Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: ***ICC-02/04-01/05***
Date: **7 February 2025**

THE APPEALS CHAMBER

Before: **Judge Tomoko Akane, Presiding Judge**
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF
THE PROSECUTOR v. JOSEPH KONY

Public

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

Source: **Defence for Mr Joseph Kony**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

☒ **The Office of the Prosecutor**	☒ **Counsel for the Defence** D35
☒ **Legal Representatives of the Victims** V49	☐ **Legal Representatives of the Applicants**
☐ **Unrepresented Victims**	☐ **Unrepresented Applicants (Participation/Reparation)**
☐ **The Office of Public Counsel for Victims**	☐ **The Office of Public Counsel for the Defence**
☐ **States' Representatives**	☐ **Amicus Curiae**

REGISTRY

Registrar Mr Zavala Giler, Osvaldo	☐ **Counsel Support Section**
☐ **Victims and Witnesses Unit**	☐ **Detention Section**
☐ **Victims Participation and Reparations Section**	☐ **Other**

I. INTRODUCTION

1. The Defence for Mr Joseph Kony hereby files its appeal brief against Pre-Trial Chamber III's "Decision on the criteria for holding confirmation of charges proceedings *in absentia*",[1] notified on 29 October 2024, for which leave to appeal was granted by Pre-Trial Chamber III on 28 January 2025 in its "Decision on the 'Kony Defence request for leave to appeal [the] 'Decision on the criteria for holding confirmation of charges proceedings *in absentia*'" on the following issue: "Whether 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)."[2]

2. Article 60(1) of the Rome Statute, entitled "Initial proceedings before the Court", requires the "surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons." This provision also requires the Pre-Trial Chamber to "satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial."

3. Notwithstanding this express requirement, Pre-Trial Chamber III ("the Pre-Trial Chamber") held that these "initial proceedings" are not required in all circumstances. This view arises from its interpretation of Article 61, entitled "Confirmation of the charges before trial," which provides that a confirmation hearing may be held:

> (2) […] 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.

4. The Pre-Trial Chamber reasoned that the use of the word "or" between "fled" and "cannot be found" implies "situations, items or sets of circumstances which are typically alternative to, and hence different from, each other."[3] This is undoubtedly correct. However, the Pre-Trial

[1] Decision on the criteria for holding confirmation of charges proceedings *in absentia*, ICC-02/04-01/05-532, 29 October 2024 ("Impugned Decision").
[2] Decision on the 'Kony Defence request for leave to appeal [the] "Decision on the criteria for holding confirmation of charges proceedings in absentia"', ICC-02/04-01/05-551, 28 January 2025; Opinion partiellement dissidente du Juge Haykel Ben Mahfoudh, ICC-02/04-01/05-551-OPI, 28 January 2025.
[3] Impugned Decision, para. 32.

Chamber, and Pre-Trial Chamber II ("the Pre-Trial Chambers") before it, erred in finding that the only way of distinguishing "fled" from "cannot be found" was to interpret the latter as not being subject to the requirement of "initial proceedings" under Article 60(1): "**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**."[4]

5. The Pre-Trial Chambers erred in so finding. The terms "fled" and "cannot be found" can be distinguished from one another, whilst also both being reconciled to the text of Article 60(1): a person who has "fled" is one who wilfully refuses to re-appear before the Court after an initial appearance, whereas a person who "cannot be found" is one whose failure to re-appear before the Court may arise from reasons outside of their control or knowledge. This latter scenario is not only a possibility, it has already occurred at least once in the Court's short history. Moreover, this is precisely the distinction adopted by the Special Tribunal for Lebanon ("STL") in interpreting virtually identical language, albeit in a statutory context not requiring an initial appearance in either case.[5] By failing to reconcile the language of Article 61(2)(b) with Article 60(1), and by adopting an interpretation that is in fact inconsistent with it, the Pre-Trial Chambers violated a basic principle of statutory interpretation: that "the bench must dismiss any solution that could result in the violation or nullity of any of [the Statute's] other provisions."[6]

6. The Pre-Trial Chambers' failure to interpret Articles 60 and 61 holistically – or consider at all the impact of Article 60(1) on the textual interpretation of Article 61(2)(b) – was an error of law materially affecting the outcome. The appropriate remedy is to reverse the Impugned Decision and either: (i) remand the matter to the Pre-Trial Chamber with instructions to engage in a proper exercise of statutory interpretation; or (ii) declare that the requirements of Article

[4] 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, para. 30 ("November Decision") (emphasis added). The Office of Public Counsel for Defence was denied leave to appeal this decision, on the basis that it was premature, as a final determination as to whether to hold a confirmation of charges hearing *in absentia* was yet to be made: Decision on the OPCD Request for Leave to Appeal the 'Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence', ICC-02/04-01/05-470, 11 December 2023, paras 23-24.

[5] STL, *Prosecutor v. Ayyash*, Decision to Hold Trial *in absentia*, STL-18-10/I/TC, 5 February 2020, paras 45, 120, 122 ("*Ayyash* Decision"). The STL, unlike the ICC, has no statutory requirement of an initial appearance, but uses the equivalent terms "has absconded or otherwise cannot be found" in Article 22(1)(c) of its Statute, on *in absentia* trials.

[6] *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 46 ("*Katanga* Trial Judgment"). *See Prosecutor v. Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2722 "a basic principle of statutory interpretation that presumes the legislator does nothing in vain and that the court must endeavour to give significance to every word of a statutory instrument" ("*Ongwen* Trial Judgment").

