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**International  
Criminal  
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Date: **30 March 2023**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Rosario Salvatore Aitala, Presiding  
Judge Tomoko Akane  
Judge Sergio Gerardo Ugalde Gordínez

**SITUATION IN UGANDA**

**THE PROSECUTOR v. JOSEPH KONY AND VINCENT OTTI**

*Public*

**OPCD Observations on the Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence**

**Source:** Office of Public Counsel for the Defence

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

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## I. INTRODUCTION

1. The Prosecution asks the Pre-Trial Chamber for a novel undertaking – an ICC confirmation of charges hearing in the absence of a suspect (“Prosecution Request”).<sup>1</sup> The Prosecution Request is one which would require the Court to divert from its established charging process, as codified in the Rome Statute, which envisages the participation of the named suspect. The OPCD submits that *in absentia* confirmation of charges proceedings should be exercised only in exceptional circumstances to preserve the intention of the drafters and give full meaning to the words of this carefully hewn treaty. This is especially salient to note given the final passage of the Prosecution’s introductory paragraphs which announces that “other cases may also justify proceeding in this fashion, based on different combination of relevant circumstances”.<sup>2</sup> This Prosecution Request, the OPCD submits, belies a purpose much broader than its application to Mr Kony.<sup>3</sup>

2. However, even on the merits of the request related to the case, the Prosecution fails to substantiate a basis to proceed in derogation from a normal confirmation process with a suspect. The purpose outlined here is one that requires the curtailing of Mr Joseph Kony’s Rome Statute rights for what is seemingly larger ICC interests of “enhanc[ing] the Court’s proceedings”,<sup>4</sup> “guarantee[ing] lasting respect for and enforcement of international criminal justice”,<sup>5</sup> and providing a “meaningful milestone for victims”.<sup>6</sup> The core relief the Prosecution seeks – using the confirmation process to publicise the evidence and galvanise stakeholders<sup>7</sup> –

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<sup>1</sup> Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 24 November 2022, [ICC-02/04-01/05-446-Red](#) (“Prosecution Request”).

<sup>2</sup> Prosecution Request, para. 8. As also noted by this Chamber, “the outcome of these novel proceedings may affect the rights of future defendants at the Court.” Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant, 7 February 2023, ICC-02/04-01/05-453, para. 17.

<sup>3</sup> See, e.g., “The ICC cannot try suspects *in absentia* but [Prosecutor] Khan said the court had ‘other pieces of architecture’ to push cases forward. He cited a recent case in which he asked judges to hold a hearing to confirm charges against Joseph Kony -- the leader of the Lord's Resistance Army, who launched a bloody rebellion in Uganda -- even though Kony remains at large. ‘That process may be available for any other case -- including the current one’ involving Putin, added Khan.” [Will Russia’s Vladimir Putin really ever be arrested?](#), France24, 17 March 2023 (last accessed 29 March 2023). “The ICC can’t have a trial of someone in absentia, but what they can do, according to Prosecutor Khan, and again it hasn’t been done historically but there is legal precedent for it, is what they call a ‘confirmation hearing in absence’ and that would essentially allow for the evidence to be preserved in a judicial setting in a timely way, paving the way for some potential future trial [...] so what they want to do at least with this possibility of the confirmation hearing is ensure that that evidence is put out there in a timely manner that, victims of these alleged atrocities are able to still have their day in court, even if it might be quite some time before you would potentially see President Vladimir Putin appearing on trial [...]”. [Russia scoffs but Putin could stand trial for alleged war crimes, ICC chief prosecutor says](#), CNN, 17 March 2023, 3’40-4’56 tweeted by ICC Official (@IntlCrimCourt), 18 March 2023, 14h31 (last accessed 29 March 2023).

<sup>4</sup> Prosecution Request, para. 6.

<sup>5</sup> Prosecution Request, para. 5.

<sup>6</sup> Prosecution Request, para. 7.

<sup>7</sup> Prosecution Request, paras 5, 31–33, 36, 52.

are improper motives for requesting a confirmation hearing, the purpose of which is to determine if the evidence is sufficient for trial. Those objectives could more appropriately be achieved through amending and updating the arrest warrant under Article 58(6) and reissuing it. Not only could this achieve the renewed interest in the charges the Prosecutor submits, but it would also serve to provide a fundamental Rome Statute right – notice to the actual suspect in this case, Mr Kony. The OPCD submits that this, if anything, is the proper path through the Rome Statute in this instance and asks that the Prosecution Request be denied in its entirety.

3. The OPCD advances these submissions under Regulation 77(4)(d) of the Regulations of the Court to protect the rights and interests of Mr Kony, who has no designated counsel, and to represent the general interests of the Defence. These observations are submitted with reservation to any arguments that Mr Kony may wish to advance himself and none of the observations that the OPCD submits can be construed as binding on him without his input.

## II. RELEVANT PROCEDURAL HISTORY

4. On 8 July 2005, the Pre-Trial Chamber, in its previous composition, issued a Warrant of Arrest for Joseph Kony, which was amended on 27 September 2005.<sup>8</sup>

5. On 6 February 2015, the case of Mr Dominic Ongwen was severed from the case of Mr Kony and others to proceed with confirmation of charges in Mr Ongwen's presence ("Severance Decision").<sup>9</sup>

6. On 24 November 2022, the Prosecution filed its request to hold a hearing on the confirmation of charges against Mr Kony in his absence pursuant to Article 61(2)(b) of the Rome Statute.<sup>10</sup>

7. On 28 November 2022, Office of Public Counsel for Victims (the 'OPCV') filed a joint request for extension of time to respond to Prosecution Request.<sup>11</sup>

8. On 2 December 2022, the Pre-Trial Chamber II issued its Decision on the OPCV request, determining that it was not necessary to consider the OPCV request at the time and that an order on the conduct of the proceedings would be issued in due course.<sup>12</sup>

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<sup>8</sup> Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 13 October 2002, [ICC-02/04-01/05-53](#).

