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Pénale  
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**International  
Criminal  
Court**

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**PRE-TRIAL CHAMBER II**

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

**SITUATION IN UGANDA**

**IN THE CASE OF  
*THE PROSECUTOR v. JOSEPH KONY***

**Public Document**

**Victims' response to "OPCD Request for Leave to Appeal the 'Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence'" (No. ICC-02/04-01/05-467)**

**Source:** Office of Public Counsel for Victims

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

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**Detention Section**

**Victims Participation and Reparations  
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**Other**

## I. INTRODUCTION

1. Counsel of the Office of Public Counsel for Victims (the “OPCV”) appointed to represent the victims in the case (the “Legal Representatives”) hereby jointly submit their response to the Office of Public Counsel for the Defence (the “OPCD”) Request for Leave to Appeal (the “Request”)<sup>1</sup> the “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence” (the “Impugned Decision”).<sup>2</sup>

2. The Legal Representatives submit that the Request should be dismissed *in limine* as the OPCD lacks standing to seek leave to appeal, and in any event the Request is premature. The OPCD fails to demonstrate that it has a particular interest in appealing a ruling which does not take any operative decision *vis-à-vis* Mr Kony – the suspect at large (the “Suspect”) – or any future *in absentia* proceedings against other defendants. It also fails to explain how the Impugned Decision – which is a preliminary one, as opposed to a final ruling on the matter – constitutes *a significant precedent* likely to affect the legal certainty of the proceedings.

3. The Request also fails on the merits, as it does not satisfy the requirements of article 82(1)(d) of the Rome Statute (the “Statute”). Indeed, it is premised on a misinterpretation of the Impugned Decision and on the OPCD merely disagreeing with its findings. The Impugned Decision did not rule on whether a confirmation of charges hearing will take place in the absence of Mr Kony, nor did it establish a “*novel legal framework*” in this regard. Thus, the alleged issue does not affect the fairness or the expeditiousness of the proceedings.

4. Lastly, the Request does not show that the intervention by the Appeals Chamber will materially advance these proceedings. On the contrary, certifying an

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<sup>1</sup> See the “OPCD Request for Leave to Appeal the ‘Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence’”, [No. ICC-02/04-01/05-467](#), 29 November 2023 (the “Request”).

<sup>2</sup> See the “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-466](#), 23 November 2023 (the “Impugned Decision”).

appeal against the Impugned Decision would be detrimental to Mr Kony's interest in being promptly and fully informed of the charges against him. It will also be detrimental to the interests of the victims who have been waiting for justice for some 20 years and to whom the start of judicial proceedings marks an important opportunity to voice their sufferings and victimisation.

## II. PROCEDURAL BACKGROUND

5. On 8 July 2005, Pre-Trial Chamber II in its previous composition (the "former Chamber") issued the Warrant for the Arrest of Mr Kony.<sup>3</sup>

6. On 10 August 2007, the Single Judge of the former Chamber granted applicants a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06, and a/0122/06 the status of victims in the Case and applicants a/0101/06 and a/0119/06 the status of victims in the context of the Situation.<sup>4</sup>

7. On 15 February 2008, the Single Judge of the former Chamber appointed Ms Massidda as legal representative of victim a/0119/06 (admitted both in the Situation and in the Case).<sup>5</sup>

8. On 14 March 2008, the Single Judge of the former Chamber granted applicants a/0094/06, a/0095/06, a/0103/06, a/0117/06, a/0120/06, a/0121/06, a/0123/06, and a/0124/06 the status of victims in the Case and applicants a/0065/06, a/0068/06, a/0093/06, a/0096/06, a/0117/06, a/0120/06, and a/0123/06 the status of victims in the context of the Situation.<sup>6</sup>

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<sup>3</sup> See the "Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-53](#), 27 September 2005. A lesser redacted version was notified on 13 March 2023: [No. ICC-02/04-01/05-456-Anx](#).

<sup>4</sup> See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-101](#) and [No. ICC-02/04-01/05-252](#), 10 August 2007.

<sup>5</sup> See the "Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-267](#), 15 February 2008.