60(1) are compatible with, and apply alongside, the modalities set out in Article 61(2)(b), thereby finding that an initial appearance is a pre-requisite to the holding of a confirmation hearing.

II. APPLICABLE LAW

7. Article 60 of the Statute provides:

> **Article 60**
> **Initial proceedings before the Court**
>
> 1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
>
> 2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
>
> 3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
>
> 4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
>
> 5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

8. Article 61 provides, in relevant part:

> **Article 61**
> **Confirmation of the charges before trial**
>
> 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, upon request of the Prosecutor or on its own motion, 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.
>
> In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.
>
> 3. Within a reasonable time before the hearing, the person shall:
>
> (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
>
> (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.
>
> The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing. […]

9. As the Appeals Chamber has confirmed:

> The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of Articles 31 and 32. The principal rule of interpretation is set out in Article 31 (1) that reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[7]

10. The standard of review for errors of law is well established in the jurisprudence of the Court. The Appeals Chamber "will not defer to the relevant Chamber's interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law."[8] If such an error has been committed, the Appeals Chamber will intervene "if the error materially affected the decision".[9] A decision is "materially

---

[7] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 33 ("Situation in the DRC Judgment on Review of Leave to Appeal").

[8] *Prosecutor v. Al Hassan*, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", ICC-01/12-01/18-2222, 13 May 2022, para. 19, fn. 28 ("*Al Hassan* Appeals Judgment on P-0113's evidence") citing *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-1225 (OA2), 22 March 2016, para. 33; *Prosecutor v. Ruto & Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-2024 (OA10), 12 February 2016, para. 20; *Prosecutor v. Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under article 87(7) of the Statute", ICC-01/09-02/11-1032 (OA5), 19 August 2015, para. 23; *Prosecutor v. Al Hassan*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', ICC-01/12-01/18-601-Red, 19 February 2020, para. 38 ("*Al Hassan* Appeals Judgment on Gravity").

[9] *Al Hassan* Appeals Judgment on P-0113's evidence, para. 19.

affected by an error of law" if the Chamber would have rendered a decision "that is substantially different from the decision that was affected by the error, if it had not made the error."[10]

III. SUBMISSIONS

11. The Pre-Trial Chamber adopted an interpretation of "cannot be found" driven by its understanding of the need to distinguish that term from its interpretation of the word "fled". In reasoning that the requirement of initial appearance in Article 60(1) was incompatible with the conjunction "or" in Article 61(2)(b), the Pre-Trial Chamber concluded that:

> (i) 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; (ii) 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; and (iii) 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 reasons unrelated to the identification of the suspect's location, for instance due to lack of cooperation from relevant States.[11]

12. The Pre-Trial Chamber not only adopted the reasoning of Pre-Trial Chamber II, but further stressed that it "did not have to provide further legal authority for its interpretation of Article 61(2)(b) of the Statute because this interpretation was grounded in the 'ordinary meaning' of the disjunctive term 'or' contained in Article 61(2)(b) of the Statute."[12] Accordingly, the Impugned Decision is based on the purported "ordinary meaning" of Article 61(2)(b), and particularly the word "or" in that provision, without resort to any other method or source of statutory interpretation.

13. The interpretation adopted by both Pre-Trial Chambers is erroneous for three reasons: (i) it disregards other substantive provisions of the Statute, namely Article 60(1), and adopts an interpretation contrary to that statutory provision; (ii) it fails to adopt a plainly available

[10] *Al Hassan* Appeals Judgment on Gravity, para. 38; *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to article 74 of the Statute", ICC-01/05-01/08-3636-Red, 8 June 2018, para. 36 citing *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, paras 18-19; *Prosecutor v. Ngudjolo*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", ICC-01/04-02/12-271-Corr, 7 April 2015, para. 20.
[11] Impugned Decision, para. 96.
[12] *Id.*, para. 32.

interpretation of Article 61(2)(b) that is consistent with Article 60(1); and (iii) no other method or source of statutory interpretation (which was in any event deemed irrelevant by the Pre-Trial Chamber) otherwise confirms the Pre-Trial Chambers' erroneous interpretation. The first two grounds of appeal that follow are inter-dependent and collectively sufficient to demonstrate reversible error. Ground Three below further emphasizes that there is no other factor mitigating or correcting this error.

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

14. The Pre-Trial Chambers' interpretation of the terms "fled" and "cannot be found" is driven by the purportedly necessary distinction between the two terms, in accordance with the conjunction "or".[13] In an interpretation that was upheld by the Pre-Trial Chamber,[14] Pre-Trial Chamber II defined the term "fled" as "referring to a case where a person who was previously accessible to the Court absconded."[15] It added:

> When the suspect is available to the Court, confirmation hearings are preceded by his or her surrender and subsequent initial appearance pursuant to Article 60(1) of the Statute. Although such initial appearance will usually have taken place in the case of a person who "fled" (because the appearance occurs within days after a suspect has become available to the Court), this is not the case when a person "cannot be found", because in this situation the person concerned was never available to the Court. An initial appearance is therefore 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.[16]

The Pre-Trial Chamber quoted and adopted this definition of "fled" provided by Pre-Trial Chamber II, as well as the consequent interpretation of "cannot be found."[17]

