Cour Pénale Internationale

International Criminal Court

Original: **English**

No.**: ICC-02/04-01/05**
Date: **20 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

PROSECUTOR V. JOSEPH KONY

Public

Prosecution response to "Defence Appeal brief against Pre-Trial Chamber III's 'Decision on the criteria for holding confirmation of charges proceedings *in absentia*'"

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INTRODUCTION

1. The appeal against the decision of Pre-Trial Chamber III ("Chamber"), ordering the confirmation of charges against Joseph Kony in his absence,[1] should be dismissed.[2] Like Pre-Trial Chamber II before it,[3] the Chamber correctly held that a suspect's initial appearance before the Court, in the meaning of article 60(1) of the Statute, is not a prerequisite for ordering a confirmation *in absentia*.[4] This was not an "[e]xpansive interpretation[]", but rather the necessary and inevitable result of the "holistic and contextual" method of interpreting the Statute routinely applied by the Court and advocated by the Parties.[5]

2. The Appeals Chamber should uphold the Chamber's conclusion. Not only was it the correct technical interpretation of the Statute, but it also comports with the common-sense and intuitive understanding of the purpose of a confirmation *in absentia* procedure. Affirming this will ensure that States, affected communities, and victims alike remain confident that the Court will be true to its mandate under the Statute. While this does entail restraint from seeking to wield authority not conferred upon the Court, it no less requires judicious and proper use of those means and procedures which *were* conferred.[6] Even if suspects seek to evade the Court's exercise of jurisdiction, the confirmation *in absentia* procedure provides a balanced means to test the evidence, to afford victims the opportunity to participate in the Court's judicial proceedings, and to advance the course of justice one step closer to a fair and expeditious trial.

SUBMISSIONS

3. The Chamber certified a single issue for appeal: "[w]hether an initial appearance by the person charged is required pursuant to article 60(1) and article 61(1) of the Statute before a confirmation of charges hearing can be held in absentia under article 61(2)(b)."[7]

4. The Defence raises three grounds of appeal, asserting that the Chamber erred in law by:

(i) failing to take proper account of article 60(1) of the Statute (Ground One);[8]

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[1] ICC-02/04-01/05-532 ("Decision").
[2] *Contra* ICC-02/04-01/05-557 OA4 ("Appeal"), paras. 6, 42.
[3] *See* ICC-02/04-01/05-466 ("Pre-Trial Chamber II Decision"), paras. 24-30.
[4] Decision, paras. 32-34, 96.
[5] *Contra* Appeal, para. 41. *See e.g.* Decision, paras. 33-34 (referring to articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT")). *See further e.g.* ICC-02/04-01/15-2022-Red A ("*Ongwen* Appeal Judgment"), para. 1061; ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 ("*Bemba et al.* Appeal Judgment"), para. 675; ICC-01/04-01/06-3121-Red A5 ("*Lubanga* Appeal Judgment"), para. 277; ICC-01/04-168 OA3 ("*DRC* Extraordinary Review Appeal Judgment"), para. 33.
[6] *Cf.* Appeal, para. 41.
[7] ICC-02/04-01/05-551 ("Certification Decision"), paras. 12(ii), 38. *See also* Appeal, para.1.
[8] *See* Appeal, paras. 5, 13-17.

(ii) misconstruing the ordinary meaning of the terms of article 61(2)(b) (Ground Two);[9] and

(iii) neglecting proper consideration of the relevant drafting history (Ground Three).[10]

5. To address the relevant issues in a logical order, the Prosecution has adjusted the order of its response to the grounds of appeal. Thus, it first addresses Ground Two, in which the Defence raises various arguments concerning not only the ordinary meaning of article 61(2)(b) but also its context. The Prosecution then examines Ground One, which in the Prosecution's view must be rejected for reasons similar to those related to Ground Two. Finally, the Prosecution addresses Ground Three on the drafting history.

6. For the reasons set out below, none of the Defence's arguments shows any error in the Decision. Nor do they show that the Chamber's ultimate conclusion—that an initial appearance is not a prerequisite for a confirmation *in absentia*—was materially affected. Even if the Appeals Chamber were to adopt different reasoning to the Chamber in some respects, this does not itself suffice to show a reversible error in the Decision.[11]

7. These appeals proceedings are concerned only with the question whether or not an initial appearance before the Court is a prerequisite for a confirmation *in absentia*.[12] If this question is answered in the negative (as submitted by the Prosecution), this does not foreclose the approach of the Court in future cases in determining precisely when such proceedings should be ordered in accordance with the statutory requirements in article 61(2).[13] In the interest of judicial economy—and mindful of the fact-sensitive nature of many of the relevant considerations—the Appeals Chamber need not enter into such questions in its present judgment. Instead, they should be left for future determination as and when they may become relevant.

[9] *See* Appeal, paras. 5, 13, 18-31.
[10] *See* Appeal, paras. 5, 13, 32-40.
[11] What matters is that the Chamber's ultimate conclusion was correct. This is because "[t]he Appeals Chamber 'will not defer to the relevant […] Chamber's interpretation of the law, but [rather] will arrive at its own conclusions as to the appropriate law'"; s*ee e.g.* Appeal, para. 10 (quoting ICC-01/12-01/18-2222 OA4 ("*Al Hassan* Rule 68(2)(b) Appeal Judgment"), para. 19).
[12] *See above* para. 3 (recalling the issue certified for appeal by the Pre-Trial Chamber).
[13] *Cf.* Appeal, para. 29. *Compare e.g.* ICC RPE, rule 125(1); Pre-Trial Chamber II Decision, paras. 58-61.