<sup>9</sup> Decision Severing the Case Against Dominic Ongwen, 6 February 2015, [ICC-02/04-01/05-424](#).

<sup>10</sup> Prosecution Request.

<sup>11</sup> Legal Representatives' Joint Request for an Extension of Time to Respond to the "Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence", 28 November 2022, [ICC-02/04-01/05-447](#).

9. On the same day the Office of Public Counsel for the Defence (the ‘OPCD’) filed a request for leave to appear in relation to the Prosecution Request.<sup>13</sup>

10. On 8 December 2022, the Pre-Trial Chamber deferred its decision on OPCD request until the issuance of an order on the conduct of the proceedings.<sup>14</sup>

11. On 7 February 2023, the Pre-Trial Chamber issued its Order on procedural matters, inviting the OPCD to file observations on the Prosecution Request by 30 March 2023, at the latest.<sup>15</sup>

### III. OPCD OBSERVATIONS

#### A. **Confirmation proceedings *in absentia* should only be possible after a person has made an initial appearance pursuant to Article 60(1)**

12. The confirmation of charges provisions of the ICC are *sui generis* and must be read with respect for the intention of its drafters. Article 61(1) is clearly framed to ensure that “[t]he hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel”. There are only two exceptions to this guarantee. While the first exception is clear – an express waiver of a suspect under Article 61(2)(a) – the second exception requires a discussion as to what is meant by the phrase “fled or cannot be found” in Article 61(2)(b) so as to override the requirement for the presence of a suspect in the process.

13. In the current Request, the Prosecution has proceeded with the assumption that there is only one way to read Article 61(2)(b), which is that the suspect’s prior surrender and first appearance are not required before proceeding in his or her absence. This is in contrast to their previous observation in the *Gaddafi* case when they explained that “commentators differ with respect to the possibility of holding a confirmation of charges without prior surrender and first appearance”.<sup>16</sup> In the present case, the Prosecution provide no explanation why they consider their new interpretation to be the correct one even though the onus is on them, as the requesting party, to demonstrate that they are relying on a legal basis which they have

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<sup>12</sup> Decision regarding the ‘Legal Representatives’ Joint Request for an Extension of Time to Respond to the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”, 2 December 2022, [ICC-02/04-01/05-449](#).

<sup>13</sup> OPCD Request for Leave to Appear on Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 2 December 2022, [ICC-02/04-01/05-450](#).

<sup>14</sup> Decision regarding the ‘OPCD Request for Leave to Appear on Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’, 8 December 2022, [ICC-02/04-01/05-451](#).

<sup>15</sup> Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant, 7 February 2023, [ICC-02/04-01/05-453](#).

<sup>16</sup> *Prosecutor v. Gaddafi and Al-Senussi*, Prosecution’s Response to the Defence “Request for an order for the commencement of the pre-confirmation phase”, 30 August 2013, [ICC-01/11-01/11-425-Red](#), fn. 51.

interpreted accurately. They ignore that the reading of Article 61(2)(b) remains an ‘open question’ and is far from having a consensus understanding.<sup>17</sup>

14. While there are different readings of Article 61(2)(b), a significant number of commentators support the interpretation that an initial appearance is first required before confirmation *in absentia* is permitted. As is explained in the *Cassese, Gaeta and Jones* commentary on the Rome Statute:

*The conditions under [articles 61(2)(a) and 61(2)(b)] 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. In all other cases, in which a warrant of arrest, originally issued or issued following the failure of a summons to appear, has not been executed, and the person has not voluntarily appeared before the Court, no trial may take place ‘in absentia’ of the accused and, therefore, no confirmation hearing is possible.<sup>18</sup>*

15. Professor William Schabas’s commentary contemporaneous to the drafting of the Rome Statute and Rules of Procedure and Evidence,<sup>19</sup> and writings by, among others, Professor Christoph Safferling,<sup>20</sup> would also suggest that a suspect should have first been in

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<sup>17</sup> See William A. Schabas, *An Introduction to the International Criminal Court*, 5<sup>th</sup> ed. (Cambridge University Press 2017), p. 272 & William A. Schabas, *An Introduction to the International Criminal Court*, 6<sup>th</sup> ed. (Cambridge University Press 2020), p. 289 (“Whether a confirmation hearing can take place when the accused has not yet been brought into custody remains an open question”).

<sup>18</sup> Michele Marchesiello, “Proceedings before the Pre-Trial Chambers”, in Antonio Cassese *et al.*, *The Rome Statute of the International Criminal Court: A Commentary. Volume II* 1231 (Oxford University Press 2002), p. 1244.