15. This approach to statutory interpretation – interpreting Article 61(2)(b) in isolation from Article 60(1) and then limiting the latter to the extent of incompatibility – was erroneous. The approach that was required, but which was not undertaken by either Pre-Trial Chamber – was to consider whether there was an available interpretation of the two alternatives set out in Article 61(2)(b) that was *consistent with* the requirements of Article 60(1), rather than assuming that the

[13] Impugned Decision, para. 32.
[14] *Id*., para. 23.
[15] November Decision, para. 29.
[16] *Id*., para. 30.
[17] Impugned Decision, para. 32 "fled, referring to a case where a person who was previously accessible to the Court absconded".

latter must be curtailed. As stated in *Katanga*, "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."[18] This is likewise "demanded by the rule against surplusage, a basic principle of statutory interpretation that presumes that the legislator does nothing in vain and the court must endeavour to give significance to every word of a statutory instrument."[19] The notion of contextual interpretation, furthermore, requires consideration, *inter alia*, of the text "as a whole and not in its isolated words and parts."[20] As stated by the Appeals Chamber, "[t]he context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety."[21] Had the Pre-Trial Chamber adopted the requisite holistic approach, it would have approached the interpretation of Article 61(2)(b) in the context of Article 60(1), which, by its plain terms, is the initial step for all proceedings, including confirmation proceedings: "Initial proceedings before the Court."

16. Furthermore, Article 60(1) is not merely a *pro forma* exercise that could be downgraded to a technical requirement. The Pre-Trial Chamber is required to discharge important functions, including ensuring that the person who has appeared is informed of their rights under Article 67 of the Statute, and is informed of the date of the confirmation hearing under Rule 121(1). The suspect will also be apprised of the content of the arrest warrant and be assisted by counsel, who would necessarily provide privileged information and advice about subsequent proceedings, including the confirmation hearing, the facilities and methods for preparing a defence, the ability to seek interim release, and the possibility and consequences of pleading guilty. Significantly, Rule 123 also requires the Pre-Trial Chamber to ensure that any person who has been "arrested or served with a summons" is "notified of the provisions of Article 61, paragraph 2."

17. Article 61(2), by its plain terms and placement, occurs subsequent to these "initial proceedings". Indeed, Article 61(1) refers expressly to holding a hearing to confirm charges

[18] *Katanga* Trial Judgment, para. 46. *See* *Ongwen* Trial Judgment, para. 2722 "a basic principle of statutory interpretation that presumes the legislator does nothing in vain and that the court must endeavour to give significance to every word of a statutory instrument"; *Prosecutor v. Kenyatta*, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11-830, 18 October 2013, para. 91 "a treaty must be read as a whole and not in its isolated words and parts" ("*Kenyatta* Decision on Conditional Excusal").
[19] *Ongwen* Trial Judgment, para. 2722.
[20] *Kenyatta* Decision on Conditional Excusal, para. 91.
[21] Situation in the DRC Judgment on Review of Leave to Appeal, para. 33. *See* also *Situation in Ukraine*, Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, ICC-01/22-90, 24 October 2024, paras 24-35 engaging in an extensive analysis of two potentially contradictory statutory provisions on the basis of the need to "address any apparent incongruities between the different provisions in the statutory framework according to a literal and a contextual interpretation, and in light of and consistently with the object and purpose of the Statute".

"within a reasonable time after the person's surrender or voluntary appearance before the Court". Accordingly, Article 60(1) defines a critical procedural step that precedes the "Confirmation of charges before trial," and which, by its express terms, is the necessary first step for all subsequent "proceedings" before the Court in the case.

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

18. An interpretation of the alternatives "fled" and "cannot be found" that is compatible with Article 60(1) is plainly and readily available. The term "fled" refers to a person who decides consciously to evade the Court's jurisdiction, whereas a person who "cannot be found" refers to a person who is otherwise unable to be found for any other reason, including abduction, arrest, illness or any other cause that falls short of willful evasion of the Court's jurisdiction. The distinction does not depend on whether the person has previously made an initial appearance before the Court, but rather the reasons and willfulness for the person's non-re-appearance.

19. This is precisely the distinction adopted by the STL Pre-Trial Chamber in the *Ayyash* case, which noted that the expression "absconded or otherwise cannot be found" referred to "distinct and mutually exclusive situations due to the fact that the former requires knowledge of the charges by the accused, and therefore a conscious decision on his part to evade service, arrest and prosecution, whereas the latter does not."[22] The statutory context of that distinction – not requiring any initial appearance of the suspect – is different to that applicable under the Rome Statute; nevertheless, 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. Curiously, Pre-Trial Chamber II referred to the *Ayyash* decision, but failed to appreciate that the two "different and independent situations" set out in that decision were quite different to the two scenarios that it adopted.[23]

20. Furthermore, that a person may make a first appearance before the Court and yet subsequently "cannot be found" is a matter of practical and legal precedent at the ICC. In *Banda and Jerbo*, following an initial voluntary appearance pursuant to Article 60,[24] a confirmation