A. The Chamber correctly interpreted article 61(2)(b) (Ground Two)

A.1. Introduction

8. Consistent with the established jurisprudence of the Court,[14] the Chamber correctly interpreted article 61(2)(b) in accordance with the general rule of interpretation in article 31 of the Vienna Convention on the Law of Treaties ("VCLT"). As the Parties agree,[15] this requires an interpretation "in good faith in accordance with the ordinary meaning" of the relevant terms "in their context and in the light of [the] object and purpose" of the treaty.[16]

9. The Chamber explicitly based its conclusion that "a first appearance cannot constitute a requirement for conducting confirmation of charges proceedings *in absentia*" on its view that "article 61(2)(b) of the Statute also applies to a situation in which the suspect has never been accessible".[17] Building upon Pre-Trial Chamber II's reasoning,[18] the Chamber concluded that that:

> [A]s a matter of law, […] the use of the conjunction 'or' in article 61(2)(b) of the Statute between 'fled' and 'cannot be found' indicates that the provision covers two different and independent situations: one where the suspect has fled, referring to a case where a person absconded, and the other where the suspect 'cannot be found' because he or she has not been arrested, surrendered, or voluntarily appeared before the Court, and all efforts made to locate and arrest the person failed since his or her precise whereabouts were and remain unknown; […] in the situation where a person 'cannot be found', an initial appearance is not a requirement to hold a confirmation of charges hearing pursuant to article 61(2)(b) of the Statute […].[19]

10. The Defence asserts that this conclusion and the underlying reasoning is erroneous. According to the Defence, there is an "interpretation of the alternatives 'fled' and 'cannot be found'" that is more consistent with the ordinary meaning of these terms in the context of other provisions in the Statute.[20] In the Defence's view, the Chamber wrongly "interpreted Article

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[14] *See above* fn. 5.
[15] *See* Appeal, para. 9.
[16] VCLT, art. 31(1).
[17] Decision, para. 33. *See also* para. 32 (noting that it was "not persuaded by the arguments put forward by the Defence", and that use of the conjunction "or" requires article 61(2)(b) "to be construed in such a way so as to clearly differentiate between the two situations set out therein", of which one pertained to circumstances in which "the suspect cannot be found and he or she 'has never been accessible'").
[18] Pre-Trial Chamber II Decision, paras. 29-30.
[19] Decision, para. 96; *see further* paras. 32-33.
[20] *See e.g.* Appeal, paras. 18, 22, 27, 31.

61(2)(b) in isolation, thus adopting an interpretation of 'or cannot be found' that improperly and unjustifiably curtailed the plain words of Article 60(1), negates Rule 123(1), and injects a subjectivity and absurdity into the use of *in absentia* proceedings".[21]

11. As shown below, it is in fact the Defence criticisms which are incorrect. The general rule of interpretation in article 31 of the VCLT requires the *joint* consideration of ordinary meaning, context, and object and purpose, since these factors are necessarily inter-related.[22] The key question is which interpretation *best* satisfies all the relevant considerations—and the position adopted by the Defence fails this test. Even if the reasoning adopted by the Chamber was less detailed in some steps, it nonetheless reached the right conclusion. In particular, while the ordinary meaning of the terms of article 61(2)(b), as understood by the Chamber, is consistent with the view that an initial appearance is not a prerequisite for confirmations *in absentia*, an even plainer exclusion of this requirement is set out in another provision—article 61(1). No interpretation other than that adopted by the Chamber adequately reconciles the various provisions of the Statute with one another.

12. Overall, if the relevant provisions of the Statute and the Rules are correctly interpreted, Ground Two of the Appeal must be dismissed. None of the six arguments presented by the Defence under this ground—three relating to the terms of article 61(2)(b),[23] and three relating to the broader context[24]—shows any reason to find the contrary.

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[21] Appeal, para. 31.
[22] *See e.g.* *Aguas del Tunari v. Bolivia* (ICSID ARB/02/03), Decision on Respondent's Objections to Jurisdiction, 21 October 2005 ("*Aguas del Tunari v. Bolivia*"), para. 91 ("Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step process iteratively closes in upon the proper interpretation. In approaching this task, it is critical to observe two things about the general rule of interpretation found in the Vienna Convention. First, the Vienna Convention does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. […] Second […] The Vienna Convention's directive to look at the ordinary meaning of a word in its context and in light of the object and purpose of the treaty is intended to [sic] (1) to find the intent of the parties in the specific instrument, (2) to respect the possibility that the parties have used the instrument to address issues of mutual concern in innovative ways, and (3) to not forcibly conform the specific aims of a treaty to general assumptions about the intent of states, assumptions which necessarily are based on assessments of past practice"). *See also* R. Gardiner, *Treaty Interpretation*, 2nd Ed. (OUP: 2015) ("Gardiner"), p. 162.
[23] *See* Appeal, paras. 19-22 (considering caselaw), 26-27 (considering the views of former Judge Trendafilova), 30 (considering the effect of the Chamber's analysis).
[24] *See* Appeal, paras. 23-25 (considering the significance of article 61(1) of the Statute), 28 (considering the significance of rule 123(1)), 29 (considering operational criteria in article 62).

