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

Date: 3 June 2025

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF THE PROSECUTOR v. JOSEPH KONY

Public document

Judgment

**on the appeal of Mr Joseph Kony against the decision of Pre-Trial Chamber III
of 29 October 2024 entitled “Decision on the criteria for holding confirmation of
charges proceedings *in absentia*”**

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

☒ **The Office of the Prosecutor**

☒ **Counsel for the Defence**

☒ **Legal Representatives of the Victims**

☐ **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 Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations
Section**

☐ **Other**

The Appeals Chamber of the International Criminal Court,

In the appeal of the Defence for Mr Joseph Kony against the decision of Pre-Trial Chamber III entitled “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”, of 29 October 2024 (ICC-02/04-01/05-532),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Pre-Trial Chamber III entitled “Decision on the criteria for holding confirmation of charges proceedings *in absentia*” is confirmed.

REASONS

I. KEY FINDINGS

1. The Appeals Chamber finds that what is decisive in terms of the application of article 61(2)(b) of the Statute, providing for *in absentia* confirmations of charges, is that at the time of the confirmation hearing, the person has fled or cannot be found despite all reasonable steps having been taken to secure his or her appearance. The reasons as to why the person either fled or cannot be found are not material. Distinctions based on reasons for non-availability are beyond the ordinary meaning to be given to the terms used in article 61(2)(b) of the Statute.

2. Based on the ordinary meaning alone, it cannot be read into the phrase “cannot be found” that they only concern persons who have “*never* been accessible” to the Court. Similarly, the phrase “cannot be found” does not only concern persons who have not had an initial appearance. Rather, it applies to persons regardless of whether they have had an initial appearance.

3. The Appeals Chamber finds that, read in context, article 61(2)(b) does not require the suspect’s initial appearance prior to proceeding to the confirmation of charges *in absentia* and that this interpretation is consistent with the object and purpose of the Statute.

II. INTRODUCTION

4. This judgment is with respect to the appeal of the Defence for Mr Joseph Kony against the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”, rendered on 29 October 2024 (hereinafter: “Impugned Decision”), in which Pre-Trial Chamber III (hereinafter: “Pre-Trial Chamber”) found that all the requirements set forth in article 61(2)(b) of the Statute were met, decided to hold the confirmation of charges hearing in Mr Joseph Kony’s (hereinafter: “Mr Kony”) absence, and instructed the Registry to undertake notification and outreach activities once a new date for the confirmation of charges hearing is set.¹

5. In particular, the Pre-Trial Chamber found in the Impugned Decision that in respect of persons, such as Mr Kony, who “cannot be found”, a confirmation of charges *in absentia* pursuant to article 61(2)(b) of the Statute may be conducted in circumstances in which the person was not present at the “initial appearance” provided for in article 60(1) of the Statute.²

6. The Defence was granted leave to appeal the Impugned Decision on the following issue: “[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) [of the Statute]”.³

7. In its appeal brief, the Defence argues that: (i) the Pre-Trial Chamber adopted an interpretation that contradicts the express requirement of “initial proceedings before the Court” in article 60(1) of the Statute (first ground of appeal);⁴ (ii) the Pre-Trial Chamber adopted an interpretation that is unsupported by the ordinary meaning of the terms of article 61(2)(b) of the Statute (second ground of appeal);⁵ and (iii) nothing in the available drafting history (which was in any event deemed irrelevant by the Pre-Trial Chamber) otherwise confirms the Pre-Trial Chamber’s erroneous interpretation (third ground of appeal).⁶ The Defence submits that the

¹ [Decision on the criteria for holding confirmation of charges proceedings *in absentia*](#), ICC-02/04-01/05-532, p. 46.

² [Impugned Decision](#), paras 95-96, p. 46.

³ [Appeal Brief](#), para. 1.

⁴ [Appeal Brief](#), p. 8.

⁵ [Appeal Brief](#), p. 10.

⁶ [Appeal Brief](#), p. 16.

first and the second grounds of appeal are “inter-dependent and collectively sufficient to demonstrate reversible error”.⁷

8. The Defence requests the Appeals Chamber 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 60(1) of the Statute are compatible with, and apply alongside, the modalities set out in article 61(2)(b) of the Statute, thereby finding that an initial appearance is a pre-requisite to the holding of a confirmation hearing.⁸

III. PROCEDURAL HISTORY

9. On 23 November 2023, Pre-Trial Chamber II issued a decision on the Prosecutor’s request to hold a confirmation of charges hearing *in absentia* (hereinafter: “First Decision”).⁹

10. On 4 March 2024, Pre-Trial Chamber II issued a second decision in which it decided to hold the confirmation of charges hearing on 15 October 2024 *in absentia* (hereinafter: “Second Decision”).¹⁰

11. On 21 June 2024, the Registry appointed Defence counsel for Mr Kony (hereinafter: “Defence”).¹¹

12. On 29 October 2024, the Pre-Trial Chamber issued the Impugned Decision, in which it decided that Mr Kony qualifies as a person who “cannot be found” and that in respect to such persons, an initial appearance is not a requirement to hold a confirmation of charges hearing *in absentia* pursuant to article 61(2)(b) of the Statute.¹²

⁷ [Appeal Brief](#), para. 13.

⁸ [Appeal Brief](#), para. 6.

⁹ [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.

¹⁰ [Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence](#), ICC-02/04-01/05-481.

¹¹ [Notification of the Appointment](#), ICC-02/04-01/05-503, with Confidential Annex II and Public Annexes I, III and IV.

¹² [Impugned Decision](#), paras 95-96, p. 46.

13. On 4 November 2024, the Defence requested leave to appeal the Impugned Decision on three proposed issues.¹³

14. On 8 November 2024, the Prosecutor and the Office of Public Counsel for Victims (hereinafter: “OPCV”) filed their respective responses to the Defence’s request for leave to appeal.¹⁴

15. On 28 January 2025, the Pre-Trial Chamber issued a decision, by majority, granting the Defence’s request for leave to appeal regarding one of the proposed issues, namely, whether an initial appearance by the person charged is required pursuant to article 60(1) of the Statute before a confirmation of charges hearing can be held *in absentia* under article 61(2)(b) of the Statute.¹⁵

16. On 7 February 2025, the Defence filed its appeal brief against the Impugned Decision (hereinafter: “Appeal Brief”), raising three grounds of appeal.¹⁶

17. On 20 February 2025, the OPCV¹⁷ and the Prosecutor¹⁸ filed their respective responses to the Appeal Brief.

¹³ [Kony Defence request for leave to appeal “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#), ICC-02/04-01/05-533. The Defence requested leave to appeal the following three issues: “Issue 1: Whether the Pre-Trial Chamber erred in reviewing prior Pre-Trial Chamber II decisions without having articulated a standard of review or providing notice to the parties, in a procedure which shifted the burden of proof to the Defence”, *see* page 8; “Issue 2: 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)”, *see* page 12; “Issue 3: Whether the Pre-Trial Chamber failed properly to exercise its discretion by failing to address relevant factors impacting on the utility of *in absentia* confirmation proceedings in the circumstances”, *see* page 17.

¹⁴ [Prosecution’s Response to the Defence Request for Leave to Appeal the Decision on the criteria for holding confirmation of charges proceedings *in absentia*](#), ICC-02/04-01/05-534; [Victims’ Response to the “Kony Defence request for leave to appeal ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’”](#), ICC-02/04-01/05-535.

¹⁵ [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.

¹⁶ [Defence Appeal brief against Pre-Trial Chamber III’s “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#), ICC-02/04-01/05-557.

¹⁷ [Victims’ Response to the “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’” \(No. ICC-02/04-01/05-557\)](#), ICC-02/04-01/05-565 (hereinafter: “OPCV Response”).

¹⁸ [Prosecution response to “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’”](#), ICC-02/04-01/05-566 (hereinafter: “Prosecutor’s Response”).