<sup>19</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 1<sup>st</sup> ed. (Cambridge University Press 2001), p. 115 (“[The pre-trial confirmation hearing] will only take place with an absent accused in the case of an individual who was arrested or summoned, who appeared before the Pre-Trial Chamber and was granted interim release, and who subsequently absconded”). See also William A. Schabas, *An Introduction to the International Criminal Court*, 2<sup>nd</sup> ed. (Cambridge University Press 2004), p. 139; William A. Schabas, *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed. (Cambridge University Press 2007), pp. 275-76; William A. Schabas, *An Introduction to the International Criminal Court*, 4<sup>th</sup> ed. (Cambridge University Press 2011), p. 289. Note that, in later commentaries, Professor Schabas appears to depart from his previous position, although the OPCD considers that his views which were expressed contemporaneous to the drafting of Article 61(2) were more consistent with the original intent: “The text of article 61(2) is unclear as to whether the Pre-Trial Chamber can commence confirmation proceedings only after the suspected person has surrendered or appeared voluntarily, and has gone through the initial proceedings before the Court provided for in article 60, or whether it is possible to hold a hearing even in a case where he or she is not arrested at all in spite of issuance of an arrest warrant. If the *Statute* itself is ambiguous on this matter, Rule 123(2) and (3) of the Rules of Procedure and Evidence seems to imply that it is indeed possible, as does the drafting history of the Rules.” William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2<sup>nd</sup> ed. (Oxford University Press 2016), p. 929. See also William A. Schabas, Eleni Chaitidou & Mohamed El Zeidy, “Article 61. Confirmation of the charges before trial”, in Kai Ambos, *Rome Statute of the International Criminal Court. Article-by-Article Commentary* 1761 (Beck.Hart.Nomos 2022), p. 1772. (“The text of paragraph 2 does not require that the suspect first surrendered or appeared voluntarily before the ICC, and the initial appearance (Article 60) has taken place in the presence of the suspect. [...]”).

<sup>20</sup> Christoph Safferling, *International Criminal Procedure*, 1<sup>st</sup> ed. (Oxford University Press 2012), p. 323 (“The person has fled or cannot be found even though all reasonable steps have been taken to secure his or her presence at the Court. In that case the Pre-Trial Chamber must ensure that an arrest warrant has been issued and that all reasonable measures have been taken to locate and arrest the person sought (Rule 123(3) RPE ICC). The

the custody of the Court before this *in absentia* exception could be invoked. The position taken in these commentaries is supported by the ordinary meaning of Rule 126 regulating the “[c]onfirmation hearing in the absence of the person concerned”, which refers to the “person concerned” as “the person who has fled”,<sup>21</sup> that is, the person who has had his or her initial appearance upon arrival at the Court and since absconded.

16. Of the different readings of Article 61(2)(b),<sup>22</sup> the OPCD submits that the interpretation that requires the suspect to have first had an initial appearance is the most judicious one. This interpretation best accords with the context of the provision as situated in Part 5 of the Rome Statute, appearing sequentially after it is assumed that an individual has made a first appearance and benefited from the safeguards that this hearing confers. This includes being informed of the allegations and their rights under Article 60(1) and being warned, after arrest or summons, that a confirmation hearing may proceed in their absence, as is procedure under Rule 123(1). A suspect who has not had a first appearance is denied these protections and not had the fair warning about the possibility of confirmation in their absence.

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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”). See also Claire Knittel, “Reading Between the Lines: Charging Instruments at the ICTR and the ICC”, 32(2) Pace Law Review 513 (2012), 519, fn. 34 (“art 61. Provision (2) allows for a situation where the person charged has waived his right to presence or has fled *and* cannot be found. In those situations, the proceeding can be conducted *ex parte*”). [Emphasis added].

<sup>21</sup> Rule 126(3) of the Rules of Procedure and Evidence: “When the person who has fled is subsequently arrested and the Court has confirmed the charges upon which the Prosecutor intends to pursue the trial, the person charged shall be committed to the Trial Chamber established under article 61, paragraph 11. The person charged may request in writing that the Trial Chamber refer issues to the Pre-Trial Chamber that are necessary for the Chamber’s effective and fair functioning in accordance with article 64, paragraph 4.”

<sup>22</sup> The OPCD acknowledges that other writers have expressed views suggesting that Article 61(2)(b) does not require the suspect to first appear, but for the reasons argued in this section, it is submitted that these views should not be preferred. Håkan Friman, initially, does not appear to differentiate between a person who has fled, and a person who cannot be found: “A confirmation hearing in the absence of the person charged may take place in two different cases: (a) when the person has waived the right to be present, or (b) when the person has fled *and* cannot be found and all reasonable steps have been taken to inform him or her of the charges and the hearing”[Emphasis added]. However, Friman later states: “It should be noted that the Statute does not require that the person has actually been informed of the charges and the hearing, only that ‘all reasonable steps have been taken’ to secure his or her appearance and to provide the information. However, if the person is arrested (after the Court has issued an arrest warrant) or served with a summons to appear, the Chamber shall ensure that the person concerned is notified of the provisions regarding hearings *in absentia* (sub-Rule 1).” Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.*, *International and National Prosecution of Crimes Under International Law* 191 (BWV 2004), p. 212. Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, 1<sup>st</sup> ed. (Oxford University Press 2016), p. 359, fn. 242. (With respect to Professor Christoph Safferling “arguing that an *in absentia* hearing is only possible if the suspect ‘has at some stage been in the custody of the Court’”, Ambos states that “[t]his clearly goes against the wording of Art. 61(2)(b) and overlooks the difference between subparas. (a) and (b) [...]”). Ekaterina Trendafilova, “Fairness and expeditiousness in the International Criminal Court’s pre-trial proceedings”, in Carsten Stahn & Göran Sluiter, *The Emerging Practice of the International Criminal Court* 441 (Martinus Nijhoff Publishers 2009), p. 453 (“A number of provisions of the Statute and the Rules make clear that the drafters intentionally provided for the possibility of a confirmation hearing *in absentia* under Article 61(2) (b), *prior* to surrender and an initial appearance before the Court”).

Proceeding in this manner appears inconsistent with the object and purpose of exceptionally permitting *in absentia* confirmation only with attendant safeguards.<sup>23</sup> Importantly, when alternative interpretations of the legal texts are possible, it is incumbent on the Chamber to adopt the interpretation that is most favourable to the suspect.<sup>24</sup> The most favourable interpretation in this circumstance is one that ensures that suspects can benefit from the rights and safeguards available through having first had an initial appearance.