[22] *Ayyash* Decision, para. 45.
[23] November Decision, paras 29, 33. In two footnotes, the Pre-Trial Chamber used the signal "Compare" prior to its citation to the *Ayyash* case, but did not otherwise address the different approach.
[24] *Prosecutor v. Banda & Jerbo*, Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, 7 March 2011, para. 13 ("*Banda & Jerbo* Corrigendum of the Decision on the Confirmation of Charges"). Initial appearance took place on 17 June 2010 following the issuance of summonses to appear: Summons

hearing was held in the absence of the suspects on the basis of a written waiver provided under Article 61(2)(a).[25] Subsequently, the Trial Chamber was apprised of a danger that the Government of Sudan would no longer facilitate Mr Banda's appearance at trial, and ordered the Registrar to "transmit to them a cooperation request to take all necessary steps to facilitate Mr Banda's presence for his trial, including by providing him with travel documents and making all other necessary arrangements as may be appropriate."[26] Despite an arrest warrant being issued to ensure the presence of Mr Banda at trial in 2014,[27] he is yet to be transferred to the Court, over a decade later. Therefore, while Mr Banda made an initial appearance pursuant to Article 60, he later (albeit subsequent to the confirmation of charges) became a person who could not be found, but without any indication – at least initially[28] – that he had "fled". The term "cannot be found" aptly encompasses, as distinct from a person who has "fled", all situations where the reasons for a person's non-reappearance before the Court are unknown or doubtful.

21. A similar – but not identical – scenario arose again in the *Libya* Situation, where several suspects wished to appear before the Court but were prevented from doing so.[29] Although there had been no initial appearance (which caused the Pre-Trial Chamber to refrain from commencing preparations for a confirmation hearing)[30], the facts of the case again highlight the concrete plausibility of a situation in which a suspect has no wish consciously to evade the Court's jurisdiction, but is, nevertheless, impeded from appearing before the Court following an initial

---

to Appear for Saleh Mahammed Jerbo Jamus, ICC-02/05-03/09-2, 27 August 2009 and Summons to Appear for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-3, 27 August 2009.

[25] The date for the confirmation of charges hearing that was set at the initial appearance was postponed when the Defence indicated that the suspects were "willing to waive their right to be present at the confirmation hearing and request[ed] that it be held in their absence": *Prosecutor v. Banda & Jerbo*, Joint Submission by the Office of the Prosecutor and the Defence as to Agreed Facts and submissions regarding modalities for the conduct of the Confirmation hearing, ICC-02/05-03/09-80, 19 October 2010, para. 90. The suspects were then requested to personally waive their right to be present in writing, as required by Rule 124(1): *Prosecutor v. Banda & Jerbo*, Decision postponing the confirmation hearing and setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, ICC-02/05-03/09-81, 22 October 2010; *Prosecutor v. Banda & Jerbo*, Second decision setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, ICC-02/05-03/09-87, 27 October 2010; *Banda & Jerbo* Corrigendum of the Decision on the Confirmation of Charges, para. 19.

[26] *Prosecutor v. Banda*, Warrant of arrest for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-606, 11 September 2014, para. 10 ("*Banda* Arrest Warrant"), citing Public Redacted Decision as to the Further Steps for the Trial Proceedings, ICC-02/05-03/09-590-Red, 14 July 2014, para. 37. Proceedings were terminated against Mr Jerbo in 2013 following his death: *Prosecutor v. Banda & Jerbo*, Public redacted Decision terminating the proceedings against Mr Jerbo, ICC-02/05-03/09-512-Red, 4 October 2013.

[27] *Banda* Arrest Warrant.

[28] *Id.*, paras 15, 20-23.

[29] *Prosecutor v. Gaddafi & Senussi*, Decision on the "Request for an order for the commencement of the pre-confirmation phase" by the Defence of Saif Al-Islam Gaddafi, ICC-01/11-01/11-440, 10 September 2013 ("*Gaddafi & Senussi* Decision on the commencement of the pre-confirmation phase").

[30] *Id.*, para. 29 "the prospect of surrender of the suspect to the Court appears uncertain… such that the Chamber cannot predict with any degree of certainty if and when Mr Gaddafi will be surrendered, and by extension, proceedings before this Court may commence."

appearance. This distinction gives rise to significant consequences, including the subsequent availability of interim release and, eventually, sentencing.[31]

22. These precedents and examples are more than sufficient to demonstrate that "cannot be found" is textually distinguishable from "fled" without contradicting Article 60(1). Yet the Pre-Trial Chambers engaged in no comparison of different potential interpretations of Article 61(2)(b) to determine their compatibility with Article 60(1). Instead, the Pre-Trial Chamber interpreted Article 61(2)(b) in isolation, interpreting "or" in Article 61(2)(b) in a manner that resulted in a contradiction of Article 60(1). The Pre-Trial Chambers even insisted that this interpretation was merely a reflection of the Statute's "ordinary meaning,"[32] requiring no recourse to contextual interpretation or evidence of the drafters' intentions. This isolated approach to the interpretation of Article 61(2)(b), in itself, is an error of law requiring reversal of the Impugned Decision.

23. Although Article 61(1) formed no part of the Pre-Trial Chamber's reasoning, Judge Trendafilova, writing extrajudicially, has argued that this provision is relevant to the issue raised in this appeal.[33] Article 61(1) reads: "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."

24. The ordinary meaning of "subject to the provisions of paragraph 2" is that it qualifies the words "shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial," which, according to the last sentence of Article 61(1), must be held "in the presence of […] the person charged." Indeed, the Prosecution has previously suggested in another proceeding that "subject to" may qualify the second sentence of Article 61(1).[34] The mention in Article 61(1) of

---

[31] *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I's "Decision on the review of detention", ICC-02/05-01/20-542, 17 December 2021, para. 27; *Prosecutor v. Gicheru*, Decision on Mr Gicheru's Request for Interim Release, ICC-01/09-01/20-90, 29 January 2021, para. 43. *See* also ICTY, *Prosecutor v. Gotovina*, Decision on Ante Gotovina's Appeal Against Denial of Provisional Release, IT-06-90.AR65.1, 17 January 2008, para. 18; ICTY, *Prosecutor v. Popović et al.*, Judgment vol. I, IT-05-88-T, 10 June 2010, para. 2160.