18. On 24 February 2025, the Defence filed a request for leave to reply in respect of five discrete issues arising from the Prosecutor’s response to the Appeal Brief (hereinafter: “Request for Leave to Reply”).¹⁹

19. On 26 February 2025, the Prosecutor filed his response to the Request for Leave to Reply.²⁰

20. On 19 March 2025, the Appeals Chamber appointed Judge Erdenebalsuren Damdin as the Presiding Judge in the present appeal.²¹

21. On 3 April 2025, following the Appeals Chamber’s decision on the Request for Leave to Reply,²² the Defence filed its reply (hereinafter: “Defence’s Reply”).²³

IV. STANDARD OF REVIEW

22. In the present appeal, the Defence alleges an error of law. Regarding errors of law, the Appeals Chamber has previously held that it

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.²⁴

23. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.²⁵ A decision is

¹⁹ [Request for Leave to Reply](#), ICC-02/04-01/05-569.

²⁰ [Prosecution response to the “Request for Leave to Reply” in support of the Defence appeal](#), ICC-02/04-01/05-570.

²¹ [Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Defence for Mr Joseph Kony against the decision of Pre-Trial Chamber III entitled “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#), ICC-02/04-01/05-576.

²² [Decision on the Defence’s request for leave to reply](#), 26 March 2025, ICC-02/04-01/05-578.

²³ [Kony Defence Reply to Prosecution response to “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’” \(ICC-02/04-01/05-566\)](#), ICC-02/04-01/05-582. A corrected version was filed on 4 April 2025 ([Corrigendum to “Kony Defence Reply to Prosecution response to ‘Defence Appeal brief against Pre-Trial Chamber III’s “Decision on the criteria for holding confirmation of charges proceedings *in absentia*’” \(ICC-02/04-01/05-566\)”](#), ICC-02/04-01/05-582, ICC-02/04-01/05-582-Corr).

²⁴ *Situation in the Republic of the Philippines*, [Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation”](#), 18 July 2023, ICC-01/21-77 (OA), para. 35 and references therein.

²⁵ *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Trial Chamber I of 17 February 2023 entitled “Decision on the admissibility of video \(DAR-OTP-0216-0119\) and records of telephone calls \(DAR-OTP-0216-0127, DAR-OTP-0216-0128\)”](#), 28 June 2023, ICC-02/05-01/20-982 (OA12) (hereinafter: “*Abd-Al-Rahman OA12 Judgment*”), para. 21, fn. 27 and references therein.

“materially 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”.²⁶

24. Finally, the Appeals Chamber recalls that the appellant is obliged to set out all the alleged errors in the appeal brief and “indicate, with sufficient precision, how [the] alleged error would have materially affected the impugned decision”.²⁷

25. The above standard of review will guide the analysis of the Appeals Chamber.

V. MERITS

26. In the interests of clarity and a proper determination of the appeal, the Appeals Chamber will at the outset address the Defence’s arguments concerning the ordinary meaning of the terms of article 61(2)(b) of the Statute, raised under the second ground of appeal, followed by those arguments addressing the context of the provision, as well as its object and purpose, raised under the first and second grounds of appeal. Subsequently, the Appeals Chamber will address the third ground of appeal.

A. Second ground of appeal: arguments concerning the ordinary meaning of the relevant terms

(a) Relevant parts of the Impugned Decision

27. In the Impugned Decision, the Pre-Trial Chamber found that:

As regards the textual argument, weight should be assigned to the use in article 61(2)(b) of the Statute of the term ‘or’, a conjunction used to link situations, items or sets of circumstances which are typically alternative to, and hence different from, each other. The Chamber finds that the use of this conjunction requires the provision to be construed in such a way so as to clearly differentiate between the two situations set out therein. Article 61(2)(b) of the Statute ‘covers two different and independent situations: one where the suspect has fled, referring to a case where a person who was previously accessible to the Court absconded, and a second where the suspect cannot be found and he or she “has never been accessible”’. Accordingly, [...] Pre-Trial Chamber II 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, whereas the references to the jurisprudence of the Special Tribunal for Lebanon [...] served as a comparison rather than the sole basis for its interpretation.²⁸

²⁶ [Abd-Al-Rahman OA12 Judgment](#), para. 21, fn. 28 and references therein.

²⁷ [Abd-Al-Rahman OA12 Judgment](#), para. 23 and references therein.

²⁸ [Impugned Decision](#), para. 32 (footnotes omitted).

28. In this respect, the Pre-Trial Chamber reiterated Pre-Trial Chamber II’s finding that article 61(2)(b) of the Statute addresses “two different and independent situations”, namely: (i) where the suspect, previously accessible to the Court, has fled, and (ii) where the suspect cannot be found and “has never been accessible”.²⁹ In particular, Pre-Trial Chamber II underlined that, in situations where the person “fled”, the initial appearance will usually have taken place, given the short time window between the arrest and the appearance.³⁰ In contrast, when a suspect “cannot be found”, the person concerned was never available to the Court.³¹ Therefore, in the latter scenario, the initial appearance is not required to hold a confirmation hearing pursuant to article 61(2)(b) of the Statute.³² In the opinion of Pre-Trial Chamber II, should an initial appearance be required both when the suspect “fled” and when that person “cannot be found”, these scenarios would no longer constitute separate and distinctive alternatives.³³

29. In its conclusion,³⁴ the Pre-Trial Chamber stated:

The Chamber, as a matter of law, finds 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.³⁵

(b) Summary of the submissions

30. The Defence argues that the Pre-Trial Chamber adopted an interpretation of the phrase “cannot be found” driven by its understanding of the need to distinguish it from its notion of “fled”.³⁶ The Defence submits that, in requiring such a distinction, the Pre-Trial Chamber was

²⁹ [First Decision](#), para. 29.

³⁰ [First Decision](#), para. 30.

³¹ [First Decision](#), para. 30.

³² [First Decision](#), para. 30.

³³ [First Decision](#), para. 30.

³⁴ [Impugned Decision](#), p. 41.

³⁵ [Impugned Decision](#), para. 96 (footnotes omitted), referring to [First Decision](#), paras 29-32.

³⁶ [Appeal Brief](#), para. 11.

guided by the purported “ordinary meaning” of the term “or” in article 61(2)(b) of the Statute, which the Defence finds “undoubtedly correct”.³⁷

31. The Defence argues that the Pre-Trial Chamber erred in finding that the only way to distinguish “fled” from “cannot be found”, maintaining them as two separate and distinctive alternatives, is to interpret the latter as not being subject to the requirement of “initial proceedings” under article 60(1) of the Statute.³⁸ Instead, the distinction should be construed by defining the term “fled” as applicable to someone “who wilfully refuses to re-appear before the Court after an initial appearance” and “cannot be found” to someone “whose failure to re-appear before the Court may arise from reasons outside of their control or knowledge”.³⁹

32. The Prosecutor submits that rather than contesting that the interpretation of article 61(2)(b) of the Statute made by the Pre-Trial Chamber falls within the ordinary meaning of the terms used, the Defence “offers a competing, alternative interpretation [...] which it considers preferable”.⁴⁰ The Prosecutor argues that the initial appearance is not required in respect of *in absentia* confirmations of charges under article 61(2) of the Statute,⁴¹ what is decisive for purposes of that requirement is whether or not the person is available to the Court.⁴² He submits that, “while the scope of those who might be subject to confirmation *in absentia* may include persons who have made their initial appearance [...], critically it is not limited to them [...]”.⁴³

33. The OPCV submits that the ordinary meaning of article 61(2)(b) of the Statute is “without any ambiguity”.⁴⁴ The OPCV argues that pursuant to article 60(1) of the Statute, the initial proceedings are solely focused on situations where the person concerned is “*actually present*” before the Court.⁴⁵ The OPCV contends that a person who “cannot be found” is a person who has never made an “appearance” within the meaning of article 60 of the Statute.⁴⁶

³⁷ [Appeal Brief](#), paras 4, 12.

³⁸ [Appeal Brief](#), paras 3-4.

³⁹ [Appeal Brief](#), paras 5, 18.

⁴⁰ [Prosecutor’s Response](#), para. 14.

⁴¹ [Prosecutor’s Response](#), paras 22-23, 32.