17. In conclusion, while there are various interpretations of the ICC texts regarding the decision to hold *in absentia* confirmation of charges proceedings in the absence of a suspect, the Chamber should adopt the interpretation that such proceedings are only possible after a suspect has made an initial appearance and subsequently fled or cannot be found. The Prosecution Request, which assumes an interpretation of Article 61(2)(b) that they failed to explain or justify, should be dismissed because Mr Kony has neither been surrendered nor had an initial appearance.

#### **B. In the alternative, *in absentia* proceedings are not justified in the present case**

18. If the Chamber considers that Article 61(2)(b) does permit a confirmation hearing in the absence of a suspect who has never appeared before the Court, the OPCD submits that doing so is not justified in Mr Kony's case. First, the Prosecution Request should have been made as a Rule 126(3) review of the previous decision declining to conduct a confirmation hearing in Mr Kony's absence. Furthermore, even if considered on the merits, the Prosecution fails to demonstrate that there is cause to hold the confirmation process without Mr Kony present.

##### **i. Preliminary issue: The Prosecution wrongly made a new application to hold an *in absentia* confirmation hearing instead of requesting a review of the previous decision**

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<sup>23</sup> See *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", Separate Opinion of Judge Georghios M. Pikis, 13 February 2007, [ICC-01/04-01/06-824](#), p. 47, para. 2 ("The presence of the accused is judged essential at every stage of the proceedings and a prerequisite for the holding of the trial (article 63 (1) of the Statute). Although the confirmation hearing may in the circumstances specified in article 61 (2) of the Statute (*see also* rule 125 of the Rules of Procedure and Evidence) be held in the absence of the person against whom the charges are levelled, such course must in the nature of things be an exceptional one").

<sup>24</sup> *Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, 2 September 1998, [ICTR-96-4-T](#), para. 319.



19. In 2015, the Single Judge in the *Kony et al.* case determined that no confirmation hearing should be held against Mr Kony in his absence. In that decision, severing the case of Mr Dominic Ongwen, the Single Judge had to consider whether to proceed with a confirmation hearing for Mr Ongwen alone or with the other named suspects in the case. At that time, and with benefit of submissions of the Prosecution, she “*opine[d] that under these circumstances, there is no cause to proceed with the confirmation of charges proceedings against [Mr Ongwen’s] three co-suspects in absentia, as provided in article 61(2)(b)*”.<sup>25</sup>

20. While the Prosecution argues that no ruling was made because the “operative part of the Severance Decision does not contain findings to this effect”,<sup>26</sup> the OPCD submits that this determination of the Single Judge is rendered with effect, even as expressed in the main body of the decision.<sup>27</sup> Findings do not have to be reiterated in the operative part of a decision to be a judicial finding and, in this case especially, the ruling had all of the hallmarks of a proper determination. First, the Single Judge adhered to the formal requirements under Rule 123(3) of the Rules before deciding by consulting with the Prosecution and inviting their observations.<sup>28</sup> Second, she considered the reservations raised by the Prosecution, and weighed several other factors in her reasoning, as is normally involved in making a determination. Third, she referenced Article 61(2) of the Statute when stating her decision, therefore invoking the legal power in that provision.<sup>29</sup> Finally, that decision was given effect – Messrs Kony, Odhiambo, and Otti were not subject to confirmation of charges processes.

21. Therefore, the proper application the Prosecution ought to have made is to review this determination in the Severance Decision. Instead, they applied for a fresh determination under Rule 125(1) of the Rules. The Prosecution Request should therefore be dismissed *in limine* for having the incorrect legal basis.

22. Should the Chamber, however, exercise its power to review the earlier decision at its own initiative under Rule 125(3) of the Rules, or otherwise consider the Prosecution Requests on the merits, the OPCD submits that this litigation should properly be conducted as a review. Rule 125(3) states:

*If the Pre-Trial Chamber decides not to hold a hearing on confirmation of charges in the absence of the person concerned, and the person is not available to the Court, the confirmation of charges may not take place until the person is available to the Court.*

<sup>25</sup> Severance Decision, para. 7.

<sup>26</sup> Prosecution Request, para. 12 and fn. 8.

<sup>27</sup> See Severance Decision, para. 7.

<sup>28</sup> *Idem* (“Having consulted the Prosecutor on whether or not ‘there is cause to hold a hearing on confirmation of charges under the conditions set forth in article 61, paragraph 2(b)’, as dictated by rule 123(2) of the Rules, the Single Judge noted the Prosecutor’s reservations expressed during the Status Conference”).

<sup>29</sup> *Idem*.

*The Pre-Trial Chamber may review its decision at any time, at the request of the Prosecutor or on its own initiative.*

23. This provision does not set out any guidance on how to conduct a review; however, derivative of common review procedures of the ICC, it is evident that there should be some determination of changed circumstance from the Severance Decision to justify diversion from the original outcome.<sup>30</sup> The OPCD will therefore respond to the factors raised by the Prosecution with this standard in mind.

**ii. *There is no cause to hold a Confirmation of Charges hearing in Mr Kony's absence***

24. If the Prosecution Request is considered on the merits, it is for the Prosecution, as the requesting party, to substantiate and demonstrate that cause exists to justify holding the confirmation hearing against Mr Kony in his absence. The current request, however, fails to substantiate claims made or show a significant change of circumstance since the Severance Decision. Moreover, when balancing any potential factors in favour of holding confirmation hearings in the absence of the suspect, this is outweighed by disproportionate harm such proceedings would cause to the suspect's rights as granted to him in the Rome Statute.