[32] Impugned Decision, para. 32.

[33] E. Trendafilova, "Chapter 23, Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings", in C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, 2009, p. 453 ("Trendafilova, Fairness and expeditiousness in the ICC's pre-trial proceedings").

[34] *Prosecutor v. Gaddafi & Senussi*, Prosecution's Response to the Defence "Request for an order for the commencement of the pre-confirmation phase", ICC-01/11-01/11-425-Red, 30 August 2013, para. 28, fn. 51 ("*Gaddafi & Senussi* Prosecution Response to the Defence Request for the commencement of the pre-confirmation

the requirement of an initial appearance is a mere parenthetical recitation of the independent requirement arising from Article 60(1). This reading is confirmed by the equally authentic Spanish version of Article 61(1): "Con sujeción a lo dispuesto en el párrafo 2 **y** dentro de un plazo razonable tras la entrega de la persona a la Corte o su comparecencia voluntaria…". This translates as "Subject to the provisions of paragraph 2 **and** within a reasonable time after the person's surrender or voluntary appearance…".[35] The French version likewise implies that it is the words following "la Chambre" that are qualified by the expression "[s]ous reserve du paragraphe 2." This reading is also consistent with the unqualified terms of Article 60(1) itself.

25. Further, the expression "the provisions of paragraph 2" encompasses all three scenarios foreseen in that paragraph, namely that the person has "waived his or her right to be present", "fled", or "cannot be found." According to the Pre-Trial Chambers, the former two scenarios require an initial appearance.[36] It would be incongruous to assert that the reference to "paragraph 2" in article 61(1) creates an exception to the requirement of an initial appearance whereas two of the three scenarios included in that paragraph entail an initial appearance. This "surplusage"[37] of meaning shows a clear contradiction in the interpretation that the Statute allows an exception to the requirement of an initial appearance for the person who "cannot be found".

26. Moreover, Judge Trendafilova herself expressed caution about whether her textual interpretation of Article 61(2)(b) was correct, describing her interpretation as "arguabl[e]" and that textual factors merely made it "logical to assume" that Article 61(2) has "an independent meaning" which overrides with the requirement of an initial appearance.[38] On the basis of these doubts, she then purported to resort to "the apparent intention of the drafters of the Statute," opining that it was "unlikely that the drafters introduced comprehensive provisions for a confirmation hearing *in absentia* only for the singular scenario in which a person flees or cannot be found after the initial appearance."[39] Nevertheless, having apparently conceded that the "ordinary meaning" of the text was not sufficient in itself to support her interpretation, Judge Trendafilova then failed to cite to any of the drafting history to substantiate her speculation about

---

phrase") "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 version of this provision would support this interpretation".

[35] Emphasis added.

[36] November Decision, paras 27 "in the first case, the suspect is before the Court and chooses to waive his or her right to be present at the confirmation hearing", 29 "where the suspect has fled, referring to a case where a person who was previously accessible to the Court absconded"; quoted in Impugned Decision, para. 32.

[37] *Ongwen* Trial Judgment, para. 2722.

[38] Trendafilova, Fairness and expeditiousness in the ICC's pre-trial proceedings, p. 453.

[39] *Id.*

what had been "unlikely". On the contrary, and as discussed below, nothing in the drafting history supports this interpretation.[40]

27. Ultimately, Judge Trendafilova's approach rather highlights the manifest insufficiency of the Pre-Trial Chamber's reasoning. The "ordinary meaning" of Article 61(2)(b), especially when interpreted in isolation from Article 60(1), plainly does not substantiate the Pre-Trial Chamber's conclusion that an initial appearance is not required before a confirmation hearing. Not even the Prosecution, in previous submissions, has considered the interpretation of the provision to be free from doubt.[41] Indeed, to the contrary, numerous eminent commentators have adopted the view that Article 61(2)(b) creates no exception to the requirement of an initial appearance prescribed in Article 60(1).[42]

28. A further indication that Article 61(2)(b) must be read consistently with Article 60(1) is Rule 123 (1), which requires a Pre-Trial Chamber to "ensure that the person [i.e. the suspect] is notified of the provisions of Article 61, paragraph 2." This is an obligation of result, not of reasonable efforts. The only opportunity that a Pre-Trial Chamber would have to "ensure" the communication of this information is in context of the initial appearance prescribed by Article 60(1). This provision would be violated by adopting an interpretation of Article 61(2)(b) that

[40] *See* below, paras 32-40.

[41] *Gaddafi & Senussi* Prosecution Response to the Defence Request for the commencement of the pre-confirmation phrase, para. 28 "The Debate among commentators with respect to the possibility of holding confirmation hearings without the suspect's prior surrender is irrelevant to this case. Even assuming that the statutory framework permits such a possibility, a contextual reading of the relevant provisions indicates that it would only be possible in the second scenario under article 61(2)(b), namely, if the person could not be located […] Commentators differ with respect to the possibility holding a confirmation of charges without prior surrender and first appearance."