⁴² [Prosecutor’s Response](#), para. 21.

⁴³ [Prosecutor’s Response](#), para. 23.

⁴⁴ [OPCV Response](#), para. 27.

⁴⁵ [OPCV Response](#), para. 20 (emphasis in original).

⁴⁶ [OPCV Response](#), para. 20.

(c) Determination by the Appeals Chamber

34. Article 60(1) of the Statute, regulating the “[i]nitial proceedings before the Court” provides, in its relevant part, that:

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.

35. Article 61 of the Statute, dealing with the “[c]onfirmation of the charges before trial”, provides, in its relevant part, that:

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.

36. The Appeals Chamber recalls at the outset that the interpretation of treaties, such as the Rome Statute, is governed by the Vienna Convention on the Law of Treaties (hereinafter: “VCLT”), specifically by the provisions of articles 31 and 32 thereof. Pursuant to article 31(1) of the VCLT, “[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”. In this respect, the early jurisprudence of the Appeals Chamber sets out that a section of the law shall be interpreted in accordance with:

[I]ts wording read in context and in light of its object and purpose. The 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. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes

from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.⁴⁷

(i) *Interpretation of the word “or” in the phrase “fled or cannot be found” in article 61(2)(b) of the Statute*

37. The Appeals Chamber notes that a central element in the Pre-Trial Chamber’s interpretation of articles 60 and 61(1) and (2) of the Statute lies in its understanding of the term “or” in the phrase “fled or cannot be found”. In the Impugned Decision, the Pre-Trial Chamber referred to the ordinary meaning of the disjunctive term “or” which, in its view, is employed to connect situations, items or sets of circumstances that are typically alternative to, and hence different from, each other.⁴⁸ On this basis, the Pre-Trial Chamber interpreted the phrase “fled or cannot be found” as necessarily referring to two “different and independent situations”.⁴⁹

38. In order to differentiate these situations in a manner that makes them mutually exclusive, the Pre-Trial Chamber defined “fled” as referring to a person who “was previously accessible to the Court and absconded”,⁵⁰ as opposed to “cannot be found” as referring to a person who “has never been accessible” to the Court and whose precise whereabouts were and remain unknown.⁵¹ It followed, in line with this interpretation, that the holding of an initial appearance could not constitute a requirement for a person who has never been accessible to the Court.⁵² The Pre-Trial Chamber reasoned that “[a]ny other understanding would contravene the ordinary meaning to be given to the term ‘or’ in article 61(2)(b) of the Statute as understood in its context”.⁵³

39. The Defence submits that the Pre-Trial Chamber’s interpretation of the term “or” is “undoubtedly correct”.⁵⁴ Nonetheless, it emphasises that “fled” and “cannot be found” can be differentiated without relying on the initial appearance as a distinguishing criterion, which it

⁴⁷ *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*, 13 July 2006, ICC-01/04-168 (OA3) (hereinafter: “DRC OA3 Judgment”), para. 33 (footnotes omitted). *See also The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases*, 9 June 2008, ICC-01/04-01/07-573 (OA6), para. 5.

⁴⁸ *Impugned Decision*, paras 32, 34.

⁴⁹ *Impugned Decision*, paras 32, 96.

⁵⁰ *Impugned Decision*, paras 32, 96.

⁵¹ *Impugned Decision*, paras 32, 96.

⁵² *Impugned Decision*, para. 33.

⁵³ *Impugned Decision*, para. 34.

⁵⁴ *Appeal Brief*, para. 4.

contends is an error.⁵⁵ The Appeals Chamber considers that before examining the Pre-Trial Chamber's findings as to the basis for the distinction between the two scenarios, it is important to first analyse the nature of this distinction.

40. The Appeals Chamber notes in this regard that, while the Pre-Trial Chamber adopted the meaning of “or” allowing for distinguishing between two “different and independent situations”,⁵⁶ the word “or” may also have a related but distinct meaning.⁵⁷ The word “or” can also be used in an inclusive or weak sense to separate notions which are not entirely “different and independent” from each other. The Appeals Chamber notes that the Statute sometimes uses “or” with one of these two meanings and at other times with the other. For instance, article 84(2) of the Statute provides that in cases in which the Appeals Chamber receives a meritorious application for revision of a conviction or sentence, it may “(a) [r]econvene the original Trial Chamber; (b) [c]onstitute a new Trial Chamber; *or* (c) [r]etain jurisdiction over the matter” [emphasis added]. Here, the meaning is clearly that the Appeals Chamber may not retain jurisdiction, reconvene the original *and* create a new trial chamber with respect to the same matter. This is known as the “strong or exclusive” sense of the disjunction “or”, where the meaning is “at least one and at most one”.⁵⁸ This is the meaning adopted in the Impugned Decision.

41. By contrast, pursuant to article 81(1)(a) of the Statute, “[t]he Prosecutor may make an appeal on any of the following grounds: (i) [p]rocedural error, (ii) [e]rror of fact, *or* (iii) [e]rror of law” [emphasis added]. Here, the intent is that an appeal may for instance be made on grounds of an error of law, an error of fact, *or both*.⁵⁹ The scenarios referred to in this provision clearly do not exclude each other. In an inclusive disjunction, such as this, the statement is true if at least one of the conditions is true, or if both are true. The inclusive sense of the disjunction “or” is captured by the phrase “either, possibly both”.⁶⁰

⁵⁵ [Appeal Brief](#), paras 3-4, 18.

⁵⁶ [Impugned Decision](#), para. 96.

⁵⁷ See e.g. I. Copi *et al.*, ‘Introduction to Logic’, 15th ed., Routledge, New York (2019) (hereinafter: “Copi *et al.*”), p. 269.

⁵⁸ See Copi *et al.*, p. 269.

⁵⁹ Similarly, article 83(2) of the Statute stipulates that, “[i]f the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, *or* that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may [...] [r]everse or amend [...]” (emphasis added). The two scenarios referred to in this provision clearly do not exclude each other.

⁶⁰ See Copi *et al.*, p. 269.

42. The Appeals Chamber finds that the two meanings, inclusive and exclusive, properly fall within the ordinary meaning of the term “or” in article 61(2)(b) of the Statute. Taking this finding into consideration, the Appeals Chamber will now examine the Defence’s submissions and the Pre-Trial Chamber’s interpretation of article 61(2)(b) of the Statute.

(ii) Interpretation of the phrase “cannot be found” pursuant to article 61(2)(b) of the Statute

43. As noted above, the Defence submits that the distinction between “fled or cannot be found” can and should be based on the definitions of the terms themselves, rather than on the requirement of an initial appearance.⁶¹ According to the Defence, if there is an interpretation consistent with the requirement of an initial appearance in article 60(1) of the Statute, the Pre-Trial Chamber should have adopted it in order to ensure that article 61(2)(b) is read in the context of article 60(1) of the Statute instead of in isolation thereof.⁶²

44. The Defence contends that the relevant definitions should be construed as follows:

[t]he 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.⁶³

45. The Appeals Chamber notes that, contrary to the Defence’s contention,⁶⁴ what is decisive in terms of the application of article 61(2)(b) of the Statute is that at the time of the proposed hearing, the person has fled or cannot be found despite all reasonable steps having been taken to secure his or her appearance. The reasons as to why the person either fled or cannot be found are not material. In essence, the Defence’s interpretation places undue emphasis on the suspect’s reasons for non-availability, rather than the fact of unavailability. The Appeals Chamber considers the Defence’s proposed inclusion of a distinction based on reasons for non-availability is beyond the ordinary meaning to be given to the terms used in article 61(2)(b) of the Statute.

⁶¹ [Appeal Brief](#), paras 15, 22.

⁶² [Appeal Brief](#), paras 15, 22.

⁶³ [Appeal Brief](#), para. 18.

⁶⁴ [Appeal Brief](#), paras 14-15, 19, 22.