***1. Reliance on ICTY Rule 61 practice to define what might show "cause" for in absentia confirmation hearings is misplaced***

25. In the absence of clear case law from the ICC on Article 61(2)(b), the Prosecution relies on the practice of ICTY Rule 61 hearings as guidance for what may constitute "cause" for holding confirmation hearings *in absentia*. This is misplaced, because ICTY Rule 61 is not analogous to ICC Article 61(2)(b). While both provisions refer to the absence of suspects or accused in early stages of the proceedings, their respective goals are entirely different: Article 61(2)(b) is a part of the ICC's novel charging process, whereas the ICTY provision relates to evidentiary procedures following confirmed charges through an indictment. Specifically, ICTY Rule 61 is for the purpose of presenting victims' evidence and the issuance of an international arrest warrant.

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<sup>30</sup> See, e.g., *Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, [ICC-02/04-01/05-377](#), para. 27; *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to Rule 118 (2) of the Rules of Procedure and Evidence', 5 February 2021, [ICC-02/05-01/20-279-Red](#), paras 26–27; *Prosecutor v. Ntaganda*, Decision on Prosecution application for authorisation to provide a summary of Witness P-0040's statement and to apply redactions to the statement's annexes, 8 April 2015, [ICC-01/04-02/06-550-Red](#), para. 14.

26. Contrary to ICTY Rule 61,<sup>31</sup> Article 61(2)(b) is not a stand alone provision; rather, it belongs to the wider framework of Article 61. In this regard, Article 61 hearings aim at “ensur[ing] that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged”;<sup>32</sup> they are “designed to protect the rights of the Defence against wrongful and wholly unfounded charges”.<sup>33</sup> Moreover, the confirmation procedure “ensures that the parameters of the case are set for trial and that the charges are clear and not deficient in form, and resolves possible procedural issues in order that such issues do not taint trial proceedings”.<sup>34</sup>

27. The unique ICC charging process, envisaged with full involvement of a suspect, can not be conflated with *in absentia* proceedings of ICTY Rule 61 which were meant to be “a public reminder that an accused is wanted for serious violations of international humanitarian law”<sup>35</sup> and “to offer the victims of atrocities the opportunity to be heard”,<sup>36</sup> creating a “historical record of the manner in which they were treated”.<sup>37</sup> The sole purpose of that *ad hoc* Tribunal provision was “the public airing of the evidence against the accused and the possible issuance of an international arrest warrant”.<sup>38</sup> The ICC confirmation of charges proceedings is not, and should not, become the stage for the “creation of a historical record” as its purpose is far more significant than a show – it is a critical point of the judicial proceedings, the juncture of determining whether there is sufficient evidence to take a suspect and make him or her a person accused of the gravest of crimes.

28. These functions that the Prosecution cites as potentially establishing “cause”, derived from ICTY Rule 61 practice, therefore should not be of use to the issue presently before this Chamber. Nevertheless, even if the factors proposed by the Prosecution were accepted as valid, cause is still not established because the Prosecution fails to substantiate the claims made.

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<sup>31</sup> ICTY Rules of Procedure and Evidence, 8 July 2015, [IT/32/Rev.50](#), Rule 61 “Procedure in Case of Failure to Execute a Warrant”.

<sup>32</sup> *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, [ICC-01/04-01/07-717](#), para. 63.

<sup>33</sup> *Idem*.

<sup>34</sup> *Prosecutor v. Yekatom & Ngaïssona*, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, 20 December 2019, [ICC-01/14-01/18-403-Red](#), para. 15.

<sup>35</sup> ICTY, *Prosecutor v. Rajić*, [IT-95-12](#), Review of the indictment pursuant to rule 61 of the rules of procedure and evidence, 13 September 1996, para. 2.

<sup>36</sup> *Idem*.

<sup>37</sup> *Idem*.

<sup>38</sup> *Idem*.

## **2. The proceedings would not be ‘enhanced’ by a confirmation hearing in absentia**

29. The proceedings would not be enhanced by holding the confirmation hearing in Mr Kony’s absence. The Prosecution gives no concrete or tangible evidence in support of their claim that it would “galvanise” and accelerate efforts by states and stakeholders to apprehend Mr Kony.<sup>39</sup> This claim is speculative and no indication is provided, for instance, that the lack of judicial activity has been a reason why efforts thus far to secure Mr Kony have failed. Moreover, the Prosecution has not shown any change of circumstance since the Severance Decision.

30. Holding the confirmation hearing in Mr Kony’s absence would not enhance the legal powers available to arrest him. As discussed above, ICTY Rule 61 has no applicability in this argument by the Prosecution’s own argument in the *Gaddafi* case, where they distinguished that ICC arrest warrants “if unsealed – are already ‘international’”, unlike those at the ICTY.<sup>40</sup> Any potential confirmation decision in Mr Kony’s absence therefore has little to no utility in enhancing the legal power to secure his arrest.<sup>41</sup> Further, those instances where ICTY Rule 61 was used as “a public reminder” have been criticised in hindsight by even its most esteemed Principals. For example, in 2012, ICTY Judge Shahabuddeen described the ICTY Rule 61 proceedings as “make-work projects for judges starved of judicial activity”,<sup>42</sup> and “a mock trial”.<sup>43</sup> Former ICTY Prosecutor Louise Arbour reflected on the Rule 61 hearings as “detrimental to [her] work”,<sup>44</sup> where evidence exposure “increased the danger of witness intimidation, tampering with evidence and fabrication of convenient evidentiary responses”.<sup>45</sup> These proceedings also “monopolized important and scarce resources within OTP, with investigators and prosecutors re-examining the case for hearing preparation rather than moving on to developing new cases”.<sup>46</sup> Notably, neither the ICTR nor the Residual Mechanism chose to hold such procedure for Mr Félicien Kabuga despite that he was a fugitive for 23 years.