A.2. The Chamber correctly understood the ordinary meaning of the terms of article 61(2)(b)

13. The Chamber understood the ordinary meaning of the term "cannot be found" in article 61(2)(b) as providing that the suspect "has never been accessible" to the Court.[25] This necessarily excludes any requirement that the suspect must already have made a first appearance. Conversely, the term "fled" encompasses the "case where a person who was previously accessible to the Court absconded".[26] As former Judge Trendafilova has previously observed, writing extrajudicially and adopting a similar interpretation, "the terms 'fled' and 'cannot be found' are used in juxtaposition and so define each other."[27]

14. The Defence does not squarely contest that the Chamber's interpretation of article 61(2)(b) could fall within the ordinary meaning of the terms used. Rather, it offers a competing, alternative interpretation to that of the Chamber, which it considers preferable. In its view, the ordinary meaning of "cannot be found" is that the suspect "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." On the Defence's reading, the distinction between "fled" and "cannot be found" does "not depend on whether the person has previously made an initial appearance before the Court, but rather the reasons and wilfulness for the person's non-re-appearance."[28]

15. However, the Defence's alternative definition of "cannot be found" is not convincing. In particular, it is inconsistent with the broader context of article 61(2)(b) and the object and purpose of the Statute.[29] It is precisely because the terms of a treaty may be open to a number of 'ordinary' meanings that the general rule of interpretation depends on analysis of three component parts, and not just one.[30] Thus, while the three Defence arguments specifically addressed to the terms of article 61(2)(b) are unconvincing even in their own terms,[31] in any

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[25] Decision, para. 32. *See also* Pre-Trial Chamber II Decision, paras. 29-30.
[26] Pre-Trial Chamber II Decision, para. 29. *See also* Decision, para. 96.
[27] E. Trendafilova, 'Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings,' in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff: 2009) ("Trendafilova"), p. 454.
[28] Appeal, para. 18 (emphasis added).
[29] *See below* paras. 21-27 (context), 28-30 (object and purpose).
[30] *See above* fn. 22. In this regard, the Prosecution notes the Defence assertion that the Chamber's emphasis on the "ordinary meaning" of the terms of article 61(2)(b) was inconsistent with the general rule of interpretation in article 31(1) of the VCLT: Appeal, para. 22. However, even if it were considered for the sake of argument that the Chamber did place undue stress on one dimension of the interpretive process (*cf.* Gardiner, pp. 184-185), this error was harmless and does not require reversal of the Decision because it did not materially affect the Chamber's ultimate conclusion, which was correct: *see further above* para. 11.
[31] *Contra* Appeal, paras. 19-22 (considering caselaw), 26-27 (considering the views of former Judge Trendafilova), 30 (considering the effect of the Chamber's analysis).

event the correctness of the Chamber's interpretation is confirmed by reference to the broader context and the object and purpose of the Statute.

16. First, the Defence refers to the factual circumstances of several cases and suggests that these "are more than sufficient to demonstrate that 'cannot be found' is textually distinguishable from 'fled'" without excluding any requirement for an initial appearance.[32] However, these cases do not support this proposition.

17. For example, the Defence refers to an *obiter dictum* in the second *Ayyash* case at the STL, in which the STL Trial Chamber interpreted the terms "cannot be found" in a similar fashion to that proposed by the Defence.[33] Yet despite properly conceding that "the statutory context" at the STL "is different to that applicable under the Rome Statute", the Defence is incorrect to suggest that this example nevertheless demonstrates that the terms "fled" and "cannot be found" reflect "legally distinct categories".[34] To the contrary, the STL Trial Chamber was able to adopt a narrow interpretation of the meaning of the term "cannot be found" under article 22(1)(c) of the STL Statute precisely because article 22(1)(b) already *separately* provided for the circumstances where a suspect "[h]as not been handed over to the Tribunal by the State authorities concerned".[35] This illustrates the essential significance of context in interpreting a treaty, which can shape the ordinary meaning ascribed to the terms used. Since the context in the Rome Statute is different, so too may be the meaning even of the same or similar terms. This is why it is impermissible to interpret the terms of a treaty simply by pointing to the meaning of similar terms in another treaty or instrument. The Defence implication that the *Ayyash* case shows that the term "cannot be found" has a universal and unvarying meaning—which must be applied even in a different context (as a so-called "legally distinct" category)—is thus simply wrong in principle.

18. Likewise, the Defence refers to its understanding of the facts in the *Banda* case and certain cases in the *Libya* situation at the Court as an illustration of the "concrete plausibility" of facts arising in which a suspect with "no wish consciously to evade the Court's jurisdiction" is, "nevertheless, impeded from appearing before the Court".[36] However, this argument cannot

[32] Appeal, para. 22.
[33] *See* Appeal, para. 19 (citing STL, *Prosecutor v. Ayyash*, STL-18-10/I/TC, Decision to hold trial *in absentia*, 5 February 2020, para. 45, interpreting terms under STL Statute, art. 22(1)(c), and STL RPE, rule 106(A)(iii)).
[34] *Contra* Appeal, para. 19 ("the reasoning demonstrates that these are legally distinct categories that are unrelated to whether the person does, or does not, make an initial appearance before the Court").
[35] *See* STL Statute, art. 22(1)(b) (separately providing for trial *in absentia* where a suspect "[h]as not been handed over to the Tribunal by the State authorities concerned"). *See also* STL RPE, rule 106(A)(ii).
[36] Appeal, paras. 20-21.

form any proper basis for interpreting article 61(2)(b) of the Statute. It is no more than speculation to identify circumstances which might seem to call for one interpretation of the Statute, and then to attempt to justify a particular interpretation purely on that basis. This is not an approach compatible with the general rule in article 31 of the VCLT. Furthermore, and in any event, the Chamber's interpretation of article 61(2)(b) would not necessarily exclude confirmation *in absentia* in either scenario raised by the Defence[37]—although the difficulty in entering into such hypotheticals again underscores the deficiencies and dangers in attempting to interpret the Statute in this fashion.