46. In contrast, the Impugned Decision defined “cannot be found” by reference to two factors: (i) that the precise whereabouts of the suspect were and remain unknown,⁶⁵ and (ii) that he or she “has never been accessible”.⁶⁶ Of relevance to the issue before the Appeals Chamber is the second factor. The Appeals Chamber finds no basis for this factor in the ordinary meaning of the terms. The Statute uses the phrase “cannot be found” in the present tense and thus refers to the person’s status at the time of the envisaged confirmation hearing. The provision does not require evaluating whether the person was ever accessible to the Court previously.

47. To reflect its interpretation of the exclusive “or”, the Pre-Trial Chamber defined “fled” as referring to a person previously accessible to the Court who absconded,⁶⁷ as opposed to “cannot be found”, which it interpreted to refer to a person who “has never been accessible” to the Court and whose precise whereabouts are unknown.⁶⁸ However, as noted above, this is not the only possible reading of the term “or”. A person may qualify as someone who both fled and cannot be found without incurring contradictions. The Appeals Chamber notes that there is nothing intrinsic to the terms “fled or cannot be found” that makes them mutually exclusive.

48. In light of the foregoing, the Appeals Chamber finds that, to the extent that the Pre-Trial Chamber based these findings on the ordinary meaning of the relevant terms, it erred by considering that the situation in which someone “cannot be found” only concerns a person who “has never been accessible” to the Court and who was thus unavailable for an initial appearance.⁶⁹ In the view of the Appeals Chamber, the ordinary meaning of “cannot be found” does not support such an interpretation.

49. As noted above, in relation to errors of law, the Appeals Chamber will reach its own conclusions as to the appropriate law and determine whether the first-instance chamber misinterpreted the law. Pursuant to article 83(2) of the Statute, the Appeals Chamber may amend or reverse a decision only if it finds that the error of law materially affected the outcome, meaning that 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”.⁷⁰ The Appeals Chamber

⁶⁵ [Impugned Decision](#), para. 96; *see also* [First Decision](#), para. 31.

⁶⁶ [Impugned Decision](#), para. 32.

⁶⁷ [Impugned Decision](#), para. 32.

⁶⁸ [Impugned Decision](#), para. 32 (emphasis added).

⁶⁹ [Impugned Decision](#), paras 32, 96.

⁷⁰ [Abd-Al-Rahman OA12 Judgment](#), para. 21, fn. 28 and references therein.

finds that the Impugned Decision would not have been substantially different if the Pre-Trial Chamber had not erred in this regard. Indeed, the Pre-Trial Chamber determined that “Mr Kony, whose whereabouts remain *currently* unknown [...], qualifies as a person who ‘cannot be found’”.⁷¹ In reaching this conclusion, the Pre-Trial Chamber appears to have relied on the circumstances at the time of its determination. The Impugned Decision is thus not materially affected by the aforementioned error.

50. The Defence cites the *Banda and Jerbo* case, the factual circumstances in the *Situation in Libya*, and the *Ayyash* case, a precedent before the Special Tribunal for Lebanon (“STL”), to support the proposition that the two situations in “fled or cannot be found” constitute “legally distinct categories that are unrelated to whether the person does, or does not, make an initial appearance before the Court”.⁷² Since the Appeals Chamber reaches the same conclusion as the Defence on this issue, it finds no need to further examine the examples presented to illustrate the point. Nonetheless, the Appeals Chamber considers, as noted by the Prosecutor and the OPCV,⁷³ that the procedural framework of the STL differs so significantly from the Rome Statute in relation to the regulation of *in absentia* proceedings that the jurisprudence of the former cannot be of guidance in the interpretation of the concepts under discussion in the present appeal.⁷⁴

51. As previously found, based on the ordinary meaning alone, it cannot be read into the phrase “cannot be found” that it only concerns persons who have “*never* been accessible” to the Court. Similarly, the phrase “cannot be found” does not only concern persons who have not had an initial appearance. Rather, it applies to persons regardless of whether they have had an initial appearance.

(iii) Overall conclusion

⁷¹ [Impugned Decision](#), para. 95 (emphasis added).

⁷² [Appeal Brief](#), paras 19-21.

⁷³ [Prosecutor’s Response](#), para. 17; [OPCV Response](#), para. 28.

⁷⁴ The STL Statute, in article 22, provides for *in absentia* “trials”, as opposed to ICC *in absentia* “confirmations of charges” and it does not foresee the initial appearance as a procedural step in its proceedings altogether. Moreover, there are three scenarios in which article 22(1) of the STL Statute provides for *in absentia* trials, which differ from the scenarios set out in the Rome Statute in respect to *in absentia* confirmation proceedings. Article 22(1)(b) of the STL Statute accounts for situations where the person “has not been handed over to the Tribunal by the State authorities concerned”, which may restrict or expand the interpretation of the other scenarios stipulated in article 22(1) of the STL Statute.

52. For the above reasons, the Appeals Chamber rejects the Defence's arguments above raised under the second ground of appeal.

53. The Appeals Chamber will now assess whether the Pre-Trial Chamber's determination that the initial appearance is not required before proceeding to a confirmation of charges hearing *in absentia*, pursuant to article 61(2)(b) of the Statute, is consistent with the context and in line with the object and purpose of the Statute. These considerations are addressed below, in the analysis of the arguments raised under the first and second grounds of appeal.

B. First and second grounds of appeal: arguments concerning context, object and purpose

(a) Relevant parts of the Impugned Decision

54. In the Impugned Decision, the Pre-Trial Chamber found as follows:

In respect of the contextual argument put forward by the Defence, the Chamber, while mindful of the need to preserve the overall structure of confirmation of charges proceedings even when they are held *in absentia*, considers that the finding that a document containing the charges has to be submitted at this stage does not amount to either misconstruing or disrupting the structure of confirmation of charges proceedings. It rather adapts the structure to the specificities of confirmation of charges proceedings conducted *in absentia*, by focusing on the ultimate objective of the provision which requires that the suspect is provided with adequate information on the charges, and hence the scope of the case, before confirmation of charges proceedings *in absentia* can actually start. In the present case, by virtue of Pre-Trial Chamber II's decision to order the Prosecution to submit a document containing the charges, albeit a *sui generis* one, and to make that document the subject and centre of all notification activities, more information has been provided than usually is the case, or would have been, by the allegations as contained in the Arrest Warrant which would have been available for the purposes of the first appearance and read out in this specific context. In addition, having found that article 61(2)(b) of the Statute also applies to a situation in which the suspect has never been accessible, it further follows that, in such circumstances, a first appearance cannot constitute a requirement for conducting confirmation of charges proceedings *in absentia*.⁷⁵

(b) Summary of the submissions

55. According to the Defence, the Pre-Trial Chamber erroneously interpreted article 61(2)(b) of the Statute in isolation from article 60(1) of the Statute.⁷⁶ It contends that articles 60(1) and 61(1) and (2) of the Statute expressly require an "initial appearance" as a necessary and critical

⁷⁵ [Impugned Decision](#), para. 33.

⁷⁶ [Appeal Brief](#), para. 15.

procedural initial step regardless of whether the confirmation of charges is held in the presence of the person charged or *in absentia*.⁷⁷

56. The Defence submits that the above is not affected by the term “subject to the provisions of paragraph 2” found in article 61(1) of the Statute.⁷⁸ In the Defence’s view, the purpose of ending impunity must be achieved “through strict adherence to the provisions of the Rome Statute”.⁷⁹ It argues that the Pre-Trial Chamber has made an “expansive”,⁸⁰ “broad purposive” interpretation of article 61(2)(b) of the Statute, which risks disrespecting the statutory limits imposed by States when endowing the Court with “specific powers and procedures”,⁸¹ and could endanger “State cooperation and undermine the institutional credibility of the Court”.⁸²

57. The Defence argues that article 60(1) of the Statute “is not merely a *pro forma* exercise that could be downgraded to a technical requirement”,⁸³ but “a critical procedural step” that precedes “all subsequent ‘proceedings’ before the Court in the case”, including the confirmation of charges before trial.⁸⁴

58. The Prosecutor responds that the context provided by other provisions of the Statute as well as the Rules support the Pre-Trial Chamber’s interpretation of article 61(2)(b) of the Statute.⁸⁵ According to the Prosecutor, what is decisive for purposes of the initial appearance requirement is whether the person is available to the Court or not.⁸⁶

59. The Prosecutor argues that article 61(1) of the Statute expressly excludes article 61(2) of the Statute from the confirmation hearing after the suspect’s surrender or voluntary appearance before the Court, which strongly suggests that there was no intention to make confirmation *in absentia* proceedings conditional upon a suspect’s initial appearance.⁸⁷ He argues that this interpretation is consistent with the object and purpose of the Statute, that “the most serious

⁷⁷ [Appeal Brief](#), paras 15, 17.

