter refer to as "Impugned Decision".

6 In that decision, which bears the document number 532 in the case record, the
7 Pre-Trial Chamber found that all requirements set forth in Article 61(2)(b) of the
8 Statute were met and decided to hold the confirmation of charges hearing in the case.

9 This is a non-authoritative summary of the Appeals Chamber's written judgment.

10 The authoritative version is the written judgment, which will be made available and
11 be notified after this hearing.

12 Now I will start with a brief background to the appeal.

13 On 23 November 2023 and on 4 March 2024, Pre-Trial Chamber II issued two
14 decisions concerning the Prosecutor's request to hold a confirmation of charges
15 hearing *in absentia*.

16 On 21 June 2024, the Registry appointed Defence counsel for Mr Kony.

17 On 29 October 2024, Pre-Trial Chamber III issued the Impugned Decision, in which it
18 decided that Mr Kony qualifies as a person who cannot be found and that an initial
19 appearance in respect to such persons is not a requirement to hold a confirmation of
20 charges hearing *in absentia* pursuant to Article 61(2)(b) of the Statute.

21 On 4 November 2024, the Defence requested leave to appeal the Impugned Decision.

22 On 28 January 2025, the Pre-Trial Chamber partially granted, by majority, the
23 Defence's request for leave to appeal, certifying the following issue: Whether an
24 initial appearance by the person charged is required before a confirmation of charges
25 hearing can be held *in absentia* under Article 61(2)(b) of the Statute.

1 On 7 February 2025, the Defence filed its appeal brief against the Impugned Decision.

2 On 20 February 2025, the OPCV and the Prosecutor filed their respective responses to
3 the appeal brief.

4 On 24 February 2025, the Defence filed a request for leave to reply which was
5 partially granted by the Appeals Chamber. The Defence filed its reply on
6 3 April 2025.

7 For reasons that I shall proceed to outline, the Appeals Chamber rules that the
8 Impugned Decision is confirmed.

9 The Appeals Chamber will first address the main Defence's arguments concerning the
10 ordinary meaning of the terms of the Article 61(2)(b) of the Statute raised under the
11 second ground of appeal. Then it will address the arguments concerning the context
12 of the provision, as well as the object and purpose, raised under the first and second
13 grounds of appeal. It will then address the arguments raised under the third ground
14 of appeal.

15 Under the second ground of appeal, the Defence argues that the Pre-Trial Chamber
16 adopted an interpretation of the phrase "cannot be found" driven by its
17 understanding of the need to distinguish it from its notion of "fled". The Defence
18 submits that, in requiring such a distinction, the Pre-Trial Chamber was guided by the
19 purported ordinary meaning of the term "or" in Article 61(2)(b) of the Statute.

20 The Defence argues that the Pre-Trial Chamber erred in finding that the only way to
21 distinguish "fled" from "cannot be found", maintaining them as two separate and
22 distinctive alternatives, is to interpret the latter as not being subject to the requirement
23 of initial proceedings under Article 60 of the Statute.

24 The Appeals Chamber recalls at the outset that the interpretation of treaties such as
25 the Rome Statute is governed by the Vienna Convention on the Law of Treaties

1 specifically by the provisions of Articles 31 and 32 thereof. Pursuant to Article 31 of
2 the VCLT, quote, "treaty shall be interpreted in good faith in accordance with the
3 ordinary meaning to be given to the terms of the treaty in their context and in the
4 light of its object and purpose", end of quote.

5 The Appeals Chamber notes that the Pre-Trial Chamber referred to the ordinary
6 meaning of the distinctive term "or" which, in its view, is employed to connect
7 situations, items or sets of circumstances that are typically alternative to and, hence,
8 different from each other. On this basis, the Pre-Trial Chamber interpreted the
9 phrase "fled or cannot be found" as necessarily referring to two different and
10 independent situations.

11 In order to differentiate these situations in a manner that makes them mutually
12 exclusive, the Pre-Trial Chamber defined "fled" as referring to a person who was
13 previously accessible to the Court and absconded. In turn, "cannot be found" was
14 defined as referring to a person who has never been accessible to the Court and
15 whose precise whereabouts were and remain unknown. It followed, in line with this
16 interpretation, that the holding of an initial appearance could not constitute a
17 requirement for a person who has never been accessible to the Court. The Pre-Trial
18 Chamber reasoned that, quote, "any other understanding would contravene the
19 ordinary meaning to be given to the term 'or' in Article 61(2)(b) of the Statute as
20 understood in its context", end of quote.