19. Second, the Defence overstates former Judge Trendafilova's "caution" in her 2009 book chapter in interpreting the ordinary meaning of the terms of article 61(2)(b).[38] Rather, Judge Trendafilova had explained that it is "*clear* that the drafters intentionally provided for the possibility of a confirmation hearing *in absentia* under Article 61(2)(b), *prior* to surrender and an initial appearance before the Court."[39] She based her conclusion not only on the text of article 61(1),[40] but also explained why it was consistent with article 61(2)(b).[41] While Judge Trendafilova may have expressed herself carefully, this cannot be understood as a lack of confidence in her position.[42] Nor did she acknowledge any inconsistency in the relevant considerations under the general rule of interpretation in article 31 of the VCLT.[43] Furthermore, Judge Trendafilova's view was again subsequently made clear in her consideration of

[37] *See e.g.* Appeal, paras. 20 (qualifying that there was no indication "initially" that Mr Banda had fled), 21 (noting that the suspects in the *Libya* situation had not made an initial appearance before the Court). *See also below* fn. 50 (concerning the "cannot be found" requirement). While the Defence further suggests that the *Libya* Pre-Trial Chamber considered that the absence of an initial appearance caused it "to refrain from commencing preparations for a confirmation hearing", it is important to place this conclusion in context. On the facts of that particular situation, the Pre-Trial Chamber refrained from granting the Defence request for "commencement of the pre-confirmation process" (essentially, a vehicle to secure disclosure from the Prosecution) in the absence of an initial appearance—but this was expressly "without prejudice" to the question whether a confirmation *in absentia* could have been ordered, since it had not been requested: *see* ICC-01/11-01/11-440 ("*Gaddafi* Pre-Confirmation Phase Decision"), paras. 24, 26.
[38] *Contra* Appeal, para. 26.
[39] Trendafilova, p. 453 (emphasis supplied).
[40] *See* Trendafilova, pp. 453-454. *See further below* para. 22.
[41] Trendafilova, p. 454 (whether it is appropriate to apply "the precursor to the confirmation hearing *in absentia* (the initial appearance) depends on whether the person has 'fled' or 'cannot be found' […] distinguished on the basis of the person's availability to the Court. 'Fled' describes the person who was at some point accessible to the Court. 'Cannot be found' describes the person who has never been accessible"). *See also* pp. 454-455 (further reasoning that, while the concept of flight "suggests a link between the accused and the Court", based on some "form of availability of the person in question", a "person who 'cannot be found' is entirely absent any link to the Court", which "thus implies that the person neither made nor could have made his or her initial appearance").
[42] *Contra* Appeal, para. 26 (relying on isolated terms used by Judge Trendafilova such as "arguabl[e]" and "logical to assume").
[43] *Contra* Appeal, para. 26. Judge Trendafilova specifically situated her discussion of confirmations *in absentia* in the context of the impasse at the Rome conference concerning the possibility of trials *in absentia* and analysed the text, context, and object and purpose of the Statute accordingly: *see* Trendafilova, pp. 448-457, *especially* p. 452. *See also below* paras. 33-36.

confirmation *in absentia* proceedings for suspects including Mr Kony, even though they had made no such appearance.[44] Other judges have likewise not excluded this possibility.[45] Similarly, the Defence overstates the general position in academic discourse. Contrary to the three commentators highlighted by the Defence (who are in the minority), the prevailing view aligns with that of Judge Trendafilova.[46]

20. Third, the Chamber's understanding of the ordinary meaning of the terms of article 61(2)(b) does not lead to "manifestly absurd" results or any inequality in the application of the