[42] C. Safferling, *International Criminal Procedure*, Oxford, 2012, p. 323 "The wording of these provisions does not clarify whether the holding of the confirmation hearing *in absentia* is possible only if the person concerned has at some stage been in the custody of the Court or whether it is also applicable where that person has never been in touch with the Court. It is suggested that the former is correct. Three grounds support this view. First, as expressed in Art. 63 ICCSt the Rome State is based on the presumptions that there will be no trial *in absentia*. The ICC furthermore depends heavily on the presence of the suspect, as illustrated by Arts 58-60 ICCSt, which demonstrate that the initial proceedings before the Court also require the presence of the person concerned. Second, it is unclear what should be achieved by holding a confirmation hearing in the absence of the person concerned. Whereas at the ICTY the Rule 61 procedure leads to an international arrest warrant, this is not the case at the ICC, even if the Art. 61(2) ICCSt Procedure is often compared to the Rule 61 RPE ICTY Procedure. Third, should the person concerned be transferred to The Hague after the confirmation of the charges, a new confirmation hearing must be held. Not to do so would be unfair, since the person concerned would not have had a chance to raise objections to the charges at the confirmation stage"; M. Marchesiello, "Proceedings before the Pre-Trial Chamber" in A. Cassese (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1244 "The conditions under (a) and (b) [of article 61(2)] both seem to presuppose the initial appearance of the person before the PTC, under article 60. A hearing in the absence of the person charged may therefore be held only if, after the first appearance, he or she has waived his or her right to be present, has fled, or cannot be found."; A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford, 2009, p. 359 "The hearing **will** take place after the surrender of the suspect or his or her appearance before the Court (Art. 61(1) ICCSt.). It **may** be held without the suspect being present if all reasonable steps for the arrest of the suspect have been taken or the suspect has waived his or her right to be present (Art. 61(2) ICCSt.)." (emphasis added).

permits *in absentia* proceedings without such a notification having taken place. Conspicuously, this obligation is not relieved or modified by Rule 126, concerning "Confirmation hearings in the absence of the person concerned": that rule qualifies "*mutatis mutandis*" only Rules 121 and 122, not Rule 123.[43] Accordingly, like Article 60(1), Rule 123 is an independent obligation that must be applied and cannot be contradicted or negated by a particular interpretation of Article 61(2)(b).

29. An additional contextual indication weighing against the Pre-Trial Chamber's interpretation of Article 61(2)(b) is the absence of any statutory criteria for permitting a procedure that, even according to the Pre-Trial Chambers, is "exceptional."[44] How are the Judges of this Court meant to decide whether an *in absentia* proceeding should be held against Joseph Kony, but not against, for example, Vladimir Putin or Benjamin Netanyahu? The danger is not merely that the Court will be drawn into highly subjective judgments that will provoke serious controversy, but that there are absolutely no statutory criteria by which such assessments are to be made. The magnitude and danger of the controversy increases with the number of unexecuted arrest warrants, and the Prosecution's apparent ambition to use the confirmation hearings as an opportunity to hear as many as twelve witnesses – apparently, turning the confirmation hearing into a mini-trial.[45] In addition, thousands of victims may be enrolled to "participate" in these confirmation hearings, requiring substantial logistical efforts and raising expectations that are likely to be disappointed.[46] If the expression "or cannot be found" in Article 61(2)(b) were meant to open the door to such a universe of proceedings before the Court, it is inconceivable that there would be no statutory criteria guiding and constraining the exceptional circumstances in which such proceedings could be justified.

30. Finally, the Pre-Trial Chamber's interpretation of Article 61(2)(b) produces manifestly absurd results.[47] According to the Pre-Trial Chambers, an *in absentia* hearing without an initial

[43] 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".
[44] November Decision, para. 37; Impugned Decision, para. 23.
[45] Prosecution's Observations on the conduct of the confirmation proceedings in absentia and Requests for the adoption of certain protocols and an in situ hearing in Uganda, ICC-02/04-01/05-490, 28 March 2024, para. 15; Decision Setting the Disclosure Regime, ICC-02/04-01/05-537, 12 December 2024, para. 10.
[46] *Prosecutor v. Katanga*, Confirmation of Charges Hearing Transcript, ICC-01/04-01/07-T-46-ENG, 11 July 2008, p. 17, lns 9-22, where the representative of the Office of Public Counsel for Victims noted, "For the victims, the presence of the suspect… is an essential point in the procedures, because the proceedings are very far away already from where the events took place… for the victims in the proceedings and in view of the role of the proceedings for the community and for the appearance of justice being done and for justice to be understood, the presence of a person in judicial settings is just as important as the justice itself and the law applied."
[47] *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, para. 36 "Adopting

appearance can be held only in respect of a person whose whereabouts are unknown, but not in respect of a person who has "fled" and openly announces their whereabouts in a country that refuses to hand them over to the Court.[48] Thus, a person who has never appeared for reasons unknown could be subjected to a confirmation hearing, whereas a person who perfectly knowingly flouts the Court's jurisdiction could not. There is no need to resort to drafting history to recognise this as a manifestly absurd result that can be avoided simply by interpreting Article 61(2)(b) in conformity with Article 60(1). The outcome of that interpretation would be that any person who does not re-appear after their initial appearance, regardless of whether they flee or cannot be found, would be subject to confirmation hearings in their absence. Such comprehensive treatment eliminates the anomalous outcome entailed by the Pre-Trial Chamber's approach and promotes equality before the law between different suspects.