21 Upon analysis of the nature of this distinction adopted by the Pre-Trial Chamber,
22 Appeals Chamber notes that the word "or" can be used in an exclusive, also in an
23 inclusive or weak sense, to separate notions which are not entirely different and
24 independent from each other. The Appeals Chamber finds that two meanings,
25 inclusive and exclusive, properly fall within the ordinary meaning of the term "or" in

1 Article 61(2)(b) of the Statute.

2 Taking this finding into consideration, the Appeals Chamber will now examine the
3 Defence's submissions and the Pre-Trial Chamber's interpretation of Article 61(2)(b)
4 of the Statute.

5 According to the Defence, the distinction between "fled" and "cannot be found" does
6 not depend on whether the person has previously made an initial appearance before
7 the Court, but rather depends on the reasons and willfulness for the person's
8 non-reappearance. In the submission of the Defence, quote, "the term 'fled' refers to
9 a person who decides consciously to evade the Court's jurisdiction, whereas a person
10 who 'cannot be found' refers to a person who is otherwise unable to be found for any
11 other reason, including abduction, arrest, illness or any other cause that falls short of
12 willful evasion of the Court's jurisdiction", end of quote.

13 The Appeals Chamber notes that, contrary to the Defence's contention, that what is
14 decisive in terms of the application of Article 61(2)(b) of the Statute is that at the time
15 of the proposed hearing, the person has fled or cannot be found despite all reasonable
16 steps having been taken to secure his or her appearance. The reasons as to why the
17 person either fled or cannot be found are not material. In essence, the Defence's
18 interpretation places undue emphasis on the suspect's reasons for non-availability
19 rather than the fact of unavailability.

20 The Appeals Chamber considers that inclusion of this proposed distinction based on
21 the reasons for non-availability is beyond the ordinary meaning to be given to the
22 terms used in Article 61(2)(b) of the Statute.

23 The Impugned Decision defined "cannot be found" by reference to two factors: First,
24 that the precise whereabouts of the suspect were and remain unknown; and second,
25 that he or she has never been accessible. Of relevance to the issue before the Trial

1 Chamber -- Appeals Chamber, sorry, is the second matter. The Appeals Chamber
2 finds no basis for this factor in the ordinary meaning of the terms. The Statute uses
3 the phrase "cannot be found" in the present tense and thus refers to the status of the
4 person at the time of the confirmation hearing. The provision does not require
5 evaluating whether the person was ever accessible to the Court previously. A
6 person may qualify as someone who both fled or cannot be found without incurring
7 contradictions. There is nothing intrinsic to the terms "fled" or "cannot be found"
8 that makes them mutually exclusive.

9 The Appeals Chamber finds that, to the extent that the Pre-Trial Chamber based these
10 findings on the ordinary meaning of the relevant terms, it was an error to consider
11 that the phrase "cannot be found" only concerns persons who have never been
12 accessible to the Court and who were thus unavailable for an initial appearance.

13 In the view of the Appeals Chamber, the ordinary meaning of "cannot be found" does
14 not support such interpretation. This error, however, has not materially affected the
15 Impugned Decision.

16 In conclusion, based on the ordinary meaning alone, it cannot be read into the phrase
17 "cannot be found" that it only concerns persons who have never been accessible to the
18 Court. Similarly the phrase "cannot be found" does not only concern persons who
19 have not had an initial appearance. Rather, it applies to persons regardless of
20 whether they have had an initial appearance.

21 Accordingly, the Appeals Chamber rejects Defence's arguments above raised under
22 the second ground of appeal.

23 The Appeals Chamber will now assess whether or not requiring an initial appearance
24 before the proceedings to a confirmation of charges *in absentia* is consistent with the
25 context and in line with the object and purpose of the Statute.