[44] *See e.g.* ICC-02/04-01/05-424 ("*Ongwen* Severance Decision"), para. 7 (determining, after consultation with the Prosecutor, that there was no cause to order an *in absentia* hearing at that time, not that this was impossible).
[45] *See e.g.* ICC-02/05-01/20-92 ("*Abd-Al-Rahman* Severance Decision"), para. 8 (noting that it was not apparent whether the procedural steps in article 61(2)(b) had been fulfilled with regard to Mr Harun); ICC-01/09-01/15-62 ("*Gicheru* Severance Decision"), paras. 12-14 (considering that it was "not appropriate in the present circumstances" to conduct a confirmation *in absentia* hearing for Mr Bett). The *Gaddafi* Pre-Trial Chamber also expressly took no position on the question whether the charges against Mr Gaddafi could be confirmed in his absence, without his surrender to the Court: *Gaddafi* Pre-Confirmation Phase Decision, para. 24.
[46] *Contra* Appeal, para. 27 (citing C. Safferling, *International Criminal Procedure* (OUP: 2012), p. 323; M. Marchesiello, 'Proceedings before the Pre-Trial Chamber,' in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (OUP: 2002), p. 1244; A. Cassese, *The Oxford Companion to International Criminal Justice* (OUP: 2009), p. 359). *But compare e.g.* W.A. Schabas, E. Chaitidou, and M. El Zeidy, 'Article 61: confirmation of the charges before trial,' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (Beck/Hart/Nomos: 2022), p. 1772 (mn. 20: "The text of [article 61] paragraph 2 does not require that the suspect first surrendered or appeared voluntarily before the ICC, and the initial appearance (Article 60) has taken place in the presence of the suspect"); W.A. Schabas, *The International Criminal Court: a Commentary on the Rome* Statute, 2nd Ed. (OUP: 2016), p. 929 ("The text of article 61(2) is unclear as to whether the Pre-Trial Chamber can commence confirmation proceedings only after the suspected person has surrendered or appeared voluntarily, and has gone through the initial proceedings before the Court provided for in article 60, or whether it is possible to hold a hearing even in a case where he or she is not arrested at all in spite of issuance of an arrest warrant. If the Statute itself is ambiguous on this matter, Rule 123(2) and (3) […] seems to imply that it is indeed possible, as does the drafting history of the Rules"); K. Ambos, *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, 1st Ed. (OUP: 2016), p. 358 (referring to the possibility of confirmation *in absentia* if the suspect has waived his right to be present or cannot be brought before the Court", and stating that "[t]he second exception presupposes the absolute and definitive unavailability of the suspect"); D. Guilfoyle, *International Criminal Law* (OUP: 2016), p. 140 ("confirmation of charges will usually only follow a suspect being surrendered to, or voluntarily appearing before, the Court. However, as obtaining the custody of suspects can be 'a serious obstacle to international criminal proceedings…special confirmation proceedings *in absentia*' may occur under the ICC Statute"); L. Bourguiba, 'Article 61,' in J. Fernandez and X. Pacreau, *Statut de Rome de La Cour pénale internationale: commentaire article par article*, 1st Ed. (Editions A. Pedone: 2012), Tome II, p. 1394 ("*Bien que l'article 61-2 du Statut soit imprécis à cet égard, une lecture de la règle 123-2 et […] semble envisager la possibilité d'une audience en l'absence du suspect y compris dans le cas de figure où ce dernier n'a pas été arrêté malgré la délivrance d'un mandat d'arrêt à son encontre. […] En conséquence, si les conditions du second paragraphe sont remplies, la comparution initiale du suspect à la suite de l'exécution d'un mandat d'arrêt ou d'une citation à comparaître n'apparaît pas comme un pré-requis*"); G.M. Pikis, *The Rome Statute for the International Criminal Court* (Martinus Nijhoff, 2010), p. 136 ("Article 61.2(b) does not envision the arrest of the person or the communication of a summons to appear as prerequisites for holding the confirmation hearing in the absence of the person. The words 'fled or cannot be found' indicate impossibility to trace the person, notwithstanding reasonable efforts"); Trendafilova, p. 453. *See also* H. Friman, H. Brady, M. Costi, F. Guariglia, and C. Stuckenberg, 'Charges,' in G. Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (OUP: 2013), p. 404 ("According to Article 61(1) of the Statute, the confirmation hearing must be held 'within a reasonable time' after the surrender or voluntary appearance of the suspect. […] However, an exception exists for a confirmation proceeding *in absentia*").

law.[47] To the contrary, finding that an initial appearance is not a prerequisite for a confirmation *in absentia* not only aligns with the wording of article 61(2)(b) but is also more intuitively appealing than the reading proposed by the Defence. Notably, the Chamber's approach provides a flexible and appropriate means by which the Court can ensure that its proceedings are not wholly frustrated by the inability to execute an arrest warrant (continuing at least to the confirmation stage),[48] regardless of the suspect's reasons or motivation for non-appearance.[49] While the *obiter dicta* of the Chamber highlighted by the Defence may be seen as somewhat anomalous, and unsupported by authority, at most these amount to a harmless error.[50] In any event, these comments were not integral to the Chamber's reasoning, and go to matters beyond the scope of this appeal. They do not show the broader error that the Defence claims.

A.3. The Chamber's understanding of article 61(2)(b) is supported by the statutory context

21. The context provided by other provisions of the Statute, as well as the Rules, strongly supports the Chamber's interpretation of article 61(2)(b), confirming that an initial appearance is not a prerequisite for confirmations *in absentia*. The three Defence arguments to the contrary are unconvincing.[51] Rather, considered in context, the Statute emphasises a material distinction between persons who are "available to the Court"[52] and persons who are "not available to the Court".[53] As further elaborated below, this objective standard is consistent with the object and purpose of the Statute as a whole.[54] Notably, nothing in the relevant context of the Statute supports the strained interpretation that confirmation *in absentia* hinges on the suspect's reasons or motivations for evading the Court's jurisdiction, once they have made an initial appearance.[55]

22. First, article 61(1) provides that the Pre-Trial Chamber shall hold a confirmation hearing within a reasonable time after the suspect's surrender or voluntary appearance before the Court, and that this hearing shall be held in the presence of the suspect. However, it expressly excludes

[47] *Contra* Appeal, para. 30.
[48] See ICC RPE, rule 125(3).
[49] *See also below* para. 21.
[50] *Contra* Appeal, para. 3 (fn. 48: quoting Decision, para. 96 ("the phrase 'cannot be found' does not cover a situation in which the approximate whereabouts of the person are known but the Court is unable to have an arrest warrant executed due to lack of cooperation from relevant States"); Pre-Trial Chamber II Decision, para. 32). *See above* para. 6.
[51] *Contra* Appeal, paras. 23-25 (considering the significance of article 61(1) of the Statute), 28 (considering the significance of rule 123(1)), 29 (considering operational criteria in article 62).
[52] ICC RPE, rule 124(1).
[53] ICC RPE, rule 125(3).
[54] *See below* paras. 28-30.
[55] *Contra* Appeal, paras. 5, 18.

from this regime article 61(2), which governs confirmations *in absentia* ("[s]ubject to the provisions of paragraph 2"). 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 under article 60(1).[56] Otherwise there would be no need to include any kind of exclusion for article 61(2) at all.[57] In this context, the Defence effort to minimise the significance of article 61(1) is unconvincing.[58] Furthermore, nothing in rule 121(1)—regulating the conduct of an initial appearance—detracts from this reading of the effect of article 61(1).[59]