31. The Pre-Trial Chamber erred in law by failing to reconcile the wording of Article 61(2)(b) with the wording of Article 60(1), so that full effect was given to the text of each provision. Instead, it interpreted Article 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 that will damage the integrity and legitimacy of the Court. This conclusion was also an error of law. Either way, the appropriate remedy is to either remand the matter to the Pre-Trial Chamber with instructions to conduct a full and proper statutory interpretation, or to declare that Article 60(1) applies to all "persons" subject to a confirmation hearing, regardless of whether they have "fled or cannot be found."

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

such an interpretation, however, would amount to an absurd conclusion, because it excludes an examination of the other jurisdictional requirements".

[48] Impugned 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 reasons unrelated to the identification of the suspect's location, for instance due to lack of cooperation from relevant States." *See* also, November Decision, para. 32 "The concept of 'cannot be found' in article 61(2)(b) of the Statute 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 reasons unrelated to the identification of the suspect's location, for instance due to lack of cooperation from relevant States. The Court relies on State cooperation to identify the whereabouts of the suspect with the aim to secure his or her apprehension and there are specific procedures in the Statute to address any non-cooperation in this regard."

32. Pursuant to Article 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* present a supplementary method of interpretation, to which recourse is only necessary where "the general rule of interpretation contained in Article 31 of the VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."[49] The Defence asserts that grounds 1 and 2 are, in themselves, sufficient to demonstrate that the Pre-Trial Chamber (and Pre-Trial Chamber II before it) committed errors of law that require reversal of the Impugned Decision.

33. Nevertheless, additional reference is made here to the drafting history of the Statute and the rules, to show that no such manifestly absurd or de-contextualised interpretation of Article 61(2)(b) is discernible in the relevant drafting history, and that the Pre-Trial Chamber's interpretation finds no basis in the intent of the drafters.

34. Article 61 was first included in a proposal advanced by 13 states in April 1998, which reads:

> **Article 54**
> **Confirmation of the charges before trial**
>
> 1. Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel [, unless –
>
> (a) the person has waived his right to be present; or
>
> (b) the person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held, in which case the person shall not be represented by counsel].[50]

35. The Working Group on Procedural Matters considered the provision, amongst others, on 14 and 15 July 1998 and transferred the following text to the Committee of the Whole:

> **Article 61**
> **Confirmation of the charges before trial**
>
> 1. Subject to the provisions of paragraph 1 bis within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial

[49] Impugned Decision, para. 34.
[50] Preparatory Committee on the Establishment of an International Criminal Court, 16 March-3 April 1998, Working Group on Procedural Matters, Proposal submitted by the delegations of Argentina, Australia, Japan, Lesotho, Malawi, Mexico, the Netherlands, New Zealand, Norway, the Republic of Korea, Singapore, South Africa, Sweden, A/AC.249/1998/WG.4/DP.40, 1 April 1998, p. 5. This text was repeated verbatim as article 61 in the "Further option for article 58-61" document included in the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, A/CONF.183/2/Add.1, 14 April 1998, pp. 93, 96–97.

> Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel.
>
> 1 bis. When:
>
> (a) The person has waived his right to be present; or
>
> (b) The person has fled or cannot be found and all reasonable steps have been made to secure his or her appearance before the Court and to inform the person of the proposed charges and that a hearing to confirm those charges will be held, the Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the accused to confirm the charges on which the Prosecutor intends to seek trial. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.[51]

36. As can be seen, the provisions are identical, with the exception that "unless" at the end of the previous draft became "subject to" at the start of the new draft when one provision became two. None of the first-hand accounts of the drafting process in the literature describe any discussion leading to the intention behind this change.[52] Nor do the reports of the Committee of the Whole or the Working Group on Procedural Matters[53] indicate that the wording ultimately adopted, whereby "subject to" appears in the first sentence, was intended to reach a different result than what the drafters had clearly considered throughout the drafting process that Article 61(2) provides an exception to the rule that the confirmation hearing shall be held in the presence of the accused, not to the requirement of an initial appearance. The inference is that this change was nothing more than an elegant drafting means of replacing the word "unless," at the end of the previous version, when one provision became two separate provisions.

37. The Drafting Committee proposed the following text on 16 July 1998:

Article 61

---

[51] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Documents of the Committee of the Whole, Extract from Volume III of the Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Reports and other documents), Document A/CONF.183/C.1/WGPM/L.2, p. 283.

[52] H. Friman, "Investigation and Prosecution" in R.S. Lee, *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 528 ("Friman, Investigation and Prosecution"); W. Schabas et al., "Article 61: confirmation of charges before trial" in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos Verlagsgesellschaft, 2016, pp. 1494-1495.

[53] The Working Group considered "the remaining articles of parts 5, 6 and 8" of the Statute on 14 and 15 July 1998 and following that meeting, transmitted, *inter alia*, the draft article 61, paragraphs 1 and 1 bis, to the Committee of the Whole, *see* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Documents of the Committee of the Whole, Extract from Volume III of the Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Reports and other documents), Document A/CONF.183/C.1/WGPM/L.2, p. 283.