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<sup>39</sup> Prosecution Request, para. 36.

<sup>40</sup> *Prosecutor v. Gaddafi and Al-Senussi*, Prosecution’s Response to the Defence “Request for an order for the commencement of the pre-confirmation phase”, 30 August 2013, [ICC-01/11-01/11-425-Red](#), para. 33.

<sup>41</sup> See Leïla Bourguiba, “Article 61”, in Julian Fernandez et al. (eds.), *Statut de Rome de la Cour pénale internationale*, 2nd edition (Editions A. Pedone, 2019), p. 1683.

<sup>42</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2<sup>nd</sup> ed. (Oxford University Press 2016), p. 926.

<sup>43</sup> Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal. A Judge’s Recollection*, 1<sup>st</sup> ed. (Oxford University Press 2012), p. 130.

<sup>44</sup> Louise Arbour, “The Crucial Years” 2(2) *Journal of International Criminal Justice* 396 (2004), 399.

<sup>45</sup> *Idem*.

<sup>46</sup> *Idem*.

31. Here, there is no demonstrated overall efficiency of resources by holding an *in absentia* proceedings. A confirmation hearing would involve substantial investment of staff and judicial time and resources, as well as those of any witnesses who might be called to testify. The Court would need to appoint Counsel and draw on legal aid funds to represent Mr Kony's interests,<sup>47</sup> facilitate droves of disclosure (especially owing to the existing *Ongwen* litigation), hear potential litigation related to *in absentia* confirmation hearings,<sup>48</sup> and arrange court sitting days. The Chamber would have to analyse a substantial amount of evidence, the views and concerns of victims, all the arguments presented, and draft a confirmation decision; the Appeals Chamber may also be seized in interlocutory appeals and/or any potential request for leave to appeal such a decision.

32. In return for this investment, there would be limited, if any, overall judicial economy in the event that Mr Kony eventually does become available to the Court. Unless Mr Kony is brought soon after any potential *in absentia* confirmation decision, the case would slowly return to dormancy. Reviving cases from dormancy when suspects arrive requires substantial time and effort. For example, Mr Ongwen's case was dormant for nearly ten years when he was surrendered to the Court on 16 January 2015,<sup>49</sup> and it was only over a year later that the confirmation hearing commenced.<sup>50</sup> There is a risk, therefore, that substantial effort is exerted to revive this case for *in absentia* confirmation proceedings only for this to be required again if and when Mr Kony is brought before the Court, thus leading to inefficiency.

33. Furthermore, in the event that happens, it is not clear what relitigation of the confirmation process would be required or requested by the suspect. This inevitably leads to litigation to resolve the question of scope of Rule 126(3) and, only thereafter, litigation on what preliminary issues should be referred back from the Trial Chamber to the Pre-Trial Chamber, which could itself be complex and substantial. Judicial economy would be better achieved by holding the confirmation process once, in a procedurally more clear and certain way, when Mr Kony is available to the Court.

34. Lastly, it is not a legitimate reason to hold an *in absentia* confirmation hearing to "verify that the resources required to continue seeking to apprehend Mr Kony remain

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<sup>47</sup> If the Pre-Trial Chamber grants the Prosecution Request, the OPCD would file a separate submission arguing that it would be in the interests of justice for a Defence team to be appointed to represent Mr Kony's interests in the *in absentia* confirmation hearing.

<sup>48</sup> If the Pre-Trial Chamber grants the Prosecution Request, the matter of Mr Otti would need to be addressed in additional confirmation or severance proceedings.

<sup>49</sup> *Prosecutor v. Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, [ICC-02/04-01/15-422-Red](#), paras 4–5.

<sup>50</sup> *Ibid*, para. 11.

justified”.<sup>51</sup> This is not the purpose of the confirmation process. Verifying the resources required to pursue suspects is the Prosecutor’s responsibility. If the Prosecutor considers that there are aspects of the case against Mr Kony which are unjustified, the proper action would be to request to withdraw relevant allegations in the arrest warrant.<sup>52</sup>

### **3. *The length of time does not justify holding a confirmation hearing in absentia***

35. While Mr Kony has been a suspect before the ICC for a protracted period, there is no legal precedent that the length of time, by itself, demonstrates cause to proceed *in absentia*. Mr Kony’s case had already been pending for ten years at the time of the Severance Decision, yet length of time was not considered a factor by the Single Judge – and indeed has never been considered a factor in any decision on whether to proceed in the suspect’s absence. The Prosecution has not demonstrated why this calculation is now different.

36. The Prosecution cites the practice of the *ad hoc* Tribunals to demonstrate that they employed “all appropriate means within their procedural frameworks to advance cases”<sup>53</sup> against “high profile fugitives”,<sup>54</sup> but their examples actually undermine their argument. When the ICTY judges utilised Rule 61 for Mr Radovan Karadžić and Mr Ratko Mladić, they did this in 1996 when they were unaware that these two suspects would later become the tribunal’s longest running fugitives, so the length of time could not have been a factor in their decision.<sup>55</sup> Furthermore, while Rule 61 was available to use against Mr Kabuga, as noted above, the ICTR judges never used it against him, meaning that they chose not to use “all appropriate means” to advance the case against him as the Prosecution claims. The Rule 71*bis* procedure the ICTR did use in the *Kabuga* case is of little relevance because it is more akin to the Article 56 process at the ICC, with the aim to “preserv[e] evidence at risk of loss owing to the passage of time or vulnerability of witnesses”.<sup>56</sup> Article 56 procedures remain available to the Prosecution and have nothing to do with the need for a confirmation hearing.