⁷⁸ [Defence’s Reply](#), paras 4, 9.

⁷⁹ [Defence’s Reply](#), para. 12, referring to [Statement of ICC President Judge Tomoko Akane following the issuance of US Executive Order seeking to impose sanctions on the International Criminal Court](#), 7 February 2025; J. Powderly, *Judges and the Making of International Criminal Law* (Brill, 2020), pp. 454-541.

⁸⁰ [Appeal Brief](#), para. 41.

⁸¹ [Defence’s Reply](#), para. 12.

⁸² [Defence’s Reply](#), para. 15.

⁸³ [Appeal Brief](#), para. 16.

⁸⁴ [Appeal Brief](#), para. 17.

⁸⁵ [Prosecutor’s Response](#), para. 21.

⁸⁶ [Prosecutor’s Response](#), para. 21.

⁸⁷ [Prosecutor’s Response](#), para. 22.

crimes of concern to the international community as a whole must not go unpunished”.⁸⁸ He adds that *in absentia* confirmation proceedings enable a mechanism “to air the evidence, allow the victims to speak, increase public awareness, and potentially [...] galvanise cooperative efforts to bring fugitives to justice before the Court [...]”.⁸⁹

60. The OPCV submits that the Pre-Trial Chamber’s interpretation is in line with “the context, object and purpose of article 61(2)(b) of the Statute”.⁹⁰ It argues that pursuant to article 60(1) of the Statute, the initial proceedings are solely focused on situations where the person concerned is “*actually present*” before the Court,⁹¹ and therefore it does not apply in circumstances in which a person cannot be located.⁹² It adds that article 61(2)(b) of the Statute and rule 125(1) of the Rules,⁹³ provide numerous safeguards for the protection of the fair trial rights of the person concerned, which were given effect by the Pre-Trial Chamber.⁹⁴

(c) Determination by the Appeals Chamber

(i) *Alleged adoption of an interpretation that contradicts the express requirement of “initial proceedings before the Court” in article 60(1) of the Statute*

61. The Appeals Chamber considers that, contrary to the Defence’s submissions, a determination that the initial appearance is not required before proceeding to confirm the charges *in absentia* does not mean that article 61(2)(b) of the Statute is being interpreted “in isolation” from article 60(1) of the Statute.⁹⁵ Hereunder, the Appeals Chamber will first examine the applicable provisions in the Statute and the Rules, and in that context it will assess how the initial appearance requirement interacts with the scenarios set out in article 61(2)(b) of the Statute.

62. The Appeals Chamber recalls that, in light of article 31(1) of the VCLT, “[t]he context of a given legislative provision is defined by the particular sub-section of the law read as a

⁸⁸ [Prosecutor’s Response](#), para. 29.

⁸⁹ [Prosecutor’s Response](#), para. 29.

⁹⁰ [OPCV Response](#), paras 18-19.

⁹¹ [OPCV Response](#), para. 20 (emphasis in original).

⁹² [OPCV Response](#), para. 20.

⁹³ Rule 125(1) of the Rules provides as follows: “After holding consultations under rules 123 and 124, 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, and in that case, whether the person may be represented by counsel. The Pre-Trial Chamber shall, when appropriate, set a date for the hearing and make the date public”.

⁹⁴ [OPCV Response](#), para. 25, referring to [Impugned Decision](#), paras 35-105.

⁹⁵ [Appeal Brief](#), para. 15.

whole in conjunction with the section of an enactment in its entirety. With respect to *in absentia* confirmation proceedings, article 61(1) and (2) of the Statute must be read together. For purposes of the present determination, it is crucial to first focus on the phrase “[s]ubject to the provisions of paragraph 2” in article 61(1) of the Statute.⁹⁶

63. The Defence submits that “[t]he 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’”.⁹⁷ It submits that the wording of articles 60 and 61 of the Statute prescribes distinct and successive appearances, with the confirmation hearing being the only exception to the presence of the suspect.⁹⁸ The Defence argues that the requirement of an initial appearance in article 61(1) of the Statute is a mere “parenthetical recitation” of the independent requirement arising from article 60(1), and that this is confirmed by the reading of the Spanish and French versions of article 61(1).⁹⁹

64. The Appeals Chamber finds that the Defence misconstrues the relevant provisions of the Statute. The Appeals Chamber has previously held that a phrase in a provision “must be read as a whole and in a manner that gives meaning and effect to all of its constituent words, rather than in a disjointed manner”.¹⁰⁰ The Defence’s suggestion to reconnect “[s]ubject to the provisions of paragraph 2” to the last sentence of that provision, “the hearing shall be held in the presence of the [...] person charged”, incurs a disjointed reading of the provision. Read as a whole, the phrasing of article 61(1) of the Statute provides that the Pre-Trial Chamber shall hold a confirmation hearing within a reasonable time after the suspect’s surrender or voluntary

⁹⁶ Article 61 reads in its relevant part:

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

2. *The Pre-Trial Chamber may [...] hold a hearing in the absence of the person charged [...] when the person has:*

(a) *Waived his or her right to be present; or*
 (b) *Fled or cannot be found (...)* (emphasis added).

⁹⁷ [Appeal Brief](#), para. 24; [Defence’s Reply](#), para. 4.

⁹⁸ [Defence’s Reply](#), para. 5.

⁹⁹ [Appeal Brief](#), para. 24.

¹⁰⁰ *The Prosecutor v. Paul Gicheru*, [Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’](#), 8 March 2021, ICC-01/09-01/20-107 (OA), para. 69.

appearance before the Court, and that this hearing shall be held in the presence of the suspect, “[s]ubject to the provisions of paragraph 2”.

65. The Appeals Chamber considers that the phrase “[s]ubject to the provisions of paragraph 2” excludes confirmation hearings *in absentia* under article 61(2) of the Statute from the regime requiring that the confirmation hearing be held “within a reasonable time after the person’s surrender or voluntary appearance before the Court” pursuant to article 60(1) of the Statute.¹⁰¹ Ignoring this construction would render the phrase “subject to” redundant and unnecessary. Read as intended by the Defence, article 61(1) of the Statute would become a “parenthetical recitation” of the initial appearance requirement which already arises from article 60(1) of the Statute,¹⁰² contradicting the very jurisprudence quoted by the Defence, according to which the Court must endeavour to give significance to every word in the Statute.¹⁰³ As addressed in further detail below in the analysis of the third ground of appeal,¹⁰⁴ the Defence’s reading of the provision does not find support in the drafting history of the Statute.

66. The Appeals Chamber now turns to the arguments raised by the Defence, according to which the Rules support the interpretation that the initial appearance is always required, whether the confirmation of charges is subsequently held in the presence of the suspect or *in absentia*. One such argument is based on rule 123(1) of the Rules, which reads as follows:

When a warrant of arrest or summons to appear in accordance with article 58, paragraph 7, has been issued for a person by the Pre-Trial Chamber *and the 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. [emphasis added]

67. According to the Defence, this rule would be violated by adopting an interpretation that permits *in absentia* proceedings without notifying the suspect of the provisions of article 61(2) of the Statute. The Defence contends that this obligation is not relieved or modified by rule 126, according to which “[t]he provisions of rules 121 and 122 shall apply *mutatis mutandis* to

¹⁰¹ See also W. A. Schabas, E. Chaitidou, M. El Zeidy, ‘Article 61: Confirmation of the charges before trial’, in K. Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck *et al.*, 4th ed., 2022), p. 1772.