Confirmation of the charges before trial

> 1. The Pre-Trial Chamber shall, within a reasonable time after the person's surrender or voluntary appearance before the Court, hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. Subject to the provisions of paragraph 2, the hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.[54]

The next day, the text for Article 61 was finalised, which is almost identical to the text in the Statute as adopted, but without parentheses around "within a reasonable time after the person's surrender or voluntary appearance before the Court".[55] Professor Bassiouni, who chaired the Drafting Committee, noted in his comprehensive account of the legislative history of the Statute that Article 61(2) provides an exception to the principle in Article 61(1) that the confirmation hearing be held in the presence of the person charged,[56] *i.e.* not to the rule that confirmation takes place after initial appearance.

38. Observers' accounts of the drafting history of the Rome Statute framework further note that "Article 61 was discussed extensively within the context of the drafting of the RPE, based upon proposals submitted by Australia and France."[57] The French proposal for what became Rule 122 included this wording:

> **Rule 62.1. Measures taken to ensure the presence of the person concerned at the hearing on confirmation of charges**
> (a) *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,[1] the person has fled or cannot be found, the Pre-Trial Chamber may hold consultations with the Prosecutor, at the request of the latter or on its own initiative, in order

[54] Draft Statute for the International Criminal Court, Part 5: Investigation and Prosecution, A/CONF.183/C.l/L.76/Add.5, 16 July 1998, pp. 9-10 ("Draft Statute for the International Criminal Court").
[55] Draft Statute for the International Criminal Court:
> "Article 61
> Paragraph 1 should read as follows:
> Confirmation of the charges before trial
> 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."

[56] M.C. Bassiouni, *Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text (3 vols)*, Brill, 2005, p. 169 "The Pre-Trial Chamber must hold hearings to confirm charges in the presence of the person charged [Article 61(1)]. If the circumstances warrant, the charges can be confirmed in the absence of the accused [Article 61(2)]" (square brackets in original).
[57] W. Schabas et al., "Article 61: confirmation of charges before trial" in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos Verlagsgesellschaft, 2016, pp. 1762-1763. *See* also Friman, Investigation and Prosecution, p. 523 "Rules 121 and 122 on proceedings before and at the confirmation hearing were developed during discussions at several meetings and are based upon the very detailed French proposals."

> to determine whether there is cause to hold a hearing on confirmation of charges under the conditions set forth in Article 61, paragraph 2. […][58]

39. This shows that, in the minds of the drafters, there was a clear distinction to be drawn between a situation where a person "has never appeared" before the Court, and one where they "have fled or cannot be found". The former phrase was ultimately not adopted in the text of the rule. The latter phrase, which is found in Article 61(2)(b), was intrinsically linked to the person who has already been surrendered or made a voluntary appearance before the Court. The Pre-Trial Chamber therefore erred when it concluded that "cannot be found" is synonymous with "has never been available".

40. Nevertheless, the Pre-Trial Chamber held that:

> In any event, the fact that the proposals emphasised by the Defence have not ultimately been retained in the adopted version of the Statute means that they do not determinatively establish the interpretation of article 61(2)(b) of the Statute put forward by the Defence. Had that interpretation been preferred by the drafters, one of the proposals explicitly requiring a first appearance to take place in relation to a confirmation of charges procedure *in absentia* would have been inserted in the final draft of the Statute.[59]

Demonstrably, the drafters considered and ultimately chose to exclude, the term "has never appeared before the Pre-Trial Chamber" as an alternative to situations where they had "fled or cannot be found". As the Appeals Chamber noted in an analogous situation, where a specific suggestion was turned down by the drafters, "[t]he dismissal of the suggestion rules out any possibility that the content of [the provision] was anything other than deliberate."[60]

IV. CONCLUSION AND RELIEF REQUESTED

41. Expansive interpretations of this Court's statutory instruments are not always the most effective or legitimate means of furthering the fight against impunity that is the ultimate objective of the Rome Statute. That fight can also be furthered by careful adherence to the limits on the Court's powers arising from a holistic and contextual interpretation of various relevant provisions. Although the result may be that a proposed procedure is not permitted, adhering scrupulously to the terms of the Rome Statute enhances the confidence of States that this Court will only wield the authority that has been conferred upon it.

---

[58] Preparatory Commission for the International Criminal Court, Proposal by France concerning the Rules of Procedure and Evidence, PCNICC/1999/DP.8/Add.2/Rev.1, 29 June 1999, p. 1 (emphasis added).
[59] Impugned Decision, para. 34.
[60] Situation in the DRC Judgment on Review of Leave to Appeal, para. 40.

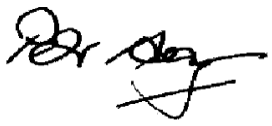
42. The Pre-Trial Chamber erred in its interpretation of Article 61(2)(b). It did so by proceeding to interpret that provision without adequate regard to Article 60(1) and other provisions of the Statute which make clear that proceedings at this Court are commenced by an initial appearance, which entails important safeguards for a suspect. By interpreting Article 61(2)(b) in isolation from Article 60(1), and then concluding that the latter must be limited and curtailed by the former, the Pre-Trial Chamber erred in its approach to statutory interpretation and adopted an erroneous interpretation. On this basis, the Defence requests the Appeals Chamber to:

REVERSE the Impugned Decision; and

REMAND the matter to the Pre-Trial Chamber for further deliberations in accordance with the instructions of the Appeals Chamber; or alternatively,

FIND that Article 60(1) requires the initial appearance of a suspect prior to holding a confirmation hearing, including pursuant to Article 61(2).

The whole respectfully submitted



Peter Haynes, KC
Counsel for Joseph Kony

Dated this 7 February 2025
At The Hague, Netherlands