<sup>6</sup> See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06,

9. On 21 October 2008, the former Chamber decided to initiate *proprio motu* proceedings under article 19(1) of the Statute.<sup>7</sup>

10. On 10 March 2009, said Chamber concluded that the case against Mr Kony et al. is admissible before the Court.<sup>8</sup> Said ruling was confirmed by the Appeals Chamber on 16 September 2009.<sup>9</sup>

11. On 21 November 2008, the Single Judge of the former Chamber granted applicants a/0076/07, a/0077/07, a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07, a/0091/07, a/0092/07, a/0093/07, a/0094/07, a/0095/07, a/0096/07, a/0097/07, a/0098/07, a/0099/07, a/0100/07, a/0101/07, a/0102/07, a/0103/07, a/0105/07, a/0106/07, a/0107/07, a/0108/07, a/0112/07, and a/0123/07 the status of victims in the Case and applicants a/0108/07, a/0115/07, a/0117/07, and a/0118/07 the status of victims in the context of the Situation.<sup>10</sup> The Single Judge thereby found it appropriate for all victims in the Case and in the context of the Situation to be represented by a Counsel from the OPCV.<sup>11</sup> With regard to a/0108/07, the Single Judge instructed the Registrar to seek his views as to whether he wishes to be represented by the legal representative appointed for the victims in the Case or by the legal representative appointed for the victims in the context of the Situation.<sup>12</sup>

12. On 9 February 2009, the Single Judge of the former Chamber appointed Ms Massidda as legal representative of a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0091/06, a/0092/06, a/0093/06, a/0096/06, a/0102/06, a/0115/06, a/0125/06, a/0126/06,

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a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-125](#), 14 March 2008.

<sup>7</sup> See the "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-320](#), 21 October 2008.

<sup>8</sup> See the "Decision on the admissibility of the case under article 19(1) of the Statute" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-377](#), 10 March 2009.

<sup>9</sup> See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" (Appeals Chamber), [No. ICC-02/04-01/05-408 OA3](#), 16 September 2009.

<sup>10</sup> See the "Decision on victim's applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-356](#), 21 November 2008.

<sup>11</sup> *Idem*, paras. 281-282.

<sup>12</sup> *Idem*, para. 284.

a/0115/07, a/0117/07 and a/0118/07, granted the status of victims in the context of the Situation; and Ms Pellet as legal representative of a/0090/06, a/0094/06, a/0095/06, a/0098/06, a/0103/06, a/0112/06, a/0118/06, a/0121/06, a/0122/06, a/0124/06, a/0076/07, a/0077/07, a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07, a/0091/07, a/0092/07, a/0093/07, a/0094/07, a/0095/07, a/0096/07, a/0097/07, a/0098/07, a/0099/07, a/0100/07, a/0101/07, a/0102/07, a/0103/07, a/0105/07, a/0106/07, a/0107/07, a/0112/07, and a/0123/07, granted the status of victims of the Case.<sup>13</sup> The decision on the legal representation of a/0117/06, a/0120/06, a/0123/06 and a/0108/07 was deferred in order to collect their views thereon. No decision in this regard was issued to date, they thus remain represented by the OPCV.

13. On 9 March 2012, the Single Judge of the former Chamber appointed the OPCV as the legal representative of all victims and victim applicants pending the appointment of a common legal representative in the Situation.<sup>14</sup>

14. On 24 November 2022, the Prosecution filed the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence” (the “Prosecution’s Request”).<sup>15</sup>

15. On 2 December 2022, the OPCD, pursuant to regulation 77(4)(d) of the Regulations of the Court, requested leave to appear before Pre-Trial Chamber II (the “Chamber”) in relation to the Prosecution’s Request.<sup>16</sup>

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<sup>13</sup> See the “Decision on legal representation of Victims a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0090/06 to a/0096/06, a/0098/06, a/0102/06, a/0103/06, a/0112/06, a/0115/06, a/0117/06, a/0118/06, a/0120/06 to a/0126/06, a/0076/07 to a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07 to a/0103/07, a/105/07 to a/0108/07, a/0112/07, a/0115/07, a/0117/07, a/0118/07 and a/0123/07” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-176](#), 9 February 2009.

<sup>14</sup> See the “Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-191](#), 9 March 2012.

<sup>15</sup> See the “Public Redacted Version of the ‘Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’”, [No. ICC-02/04-01/05-446-Red](#), 24 November 2022 (the “Prosecution’s Request”).