¹⁰² [Appeal Brief](#), para. 24.

¹⁰³ [Appeal Brief](#), para. 15, referring to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Trial Judgment](#), 4 February 2021, ICC-02/04-01/15-1762-Red, para. 2722.

¹⁰⁴ See paragraphs 89-9589 below.

the preparation for and holding of a hearing on confirmation of charges in the absence of the person concerned”, as it does not mention rule 123 of the Rules.¹⁰⁵

68. The Appeals Chamber finds, as correctly noted by the Prosecutor,¹⁰⁶ that the notification envisaged in rule 123(1) of the Rules only applies when “the person is arrested or served with the summons”. Therefore, contrary to the Defence’s arguments, there is no contradiction between this provision and the interpretation that the confirmation of charges *in absentia* does not require an initial appearance.

69. The Appeals Chamber also rejects the Defence’s argument that “the absence of any statutory criteria for permitting a procedure that, even according to the Pre-Trial Chambers, is ‘exceptional’” constitutes an additional contextual consideration weighing against the interpretation in the Impugned Decision.¹⁰⁷ Contrary to the Defence’s arguments, article 61(2) of the Statute, and rule 126 of the Rules,¹⁰⁸ which incorporates rules 121 and 122 of the Rules *mutatis mutandis* to the preparation for and holding of *in absentia* confirmations, provide detailed statutory criteria regulating the conduct of the proceedings.

70. Given the above, the Appeals Chamber finds that, read in context, article 61(2)(b) does not require the suspect’s initial appearance prior to proceeding to the confirmation of charges *in absentia*. Contrary to the submissions of the Defence,¹⁰⁹ the initial appearance may or may not be required in the different scenarios set out in article 61(2)(b) of the Statute, with no inherent contradiction, contingent only upon the availability of the suspect.

71. Whether or not, in circumstances in which the suspect has not attended the initial appearance, a pre-trial chamber may proceed to a confirmation of charges in the absence of the person concerned would depend on a variety of factors. These factors must be part of the consultations foreseen in rules 123(2) and 125(1) of the Rules upon which a pre-trial chamber “may” hold a hearing in the absence of the person charged, pursuant to article 61(2) of the Statute. The Appeals Chamber considers that article 61(2) of the Statute, read in context and in line with the applicable Rules, provides the pre-trial chamber with broad discretion to hold a

¹⁰⁵ [Appeal Brief](#), para. 28.

¹⁰⁶ [Prosecutor’s Response](#), paras 25-26.

¹⁰⁷ [Appeal Brief](#), para. 29.

¹⁰⁸ Rule 126 provides in its relevant parts: “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. 2. If the Pre-Trial Chamber has determined that the person concerned shall be represented by counsel, the counsel shall have the opportunity to exercise the rights of that person”.

¹⁰⁹ [Appeal Brief](#), para. 25.

confirmation of charges *in absentia* when, based on the specific circumstances of the relevant case, there is sufficient cause to undertake such a procedural step. That the suspect was unavailable for the initial appearance may properly form part of these considerations, but it does not preclude the confirmation of charges *in absentia* in circumstances in which he or she “cannot be found”.

(ii) *Alleged errors in the Pre-Trial Chamber’s understanding of article 61(2)(b) of the Statute in relation to the object and purpose of the Statute*

72. The Appeals Chamber finds, contrary to the Defence’s arguments, that the Pre-Trial Chamber’s interpretation that a confirmation of charges hearing may be held *in absentia* without the suspect’s initial appearance is not inconsistent, but rather aligned, with the object and purpose of the Statute.¹¹⁰

73. At the outset, the Appeals Chamber recalls article 31 of the VCLT,¹¹¹ and its established jurisprudence, which states that “[the] objects [of a given legislative provision] may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.¹¹² Accordingly, in interpreting the object and purpose of articles 60(1), 61(1), and 61(2) of the Statute, the Appeals Chamber considers both the Preamble of the Statute and the chapter in which these provisions are situated.

74. As previously held by the Appeals Chamber, the overarching purpose discernible from the preamble of the Rome Statute is “to put an end to impunity”.¹¹³ The Defence accepts that the fight against impunity is the ultimate objective of the Statute but contends that it should not lead to an expansive or broad purposive interpretation;¹¹⁴ that States enacted the statutory texts, putting limits onto the powers of the Court which should not be disrespected;¹¹⁵ and that the purpose of ending impunity must be achieved “through strict adherence to the provisions of the

¹¹⁰ [Impugned Decision](#), para. 33.

¹¹¹ See paragraph 36 above.

¹¹² See paragraph 36 above.

¹¹³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), 25 September 2009, ICC-01/04-01/07-1497 (OA8), paras 79, 83. See also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”](#), 24 July 2014, ICC-01/11-01/11-565 (OA6), para. 217.

¹¹⁴ [Appeal Brief](#), para. 41; [Defence’s Reply](#), para. 12.

¹¹⁵ [Defence’s Reply](#), para. 12.

Rome Statute”.¹¹⁶ The Appeals Chamber is of the view that the question as to whether a pre-trial chamber has the power to proceed without an initial appearance cannot be answered solely by appealing to the principle that the Court’s powers are limited. The Appeals Chamber considers this line of reasoning to be circular. Rather, the determinative considerations are whether proceeding without the initial appearance is incompatible with the rights of the defence and whether the procedural functions that underpin the confirmation of charges hearing are preserved.

75. The Appeals Chamber finds that proceeding to an *in absentia* confirmation of charges hearing without the suspect’s initial appearance is not incompatible with the rights enshrined in article 67 of the Statute. While the initial appearance is undoubtedly a significant procedural step, offering the suspect a first opportunity to be informed of the crimes which the person is alleged to have committed, and of his or her rights, including the right to apply for interim release pending trial, the Appeals Chamber is satisfied, contrary to the Defence’s arguments,¹¹⁷ that the Statute and Rules provide adequately robust safeguards to protect the suspect’s fair trial rights in the context of *in absentia* confirmation of charges, even in cases where such an initial appearance has not taken place. As shown in the present case, the Registry has taken all reasonable steps to inform Mr Kony of the charges;¹¹⁸ counsel has been appointed to represent his rights and interests;¹¹⁹ the confirmation hearing date has been postponed to ensure the Defence had sufficient time and facilities to prepare;¹²⁰ and it has been found that all reasonable efforts have been made to inform Mr Kony of the Pre-Trial Chamber’s decision to proceed with the confirmation of charges hearing.¹²¹

76. The Appeals Chamber underlines that the Statute does not incorporate trials *in absentia* but merely *in absentia* confirmations of charges. Critically, should Mr Kony appear before the

¹¹⁶ [Defence’s Reply](#), para. 12, referring to [Statement of ICC President Judge Tomoko Akane following the issuance of US Executive Order seeking to impose sanctions on the International Criminal Court](#), 7 February 2025; J. Powderly, *Judges and the Making of International Criminal Law* (Brill, 2020), pp. 454-541.

¹¹⁷ [Defence Reply](#), para. 12.

¹¹⁸ [Second Decision](#), para. 9.

¹¹⁹ Registry, *The Prosecutor v. Joseph Kony*, [Notification of the Appointment](#), 21 June 2024, ICC-02/04-01/05-503; see also [Second Decision](#), para. 12; Pre-Trial Chamber III, *The Prosecutor v. Joseph Kony*, [Order to Appoint Counsel](#), 19 June 2024, ICC-02/04-01/05-502.

¹²⁰ Pre-Trial Chamber III, *The Prosecutor v. Joseph Kony*, [Decision Postponing the Confirmation of Charges Hearing](#), 12 September 2024, ICC-02/04-01/05-526, paras 11-13.

¹²¹ Pre-Trial Chamber III, *The Prosecutor v. Joseph Kony*, [Decision on the notification of the date of the confirmation hearing](#), 13 March 2025, ICC-02/04-01/05-573, para. 20.

Court such that a trial may be conducted, he will be able to exercise in person all rights enshrined in article 67 of the Statute.