1 Under the first and second grounds of appeal, the Defence alleges that Pre-Trial
2 Chamber erroneously interpreted Article 61(2)(b) of the Statute in isolation from
3 Article 60 of the Statute. The Defence contends that Articles 60 and 61(1) and (2) of
4 the Statute require an initial appearance as a necessary and critical procedural initial
5 step, regardless of whether the confirmation of charges be held in the presence of the
6 person charged or *in absentia*. It submits that this is not affected by the terms -- by
7 the term "subject to the provision of paragraph 2" of Article 61(1) of the Statute.
8 The Appeals Chamber finds that the Defence misconstrues the relevant provisions of
9 the Statute. The Appeals Chamber has previously held that a phrase in a provision,
10 quote, "must be read as a whole and in a manner that gives meaning and effect to all
11 of its constituent words, rather than in a disjointed manner", end of quote. The
12 Defence's suggestion to reconnect subject to the provisions of paragraph 2 to the last
13 sentence of the provision "the hearing shall be held in the presence of the [...] person
14 charged", incurs a disjointed reading of the provision. Read as a whole, the phrase
15 in Article 61(1) of the Statute provides that the Pre-Trial Chamber shall hold a
16 confirmation hearing within a reasonable time after the suspect's surrender or
17 voluntary appearance before the Court and that this hearing shall be held in the
18 presence of the suspect, subject to the provisions of paragraph 2.
19 Ignoring this construction would render the phrase "subject to" redundant and
20 unnecessary, contradicting the very jurisprudence quoted by the Defence, according
21 to which the Court must endeavour to give significance to every word in the Statute.
22 The Appeals Chamber finds that, read in context, Article 61(2)(b) does not require the
23 suspect's initial appearance prior to proceedings to the confirmation of charges
24 *in absentia*. Contrary to the submissions of the Defence, the initial appearance may or
25 may not be required in the different scenarios set out in Article 61(2)(b) of the Statute,

1 with no inherent contradiction, contingent only upon the availability of the suspect.

2 In relation to the object and purpose of the Statute, the Defence submits that ending
3 impunity must be achieved through strict adherence to the provisions of the Rome
4 Statute. It contends that the Pre-Trial Chamber has made an expansive and broad
5 purposive interpretation of Article 61(2)(b) of the Statute.

6 The Appeals Chamber is of the view that the main considerations in this respect are
7 whether proceeding without an initial appearance is incompatible with the rights of
8 the Defence and whether the procedural functions that underpin the confirmation of
9 charges hearing are preserved.

10 The Appeals Chamber finds that proceeding to an *in absentia* confirmation of charges
11 hearing without the suspect's initial appearance is not incompatible with the rights
12 enshrined in Article 67 of the Statute. The Statute and Rules provide adequately
13 robust safeguards to protect the suspect's fair trial rights even in cases where such an
14 initial appearance has not taken place.

15 The Appeals Chamber considers that an interpretation that restricts *in absentia*
16 confirmation hearings to unusual scenarios, such as when a suspect has previously
17 appeared but then absconded, undermines the Statute's broader aim to put an end to
18 impunity. Additionally, such a reading does not offer any meaningful additional
19 protection under the relevant provisions and does not deprive the person of any
20 rights and guarantees which are fully available at trial.

21 The Appeals Chamber finds that the holding of confirmation hearing *in absentia*, even
22 without an initial appearance, is consistent with the object and purpose of the Statute.
23 Therefore, the Appeals Chamber rejects the Defence's arguments in this respect.
24 Under the third ground of appeal, the Defence claims that the drafting history of the
25 Statute and the Rules show that the Pre-Trial Chamber's interpretation of

1 Article 61(2)(b) of the Statute finds no basis in the intent of the drafters.
2 The Defence submits that the drafting history of Article 61(2) of the Statute and
3 Rule 122 of the Rules supports that drafters intended to exempt the confirmation
4 hearing, not the initial appearance, from the requirement of the accused's presence.
5 The Appeals Chamber rejects this interpretation. The placement of the wording
6 "subject to" at the beginning of Article 61(1) of the Statute, rather than the end of that
7 provision, tends to suggest that the very need for a surrender or voluntary
8 appearance are subject to provisions which regulate *in absentia* confirmation
9 proceedings.
10 For the reasons set out in further detail in the written judgment, the Appeals Chamber
11 rejects the Defence's third ground of appeal.
12 This brings us to the end of the summary of the Appeals Chamber's judgment of
13 today.
14 For these reasons, and for the reasons stated more fully in the written judgment, the
15 Appeals Chamber rejects the appeal and confirms the Impugned Decision.
16 The present judgment is unanimous.
17 I would like to end by thanking all the parties, attendees, participants and their
18 counsel and Registry staff who have assisted with today's hearing. There is a lot of
19 work that goes on behind the scenes to ensure that these hearings run smoothly and
20 the Appeals Chamber is very grateful to all those involved. I would like to thank my
21 colleagues, the Judges and the Appeals Chamber's staff for their support.
22 THE COURT USHER: [10:57:09] All rise.
23 (The hearing ends in open session at 10.57 a.m.)