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<sup>51</sup> Prosecution Request, para. 37.

<sup>52</sup> See, e.g., *Prosecutor v. Simone Gbagbo*, Decision on the Prosecutor’s request to vacate the effect of the Warrant of Arrest issued against Ms Simone Gbagbo, 19 July 2021, [ICC-02/11-01/12-90](#).

<sup>53</sup> Prosecution Request, para. 33.

<sup>54</sup> Prosecution Request, para. 34.

<sup>55</sup> See Prosecution Request, para. 34, referring to ICTY, *Prosecutor v. Karadžić & Mladić*, IT-95-5-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996. The arrest warrants for the two accused had only been issued on 25 July and 16 November 1995. See Prosecution Request, fn. 14, referring to ICTY, *Prosecutor v. Karadžić & Mladić*, IT-95-5-R61 and IT-95-18-R61, Transcript, 11 July 1996, pp. 918–919.

<sup>56</sup> Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015, 17 November 2015, [S/2015/884](#), para. 32.

**4. *The views of victims in Mr Kony's case were factored in the Severance Decision and, in any event, must be balanced against the rights of the suspect***

37. The Single Judge already considered the impact on victims linked to Mr Kony's case in the Severance Decision. She considered whether to proceed with confirmation for Mr Ongwen alone or with his absent co-suspects. She held that proceeding with the absent co-suspects when the victims linked to their case would then be unable to participate at trial “would not meet the valid expectations of victims [linked to the absent co-suspects], who will have participated during the pre-trial proceedings and remain possibly highly disappointed”.<sup>57</sup> The Prosecution argues that now the calculus is different because 4,000 victims participated in the *Ongwen* proceedings, while victims linked to Mr Kony's case “have still not had an opportunity to express their views and concerns”.<sup>58</sup>

38. But this is not a new or different calculation. This is precisely what the Single Judge envisaged in 2015 – that victims linked to Mr Ongwen would be able to participate in a trial while those linked to Mr Kony would not. Seven years later, victims linked to Mr Kony's case still have no possibility to participate in any trial while he remains unavailable; a confirmation of charges proceeding alone will not alter this. The Prosecution has not demonstrated what has changed since the Severance Decision and why proceeding with confirmation now would meet the victims' expectations when in the original decision it did not.

39. In any event, although Article 68(3) permits the victims' views and concerns to be presented “at stages of the proceedings determined to be appropriate by the Court”, they must be given “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. The OPCD is unable to comment on whether those anticipated views and concerns are prejudicial to or inconsistent with Mr Kony's rights because we have not seen the victims' observations yet. When making this assessment, however, the Chamber is requested to take into account that a confirmation hearing in the suspect's absence could adversely impact his or her rights in at least two main ways.

40. First, it could lead to irrevocable loss of rights associated with participating in the confirmation hearing in person. The only way to ensure that there is no loss of the suspect's rights would be to fully repeat the confirmation hearing if Mr Kony becomes available, but this does not seem to be contemplated as it would undermine the proclaimed “procedural

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<sup>57</sup> Severance Decision, para. 7.

<sup>58</sup> Prosecution Request, para. 41.



economy” of holding it *in absentia*.<sup>59</sup> It appears that, once committed for trial, the accused would only be able to refer issues to the Pre-Trial Chamber which are necessary for the “effective and fair functioning” of the Trial Chamber.<sup>60</sup> There is therefore little by way of safeguards to restore the then-accused’s lost opportunity to participate in the confirmation hearing. The accused would at no point be able to object to the charges or challenge the evidence presented by the Prosecution in the *in absentia* confirmation hearing under Article 61(6), which are critical ways the suspect contributes to the Chamber determining the proper factual scope of the trial. He would therefore be subjected to a trial that may be greater in scope than necessary, which further risks his right to be tried without undue delay.<sup>61</sup>

41. Second, a confirmation hearing in his absence could harm the suspect’s right to be presumed innocent. The right to be presumed innocent also protects the “good reputation” of the suspect in public.<sup>62</sup> Even with the utmost care in highlighting that a confirmation hearing is not a trial, the public would likely be left with the indelible impression of the Prosecution’s unopposed narrative and evidence presented in a courtroom that, for the vast majority, would be indistinguishable from a trial. The Prosecution fails to mitigate this risk – and, in fact, appears to court it – by stating forthrightly that the objectives would be “reminding the public and the international community of the serious nature of the alleged crimes”<sup>63</sup> and for “the evidence of Mr KONY’s alleged crimes and his criminal responsibility to be aired publicly”.<sup>64</sup> The OPCD submits that seeking such publicity in this context strays far from the intended purpose of confirmation hearings, which is to determine whether there is sufficient evidence for trial,<sup>65</sup> and could therefore lead to an arbitrary and disproportionate interference in the suspect’s right to be presumed innocent.

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<sup>59</sup> Prosecution Request, para. 37.

<sup>60</sup> Rule 126(3) of the Rules of Procedure and Evidence. *See also Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, [ICC-01/09-02/11-728](#), para. 83.

<sup>61</sup> Article 67(1)(c) of the Rome Statute.

<sup>62</sup> *See* Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), pp. 164, 178; European Commission, Commission Staff Working Document, Impact Assessment, Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, 27 November 2013, [SWD\(2013\) 478 final](#), p. 19. *See also Konostas v. Greece*, 24 May 2011, [53466/07](#), para. 32 (“the presumption of innocence, as a procedural right, serves mainly to guarantee the rights of the defence and at the same time helps to preserve the honour and dignity of the accused”).