23. Second, supporting the interpretation of article 61(1) above, article 61(2) makes specific alternative provision for matters which would otherwise be addressed in an initial appearance pursuant to article 60(1) and rule 121(1). Article 60(1) provides that "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". Further, rule 121(1) provides that at the initial appearance a date is set for the confirmation hearing. Correspondingly, for the purpose of a confirmation *in absentia*, article 61(2) requires that "all reasonable steps" have been taken "to inform the person of the charges and that a hearing to confirm those charges will be held". Considering this scheme as a whole, it is clear therefore that the alternative provision made in article 61(2) 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). The only conclusion which can be drawn from this is that, while the scope of those who might be subject to confirmation *in absentia* may include persons who have made their initial appearance (such as persons who then flee), critically it is not limited to them (also encompassing those who

[56] Specifically, such proceedings take place "[u]pon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons": Statute, art. 60(1).
[57] *See also* Trendafilova, p. 453 ("The wording of Article 61(1) of the Statute indicates that requirement of 'surrender or voluntary appearance' is not absolute but subject to exception as provided in paragraph 2. The phrase 'subject to' is habitually employed by the drafters as a favourite technique to limit the force and effect of various Articles and Rules, and to explicitly specify exceptions to their directives. The reference in Article 61(1) suggests that paragraph 2 carves out an exception to the general rule. It is thus logical to assume that the wording of Article 61(1), 'subject to', gives Article 61(2) an independent meaning and leaves room for a confirmation hearing when there has been no initial appearance. In other words, paragraph 2 could be considered *lex specialis* to paragraph 1").
[58] *Contra* Appeal, paras. 23-25. In particular, the mere fact that some of the suspects to which article 61(2) may apply will have made their initial appearance does not establish any kind of "contradiction." Rather, and logically, the scope of article 61(2) includes *both* suspects who have made their initial appearance but then fled, *and* suspects who have not made an initial appearance because they cannot be found.
[59] *See* ICC RPE, rule 121(1). The use of the term "shall" means that the person must appear before the Pre-Trial Chamber "promptly upon arriving at the Court". However, if the person has evaded the Court's jurisdiction—regardless of the reason—and does not arrive at the Court, no initial appearance will occur, without prejudice to the possibility of a confirmation *in absentia*. *See also below* paras. 23, 26.

cannot be found). It is this latter category for which the safeguards in article 61(2) are particularly necessary.

24. Third, article 61(2) grants the Pre-Trial Chamber discretion in deciding whether to order a confirmation *in absentia*, as shown by use of the word "may". Rather than supporting the Defence's claim that this procedure applies only when a suspect has made an initial appearance, the broad discretion given to the Chamber suggests the opposite.[60] By its discretionary terms, article 61(2) suggests the potential range of situations in which either the Prosecutor or the Chamber, on its own motion, could consider the possibility of a confirmation *in absentia*, consistent with the object and purpose of the Statute.[61] Rule 123(2) further reinforces this by allowing consultations between the Prosecutor and the Chamber on the matter.

25. Fourth, rule 123(1) requires that when a person is "arrested or served with the summons, the Pre-Trial Chamber shall ensure that the person is notified of the provisions of article 61, paragraph 2." This serves as a safeguard, ensuring that the person is aware of the possibility of a confirmation *in absentia* if they abscond.

26. The Defence misconstrues this provision, by assuming that *all* persons subject to confirmation *in absentia* must have received a rule 123(1) notification. Yet this is not what is required.[62] Rather, as the rule states in terms, it applies only when "the person is arrested or served with the summons". It is not addressed to—and has no effect upon—situations where a warrant or summons has *not* been executed. Consequently, rule 123(1) cannot be relied upon to suggest that notice to the suspect through means of an initial appearance is a prerequisite for holding a confirmation *in absentia*.[63] Rather, as correctly understood by the Chamber, article 61(2)(b) encompasses both circumstances when rule 123(1) applies (when a person has been arrested or served with the summons) and when it does not (when it has not been possible to execute an arrest warrant or serve a summons at all). Nor is it material that there is no reference to rule 123 in rule 126(1) since this latter provision serves only to apply an adapted form of the

[60] *Contra* Appeal, para. 29 (suggesting that "the absence of any statutory criteria" for ordering confirmation *in absentia* militates against the Chamber's interpretation of article 61(2)). *But see* ICC RPE, rule 125(1) ("the Pre-Trial Chamber shall decide whether there is *cause* to hold a hearing on confirmation of charges in the absence of the person concerned", emphasis added).
[61] *See also below* paras. 28-30.
[62] *Contra* Appeal, para. 28 (characterising rule 123(1) as "an obligation of result", and asserting that "[t]his provision would be violated by adopting an interpretation of Article 61(2)(b) that permits *in absentia* proceedings without such a notification having taken place").
[63] *See also below* para. 42.

procedures in rules 121 and 122 (governing the conduct of confirmation hearings in the presence of the suspect) to confirmation hearings *in absentia*.[64]

27. Fifth, rule 123(3) sets out further prerequisites for a confirmation *in absentia*, namely that "all reasonable measures have been taken to locate and arrest the person". This means that, as long as such measures have been taken, confirmation *in absentia* is permissible, regardless of the reasons why the person has not been located and arrested. If the drafters had intended that an initial appearance was a prerequisite, it would have been natural to refer to this in rule 123(3). Yet the provision is silent on that issue.

A.4. The Chamber's understanding of article 61(2)(b) is supported by the object and purpose of the Statute

28. Throughout its brief, the Defence fails to consider the object and purpose of the Statute in determining whether an initial appearance is a prerequisite for a confirmation *in absentia*, even though this is a vital component of the general rule of interpretation under article 31 of the VCLT.