77. Moreover, the Appeals Chamber finds that the essential object and purpose of the confirmation of charges process is preserved even if, exceptionally, the Pre-Trial Chamber decides to proceed with the confirmation of charges *in absentia* without a prior initial appearance. The Appeals Chamber has previously held that the purpose of the confirmation of charges hearing “is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial”.¹²² The Appeals Chamber underscores that while confirmation of charges proceedings do not result in a finding of guilt, they serve important procedural functions, including resolving disclosure disputes, determining the scope of victim participation, and framing the charges in a manner that is clear, exhaustive, and consistent with the requirement that charges reflect only the “material facts and circumstances” subject to judicial determination.¹²³ Requiring an initial appearance as a precondition for the *in absentia* confirmation of charges would deprive the suspect of the early evidence review and other procedural functions, contrary to the object and purpose of the relevant provisions.

78. The Appeals Chamber therefore considers that an interpretation that restricts *in absentia* confirmation hearings to unusual scenarios, such as when a suspect has previously appeared but then absconded, undermines the Statute’s broader aim to “put an end to impunity”. Additionally, such a reading does not offer any meaningful additional protection under the relevant provisions as the person’s rights and guarantees would be fully available at trial.

79. Finally, the Appeals Chamber notes the Defence’s contention that permitting *in absentia* confirmation hearings without an initial appearance could undermine State cooperation, including with respect to the execution of arrest warrants, and may discourage suspects from voluntarily surrendering to the Court.¹²⁴ Conversely, the Prosecution argues that the same procedure may enhance public awareness and facilitate cooperation efforts to arrest

¹²² *The Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”](#), 30 May 2012, ICC-01/04-01/10-514 (OA4), para. 47.

¹²³ [Lubanga A5 Judgment](#), para. 125, referring to Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, [Order for the prosecution to file an updated document containing the charges](#), 5 July 2012, ICC-01/09-02/11-450, para. 9. See also [Chambers Practice Manual](#) 2024, p. 7, para. 35.

¹²⁴ [Defence’s Reply](#), para. 15.

fugitives.¹²⁵ The Appeals Chamber finds that these considerations are not determinative to the interpretation of the object and purpose of the provision in general terms. Whether or not they are relevant ultimately depends on the specific context, namely the States involved, the type of cooperation expected, and the particular circumstances of the fugitives concerned. Accordingly, rather than calling into question the abstract validity of the procedure, these considerations may be part of the consultations foreseen in rules 123(2) and 125(1) of the Rules and may be weighed in the exercise of the broad discretion, provided for in article 61(2) of the Statute, according to which a pre-trial chamber “may” hold a hearing in the absence of the person charged but is not obliged to do so.

80. Accordingly, the Appeals Chamber finds that the holding of a confirmation hearing *in absentia* without an initial appearance is consistent with the object and purpose of the Statute. Therefore, the Defence’s arguments under this sub-ground of appeal are rejected.

(d) Overall conclusion

81. For the above reasons, the Appeals Chamber rejects the Defence’s arguments raised under the first and second grounds of appeal.

C. Third ground of appeal: whether the drafting history confirms the Pre-Trial Chamber’s alleged erroneous interpretation

(a) Relevant parts of the Impugned Decision

82. In the Impugned Decision, the Pre-Trial Chamber observed that:

[A]ccording to article 32 of the [VCLT], the preparatory work of a treaty merely constitutes a supplementary method of interpretation to which recourse may be had if 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.¹²⁶

83. With respect to the present case, the Pre-Trial Chamber found as follows:

As [article 61(2)(b) of the Statute] does not lead to any of the outcomes specified in article 32 of the VCLT, there is no need to have recourse to the preparatory work. 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

¹²⁵ [Prosecutor’s Response](#), para. 29.

¹²⁶ [Impugned Decision](#), para. 34.

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. Any other understanding would contravene the ordinary meaning to be given to the term ‘or’ in article 61(2)(b) of the Statute as understood in its context.¹²⁷

(b) Summary of the submissions

84. Under the third ground of appeal, the Defence refers to the drafting history of the Statute and the Rules to show that the Pre-Trial Chamber’s interpretation of article 61(2)(b) of the Statute finds no basis in the intent of the drafters.¹²⁸ According to the Defence, the version of article 61 in the proposal of April 1998,¹²⁹ is identical to the one of the Working Group on Procedural Matters,¹³⁰ 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.¹³¹ In the view of the Defence, this change was nothing more than an “elegant drafting means” when one provision became two separate provisions, and it was not meant to change “what the drafters had clearly considered throughout the drafting process that [a]rticle 61(2) [of the Statute] 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”.¹³² The Defence adds that the text of article 61 of the Statute proposed by the Drafting Committee on 16 July 1998 is almost identical to the text as adopted in the Statute, but without parentheses around “within a reasonable time after the person’s surrender or voluntary appearance before the Court”.¹³³

85. Furthermore, according to the Defence, the French proposal for what became rule 122 of the Rules 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

¹²⁷ [Impugned Decision](#), para. 34.

¹²⁸ [Appeal Brief](#), para. 33.

¹²⁹ [Appeal Brief](#), para. 34, referring to United Nations, Preparatory Committee on the Establishment of an International Criminal Court, 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*, 1 April 1998, [A/AC.249/1998/WG.4/DP.40](#) (hereinafter: “April 1998 Proposal”), p. 5; United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum*, 14 April 1998, [A/CONF.183/2/Add.1](#) (hereinafter: “April 1998 Report”), pp. 93, 96-97.

¹³⁰ [Appeal Brief](#), para. 35, referring to United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Reports and other documents*, Volume III, 15 June - 17 July 1998, [A/CONF.183/13 \(Vol. III\)](#) (hereinafter: “June-July Reports”), p. 283.

¹³¹ [Appeal Brief](#), para. 36.

¹³² [Appeal Brief](#), para. 36.

¹³³ [Appeal Brief](#), para. 37, referring to United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Draft Statute for the International Criminal Court*, 16 July 1998, [A/CONF.183/C.I/L.76/Add.5](#) (hereinafter: “Draft Statute for the International Criminal Court”), pp. 9-10.

“have fled or cannot be found”.¹³⁴ The Defence contends that 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”.¹³⁵

86. The Prosecutor submits that the Pre-Trial Chamber was not under an absolute obligation to consult the drafting history of the Statute, which is a supplementary means of interpretation.¹³⁶ He submits that, in any event, the Pre-Trial Chamber’s interpretation is consistent with the drafting history of article 61(2)(b) of the Statute.¹³⁷ The Prosecutor argues that the negotiations leading to the adoption of article 61(2) of the Statute focused on the issue of trials *in absentia* and that, given the lack of consensus 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”.¹³⁸

87. Regarding the Defence’s recourse to the Rules, the Prosecutor submits that the negotiations leading to the Rules took place subsequent to the drafting of the Statute and therefore “are not the ‘preparatory work of the treaty’ as such for the purpose of article 32 of the VCLT”.¹³⁹ He contends that, while the French formulation suggested a narrower interpretation the phrase “cannot be found”, it also anticipated that article 61(2) of the Statute applied equally to persons who have “never appeared before the Pre-Trial Chamber”.¹⁴⁰

88. The OPCV submits that, given that the interpretation of the Pre-Trial Chamber is supported by the ordinary meaning of the provision, there is no need to resort to the preparatory works.¹⁴¹ They argue that the intention of the drafters created a system in which the presence of the suspect during the confirmation of charges hearing is the rule, which recognizes exceptions when the person fled or cannot be found.¹⁴²

¹³⁴ [Appeal Brief](#), paras 38-39, referring to United Nations, Preparatory Commission for the International Criminal Court, *Proposal by France concerning the Rules of Procedure and Evidence*, 29 June 1999, [PCNICC/1999/DP.8/Add.2/Rev.1](#) (hereinafter: “French 1999 Proposal”), p. 1.

¹³⁵ [Appeal Brief](#), para. 40, referring to [DRC OA3 Judgment](#), para. 40.

¹³⁶ [Prosecutor’s Response](#), paras 33-37.

¹³⁷ [Prosecutor’s Response](#), para. 38.