<sup>63</sup> Prosecution Request, para. 31.

<sup>64</sup> Prosecution Request, paras 32, 36.

<sup>65</sup> *See Prosecutor v. Yekatom and Ngaisonna*, Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaisonna’, date of original 11 December 2019, date of corrected version 14 May 2020, date of issue 28 June 2021, ICC-01/14-01/18-403-Corr-Red, para. 14 (“The purpose of the pre-trial proceedings, and specifically of the Confirmation Hearing, is to determine whether the case as presented by the Prosecutor is sufficiently established to warrant a full trial”).



42. To conclude, whether considering any changed circumstances since the Severance Decision or considering the matter *de novo*, the Prosecution have failed to justify that cause exists to proceed with a confirmation hearing in Mr Kony's absence.

**C. No steps have been taken to inform Mr Kony of the actual charges against him**

43. Even if all other conditions are fulfilled, the Prosecution fails to show how its request complies with the Article 61(2)(b) requirement that “all reasonable steps have been taken [...] to inform the person of the charges and that a hearing to confirm those charges will be held”. Notice of charges against a suspect is a critical fair trial right recognised by international and regional human rights instruments,<sup>66</sup> and is acknowledged as a “an essential prerequisite for ensuring that the proceedings are fair”.<sup>67</sup> This right is imbued in the ICC texts and explicitly enshrined in the Rome Statute in Article 67(1)(a); further, it is a component that would be satisfied in an initial appearance in Article 60(1).

44. In the present case, not all reasonable steps have been taken to inform Mr Kony of the additional charges against him. Here, the Prosecution asserts that Mr Kony has *not* been informed of the full charges, but “will be informed – in advance of the hearing – of the charges brought for confirmation”.<sup>68</sup> This forecasting is based on the Prosecution's notice that it will seek to present “limited additional charges” in an *in absentia* confirmation of charges hearing.<sup>69</sup>

45. The OPCD submits that this prospective notice does not fulfil the procedural requirement of an Article 61(2)(b) and Rule 123(3) determination, which requires the Chamber to ensure that the absent suspect has, in fact, been put on notice of those charges against him or her. According to fair trial practices, “[p]articulards of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him”.<sup>70</sup> Notice of criminal charges must contain the factual basis as well as the legal characterisation

<sup>66</sup> United Nations, General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series, Articles 9(2) and 14(3)(a); Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 United Nations Treaty Series, Article 6(3)(a); Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series, Article 8(2)(b).

<sup>67</sup> *Pélissier and Sassi v. France* [GC], 25 March 1999, [25444/94](#), para. 52; *Sejdović v. Italy* [GC], 1 March 2006, [56581/00](#), para. 90; *López Alvarez v. Honduras*, 1 February 2006, [Serie C No. 141](#), para. 149.

<sup>68</sup> Prosecution Request, para. 42.

<sup>69</sup> Prosecution Request, paras 49-50.

<sup>70</sup> *Kamasinski v. Austria*, 19 December 1989, [9783/82](#), para. 79; *Pélissier and Sassi v. France* [GC], 25 March 1999, [25444/94](#), para. 51.

of the crime.<sup>71</sup> The UN Human Rights Committee has commented on the early nature of such right, determining:

*[T]he right to be informed of the charge requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such.*<sup>72</sup>

46. The case against Mr Kony should not be built *only* if this *in absentia* proceeding is granted – the case should be developed as the evidence dictates and supports (or diminishes) the Prosecution’s original “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”.<sup>73</sup>

47. Therefore, Rule 123(3) requires, at a minimum, that the Prosecution update the arrest warrant through the proper channels of Article 58(6) and broadcast it widely in the most unredacted version possible, and for a designated period of time. No proper notice of the charges can be assumed for Mr Kony if they are not yet even available, and the Pre-Trial Chamber can not be satisfied of the Article 61(2)(b) requirement of Mr Kony’s notice of the charges against him. What is more, this process of amendment and publishing would not only fulfil the basic notice requirement of the texts, but may also serve to achieve the publicity sought to generate cooperation and ‘galvanisation’ of the international community as referenced throughout the Prosecution Request, thus serving a core component of the relief it seeks.

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<sup>71</sup> *Mattoccia v. Italy*, 25 July 2000, [23969/94](#), para. 59; *Penev v. Bulgaria*, 7 January 2010, [20494/04](#), paras 33 and 42; *Pélissier and Sassi v. France* [GC], 25 March 1999, [25444/94](#), para. 52; *Sejdović v. Italy* [GC], 1 March 2006, [56581/00](#), para. 90.

<sup>72</sup> UN Human Rights Committee, [CCPR General Comment No. 13: Art 14](#), 13 April 1984, para. 8.

<sup>73</sup> ICC Statute, Article 58(1)(a).

**IV. RELIEF REQUESTED**

48. For the foregoing, the OPCD respectfully requests the Pre-Trial Chamber to:
- a. DISMISS the Prosecution Request, *in limine*, as filed under Rule 125(1) as they should have requested a review of the original decision not to hold an *in absentia* confirmation hearing under Rule 125(3); OR, in the alternative,
  - b. FIND that *in absentia* confirmation hearing can only be held after a suspect has made an initial appearance and, as consequence, DISMISS the Prosecution Request; OR, in the alternative,
  - c. FIND that the Prosecution has not demonstrated that there is cause to hold an *in absentia* confirmation hearing against Mr Kony pursuant to Article 61(2)(b) and, as consequence, DISMISS the Prosecution Request.



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Xavier-Jean Keïta  
Principal Counsel of the OPCD

Dated this 30<sup>th</sup> Day of March 2023  
At The Hague, The Netherlands