29. Notably, the drafters of the Statute sought to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".[65] While the Statute creates a carefully balanced regime of State cooperation, it is implicit that the Court's issuance of an arrest warrant or summons to appear will not necessarily lead to its execution. In this context, while respecting the concerns of States about the concept of *trials in absentia*,[66] the existence of an alternative mechanism for confirmation proceedings to air the evidence, allow the victims to speak, increase public awareness, and potentially to galvanise cooperative efforts to bring fugitives to justice before the Court, is entirely consistent with the object and purpose of the Statute.[67]

30. By contrast, the Defence's interpretation of article 61(2)(b) would create a gap in the Court's regulatory framework, unduly limiting the application of the procedure for confirmations *in absentia*. It would exclude what might be one of the most relevant scenarios, namely when a person evades the Court's jurisdiction without ever appearing before the Court

[64] *Contra* Appeal, para. 28 (noting that rule 123 "is not relieved or modified by rule 126"). *See* ICC RPE, rule 126(1) ("The provisions of rules 121 and 122 shall apply *mutatis mutandis* to the preparation for and holding of a hearing on confirmation of charges in the absence of the person concerned").
[65] Statute, Preamble. *See further* ICC-01/04-168 OA3 ("*DRC* Extraordinary Review Appeal Judgment"), para. 33 (acknowledging the significance of the "preamble and general tenor of the treaty").
[66] *See also below* para. 38.
[67] *See also e.g.* Trendafilova, p. 457.

under article 60(1) and rule 121(1). Again, this militates in favour of the correctness of the Chamber's and Pre-Trial Chamber II's interpretation of article 61(2)(b).

31. For all the reasons set out above, Ground Two should be dismissed.

B. The Chamber's reasoning was consistent with article 61(1), which excludes confirmations *in absentia* from the requirement of an initial appearance in article 60(1) (Ground One)

32. For the same reasons given in response to Ground Two above,[68] the Chamber's interpretation of article 61(2)(b) was not inconsistent with article 60(1) of the Statute.[69] Critically, the Defence arguments incorrectly ignore the effect of article 61(1), which makes the requirement for a confirmation hearing within a reasonable time of the suspect's initial appearance "[s]ubject to the provisions of paragraph 2" governing confirmations *in absentia*.[70] As a consequence, this excludes confirmations *in absentia* under article 61(2) from the application of the requirement for an initial appearance in article 60(1). Accordingly, Ground One must likewise be dismissed.[71]

C. The Chamber did not err in its approach to the drafting history (Ground Three)

33. In the Decision, the Chamber found that there was "no need to have recourse to the preparatory work" of the Statute, because the meaning of article 61(1) was sufficiently clear from the application of the general rule of interpretation in article 31 of the VCLT, as described above.[72] The Defence incorrectly suggests that the Chamber erred by failing to consider this drafting history.[73] In fact, the Chamber was not required to have recourse to the drafting history as a supplementary means of interpretation in these circumstances. Moreover, even if considered, the drafting history does not undermine the conclusion that the Statute does not require an initial appearance as a prerequisite for confirmations *in absentia*. Accordingly, Ground Three should also be dismissed.

C.1. The Chamber was not obliged to have recourse to the drafting history, as a supplementary means of interpretation

34. Article 32 of the VCLT provides that:

[68] *See generally above* paras. 8-31.
[69] *Contra* Appeal, paras. 14-17.
[70] *See above* para. 22.
[71] *Contra* Appeal, paras. 14-17.
[72] Decision, para. 34. *See generally above* paras. 8-31.
[73] Appeal, paras. 32-33.

> Recourse *may* be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[74]

35. It follows from the plain terms of this provision that there is no absolute obligation to consult the drafting history of a treaty when interpreting a provision, but rather that there is a discretion to do so in certain circumstances. The Defence appears to recognise as much.[75]

36. The "supplemental" role of article 32 of the VCLT is important, particularly because it underscores the centrality of the general rule of interpretation in article 31. As the International Law Commission itself observed, it is "the *text of the treaty* [which] must be presumed to be the authentic expression of the intentions of the parties"—and consequently the primary object of interpretation is "elucidation of the *meaning of the text* rather than an investigation *ab initio* of the supposed intentions of the parties".[76]

37. Accordingly, a chamber which is otherwise satisfied of the correct interpretation of a provision can only be shown to have erred in law for not relying on supplementary means of interpretation, if a very high threshold is met. The Defence makes no such showing.[77]

C.2. The drafting history does not suggest that an initial appearance was intended as a prerequisite for a confirmation in absentia

38. In any event, contrary to the claims in the Appeal, the Chamber's interpretation is consistent with the drafting history of article 61(2)(b).[78] The Defence arguments are misplaced. First, the Defence emphasises the evolution of draft provisions concerning article 61, but only addresses those prior to critical developments late in the Rome Conference—which changed the whole framework of the negotiation on this issue.[79] Second, the Defence refers to negotiations concerning the elaboration of the Rules of Procedure and Evidence for the Court—

[74] VCLT, art. 32 (emphasis added).
[75] Appeal, para. 32.
[76] *See e.g.* *Aguas del Tunari v. Bolivia*, para. 92 (quoting ILC Report on the work of its 8th session, 1966 ILC Yearbook (II) 223, Commentary to Article 28, para. 18, emphasis added).
[77] *See generally* Appeal, paras. 32-40.
[78] *Contra* Appeal, para. 33.
[79] *Contra* Appeal, paras. 34-37.

but overlooks that these necessarily occurred within the framework of the Statute as it had been drafted.[80]