¹³⁸ [Prosecutor’s Response](#), para. 39.

¹³⁹ [Prosecutor’s Response](#), para. 40.

¹⁴⁰ [Prosecutor’s Response](#), para. 41.

¹⁴¹ [OPCV Response](#), para. 35.

¹⁴² [OPCV Response](#), paras 36, 40-41.

(c) Determination by the Appeals Chamber

89. The Appeals Chamber recalls that, according to article 32 of the VCLT, the *travaux préparatoires* of a treaty are only supplementary means of interpretation, to which recourse may only be had in order to confirm an interpretation, or if the interpretation leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result.¹⁴³ In the view of the Appeals Chamber, the meaning of article 61(2) of the Statute is sufficiently clear in light of the above interpretation under article 31 of the VCLT. In any event, the Appeals Chamber considers, for the following reasons, that the preparatory work of article 61 of the Statute does not confirm the Defence’s interpretation of the provision.

90. The report of the Preparatory Committee on the Establishment of the Court from the session held from 4 to 15 August 1997 included a proposal under article 27, entitled “[c]ommencement of the prosecution”, which allowed the Pre-Trial Chamber to hold a confirmation hearing in the absence of the accused when he or she “has fled or cannot be found, and when all reasonable steps have been taken to inform the accused” and required the warrant of arrest to be issued after the confirmation of the indictment.¹⁴⁴ The working group decided to defer the consideration of the above provision until the possibility to hold trials *in absentia* was decided.¹⁴⁵

91. In April 1998, a group of 13 states submitted a proposal under article 54, entitled “[c]onfirmation of the charges before trial”, which reads as follows:

¹⁴³ *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Conf (A A2 A3 A4 A5); a public redacted version was registered on the same day ([ICC-01/05-01/13-2275-Red](#)), para. 679.

¹⁴⁴ United Nations, Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997*, 14 August 1997, [A/AC.249/1997/L.8/Rev.1](#) (hereinafter: “August 1997 Proposal”), pp. 21, 24:

4 *bis*. When one or more of the accused has fled or cannot be found, and when all reasonable steps have been taken to inform the accused, the Pre-Trial Chamber may still hold a hearing in order to examine whether it shall confirm the indictment. In that case, the accused cannot be represented by counsel (footnotes omitted). The same text is included in United Nations, Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands*, 4 February 1998, [A/AC.249/1998/L.13](#) (hereinafter: “February 1998 Report”) p. 97.

¹⁴⁵ [August 1997 Proposal](#), p. 24, fn. 29. See also United Nations, Preparatory Committee on the Establishment of an International Criminal Court, *Revised Abbreviated Compilation*, 14 August 1997, [A/AC.249/1997/WG.4/CRP.6](#), p. 3, fn. 11; [February 1998 Report](#), p. 97, fn. 163. See also United Nations, Preparatory Committee on the Establishment of an International Criminal Court, *Text of the Draft Statute for the International Criminal Court*, 1 April 1998, [A/AC.249/1998/CRP.11](#), pp. 11-12, fn. 8.

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].¹⁴⁶

92. The placement of the word “unless” at the end of the paragraph in this proposal tends to indicate that the proposed procedural regime dispensed with the presence of the accused at the confirmation of charges hearing in the listed circumstances. Independent from these circumstances, the proposed procedure required the Pre-Trial Chamber to hold the confirmation hearing within a reasonable time after the person's surrender or voluntary appearance before the Court.

93. In July 1998, as noted by the Defence,¹⁴⁷ the Working Group on Procedural Matters transmitted another version of article 61 to the Committee of the Whole. This provision replaced the word “unless” with “subject to” and, importantly, moved the latter to the beginning of the article, reading as follows:

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 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

¹⁴⁶ [April 1998 Proposal](#), p. 5 (emphasis added). The same text is included in [April 1998 Report](#), p. 96.

¹⁴⁷ [Appeal Brief](#), paras 35-36.

that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.¹⁴⁸

94. The Appeals Chamber is not persuaded by the Defence's argument that the above 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".¹⁴⁹ The placement of the wording "[s]ubject to" at the beginning of article 61(1) of the Statute, rather than the end of that provision, tends to suggest that not only the presence of the suspect during the confirmation hearing but also the timing of the hearing (within a reasonable time after the person's surrender) and the very need for a surrender or voluntary appearance are "[s]ubject to [those] provisions" which regulate *in absentia* confirmation proceedings.¹⁵⁰ A reading, as the one suggested by the Defence, that circumscribes the exception to the accused's presence only to the confirmation hearing would be more plausible if the words "subject to" remained in the second sentence of article 61(1) of the Statute. Indeed, the Drafting Committee reformulated article 61 in July 1998 moving "[s]ubject to" back down to the second sentence¹⁵¹ but the final version of the Statute opted to retain the above formulation at the beginning of the provision.

95. The Appeals Chamber is also not persuaded by the Defence's reliance on a French proposal for what later became rule 123(2) of the Rules to justify that "in the minds of the drafters" a clear distinction was 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'",¹⁵² and that the drafters "considered and ultimately chose to exclude, the term 'has never appeared before the

¹⁴⁸ [June-July Reports](#), p. 283 (emphasis added). See also p. 277; United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 61*, 12 July 1998, [A/CONF.183/C.1/WGPM/L.75](#).

¹⁴⁹ [Appeal Brief](#), para. 36.

¹⁵⁰ See also 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* (Brill, 2009), p. 453.

¹⁵¹ [Draft Statute for the International Criminal Court](#), pp. 9-10:

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 (emphasis added).

¹⁵² [Appeal Brief](#), paras 38-39. The proposal made by France for rule 62 read, in the relevant part, as follows:

(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, 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 to determine whether there is cause to hold a hearing on confirmation of charges under the conditions set forth in article 61, paragraph 2. When the person concerned has a counsel, the consultations shall be held in the presence of the counsel. (footnotes omitted). [French 1999 Proposal](#), p. 1 (emphasis added).

Pre-Trial Chamber’ as an alternative to situations where they had ‘fled or cannot be found’”.¹⁵³ The Appeals Chamber notes that such proposal was submitted following the adoption of the Statute, in June 1999 and that it needs to be read together with article 61 of the Statute. The Appeals Chamber recalls in this regard that, pursuant to article 51(4) of the Statute, the Rules shall be consistent with the Statute. The Appeals Chamber further notes that the French proposal effectively drew a distinction between a situation where “the person concerned has never appeared before the Pre-Trial Chamber” and where, “having appeared”, “the person has fled or cannot be found”. As noted by the Defence, this proposal was not adopted.¹⁵⁴ However, none of the scenarios addressed explicitly in the French proposal were retained in the final version of rule 123(2), which simply refers to article 61(2)(b) of the Statute, with no reference to the scenario in which the suspect “never appeared” and equally no reference to the scenario in which the suspect, having appeared, later fled or cannot be found. It follows, therefore, that failure to adopt this proposal does not support the proposition made by the Defence.

96. For the above reasons, the Appeals Chamber rejects the Defence’s arguments raised under the third ground of appeal.

VI. APPROPRIATE RELIEF

97. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.¹⁵⁵ In the present case, the Appeals Chamber finds it appropriate to confirm the Impugned Decision.

Done in both English and French, the English version being authoritative.



Judge Erdenebalsuren Damdin
Presiding

¹⁵³ [Appeal Brief](#), para. 40.

¹⁵⁴ [Appeal Brief](#), para. 39.

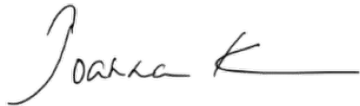
¹⁵⁵ See rule 158(1) of the Rules.



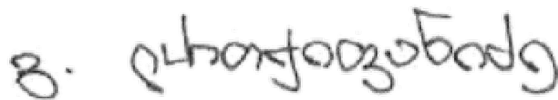
Judge Solomy Balungi Bossa



Judge Kimberly Prost



Judge Joanna Korner



Judge Gocha Lordkipanidze

Dated this 3rd day of June 2025

At The Hague, The Netherlands