39. As has been recalled, the negotiations which ultimately led to the adoption of article 61(2) had been focused on the separate issue of *trials in absentia*.[81] Since no consensus could be reached on that matter, a compromise for *confirmations in absentia* was proposed more or less at the last minute, drawing from rule 61 applicable at the ICTY.[82] Two important points arise from this history:

- First, it is unsurprising that draft provisions on the confirmation of charges which were prepared before the Rome Conference did not anticipate the contours of an *in absentia* procedure, because this was a compromise whose necessity had not initially been foreseen. As such, these earlier draft provisions shed little light on the matter presently at issue.[83]

- Second, the acknowledged influence of the ICTY rule 61 procedure on the drafting of article 61(2)[84] is significant because ICTY rule 61 was applicable in situations where a warrant of arrest had *not* been executed despite the taking of all reasonable steps.[85] This

[80] *Contra* Appeal, paras. 38-40.
[81] *See e.g.* H. Friman, 'Rights of Persons Suspected or Accused of a Crime,' in R.S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (Kluver Law International: 1999) ("Friman (1999)"), pp. 255-261; Trendafilova, p. 452.
[82] Friman (1999), pp. 260-261 ("[N]either side appeared to be prepared to give up its position. Halfway through the Conference, a report was delivered to the Working Group, showing that the main issue with respect to trials *in absentia* was still unresolved. […] The informal work continued to take place in a spirit of compromise and delegations explored different paths in order to find common ground. […] However, a number of States still expressed serious concerns about accepting under any circumstances any trial taking place without the presence of the accused […] Another obstacle for a compromise solution was that time was running out; some possible alternatives put forward could not be fully explored because of lack of time. The new text, with brackets, was sent back to the Working Group. But before the new text could be thoroughly discussed, another proposal with implications for the issue appeared. This was a working paper on the still outstanding provisions for the confirmation hearing (Article 61, paragraphs 1 and 1*bis*), which provided for such a hearing to be held without the accused being present under certain conditions. The proposal had similarities with Rule 61 of the *ad hoc* International Tribunals, but also differences due to the fact that the procedures are different. After further consultations, it was obvious that time constraints and the persisting lack of common ground would not allow the Working Group to find a compromise solution on trials *in absentia*. […] In order to avoid making this legal-technical question an issue in the final negotiations on the Statute, the major stakeholders in the debate agreed on confirmation hearings as drafted in the working paper, replacing all forms of trials *in absentia*").
[83] *Contra* Appeal, paras. 34-37.
[84] *See above* fn. 82. The influence of ICTY rule 61 on what would become article 61(2) of the Statute was also recognised in the negotiations for drafting the ICC RPE: *see e.g.* H. Friman, 'Investigation and prosecution,' in R.S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers: 2001) ("Friman (2001)), p. 527.
[85] *See e.g.* ICTY RPE, rule 61. The high profile rule 61 hearings concerning Radovan Karadžić had, for example, commenced on 27 June 1996, and resulted in a decision on 8 July 1996. Karadžić was not arrested for more than another decade.

strongly supports the view that the drafters did not intend an initial appearance to be a prerequisite for confirmation *in absentia*.

40. Similarly, the Defence assertions concerning the negotiation of the Rules are not only unconvincing, but are of limited utility in considering the correct interpretation of the Statute.[86] First, the negotiations surrounding the Rules took place after the Statute had been adopted and had to be "consistent" with its provisions.[87] Second, the negotiations leading to the Rules were not part of the drafting of the Statute itself, but rather occurred subsequent to it, and so are not the "preparatory work of the treaty" as such for the purpose of article 32 of the VCLT. While evidence of the content of the negotiations of the Rules may nonetheless be of some value on occasion, there is no requirement to refer to them, particularly if they shed little light on the issue at hand.

41. In this context, the Defence is not assisted by its reliance on a draft rule proposed by the French delegation.[88] While it is true that the French formulation suggested a narrower usage of the term "cannot be found", it is also true that the French formulation anticipated that article 61(2) applied equally to persons who have "never appeared before the Pre-Trial Chamber". In any event, the Defence is incorrect to suggest that the non-adoption of one delegation's proposed draft of a rule must necessarily and invariably be taken as meaning that the content of that draft was regarded as wrong or inappropriate by the drafters.[89] Rather, there may be various reasons for the non-adoption of one particular proposed draft. In circumstances such as the present, where there is no indication that the drafters considered they were choosing between binary alternatives, jumping to conclusions is unwarranted.

42. Notably, if 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. For example, in the negotiations leading to rule 123(1), Mexico suggested that a person charged should be informed of the Court's authority to confirm charges in their absence. However, it was "pointed out" by other delegates that "service of documents was not a requirement according to the Statute for a confirmation hearing in the

[86] *Contra* Appeal, para. 38.
[87] *See* Statute, art. 51(4) and (5).
[88] *See* Appeal, para. 38 (quoting a proposal which referred to the possibility of a confirmation *in absentia* if "the person concerned has never appeared before the Pre-Trial Chamber, or if, having appeared under the conditions set forth in rule 5.9, the person has fled or cannot be found").
[89] *Contra* Appeal, paras. 39-40.

absence of the person; the condition was that all reasonable steps must have been taken."[90] This is consistent with the understanding that confirmation *in absentia* was possible for persons in respect of whom it had not been possible to execute an arrest warrant or serve a summons.

43. For all the reasons set out above, Ground Three should be dismissed.

CONCLUSION

44. For all the reasons above, the Appeal should be dismissed.

Karim A. A. Khan KC, Prosecutor

Dated this 20th day of February 2025
At The Hague, the Netherlands

[90] Friman (2001), p. 528. *See also above* para. 25.