<sup>16</sup> See 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”, [No. ICC-02/04-01/05-450](#), 2 December 2022.

16. On 7 February 2023, the Chamber issued its “Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant” inviting, *inter alia*, the Legal Representatives to gather the views and concerns of the victims in the present case about holding *in absentia* confirmation proceedings against Mr Kony and to transmit them to the Chamber by 30 March 2023, at the latest.<sup>17</sup> It also invited the OPCD to file observations by the same date.<sup>18</sup>

17. On 30 March 2023, the Legal Representatives submitted the victims’ views and concerns on the Prosecution’s Request.<sup>19</sup> On the same day, the OPCD submitted its observations.<sup>20</sup>

18. On 3 April 2023, the Prosecution requested leave to reply to the OPCD Observations,<sup>21</sup> which the Chamber rejected.<sup>22</sup>

19. On 23 November 2023, the Chamber issued the Impugned Decision, ruling that there is cause to hold a confirmation hearing against Mr Kony in his absence and deferring its final decision on the matter in light of further steps to be undertaken by the Prosecution and the Registry.<sup>23</sup>

20. On 29 November 2023, the OPCD submitted the Request.<sup>24</sup>

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<sup>17</sup> See the “Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-453](#), 7 February 2023.

<sup>18</sup> *Idem*.

<sup>19</sup> See the “Victims’ Views and Concerns on the ‘Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’”, [No. ICC-02/04-01/05-457](#), 30 March 2023.

<sup>20</sup> See the “OPCD Observations on the Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”, [No. ICC-02/04-01/05-458](#), 30 March 2023.

<sup>21</sup> See the “Prosecution request for leave to reply to ‘OPCD Observations on the Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’ (ICC-02/04-01/05-458)”, [No. ICC-02/04-01/05-460](#), 3 April 2023.

<sup>22</sup> See the “Decision on the Prosecution request for leave to reply to the OPCD Observations” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-462](#), 12 April 2023.

<sup>23</sup> See the Impugned Decision, *supra* note 2.

<sup>24</sup> See the Request, *supra* note 1.

### III. SUBMISSIONS

#### 1. Preliminary observations on the OPCD lack of standing and the premature nature of the Request

21. The OPCD was granted leave to address the Chamber on the issue of the possibility to hold a confirmation of charges hearing in the absence of the Suspect.<sup>25</sup> However, this does not mean that it has standing to seek leave to appeal under article 82(1)(d) of the Statute. In this regard, Pre-Trial Chamber A in the Gicheru case clarified that *“the term ‘party’ in the chapeau of article 82(1) of the Statute should be interpreted as encompassing all those having a particular interest in the outcome of the proceedings for the purposes of requests for leave to appeal under article 82(1)(d) of the Statute”*.<sup>26</sup> It also referred to the Appeals Chamber jurisprudence according to which: *“who qualifies as a ‘party’ in terms of article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the appeal”*.<sup>27</sup> In granting standing to the OPCD to request leave to appeal, Pre-Trial Chamber A considered that the matter at stake constituted *“a significant precedent for any future proceedings to be conducted on this basis [...]”* or an issue that is essential to *“be reviewed by the Appeals Chamber with a view to ensuring legal certainty regarding the basis of such proceedings”*.<sup>28</sup>

22. In the present circumstances, the OPCD falls short to demonstrate that it has a particular interest in appealing a ruling which merely *“authoris[es] a pathway to in absentia Confirmation of Charges proceedings”*<sup>29</sup> – to put it in the words of the OPCD – and does not take any operative decision *vis-à-vis* the Suspect or any future *in absentia* proceedings against other defendants. In the same vein, the OPCD also fails to explain how the Impugned Decision – which is a preliminary one, as opposed to a final ruling

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<sup>25</sup> See the “Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant”, *supra* note 17.

<sup>26</sup> See the “Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’” (Pre-Trial Chamber A (Article 70)), [No. ICC-01/09-01/20-68](#), 23 December 2020, para. 27.

<sup>27</sup> *Idem*, para. 24.

<sup>28</sup> *Idem*, para. 26

<sup>29</sup> See the Request, *supra* note 1, para. 1 (emphasis added).



on the matter – can fall within the aforementioned situations identified by Pre-Trial Chamber A in the *Gicheru* case.<sup>30</sup>

23. In light of the above considerations, the Request should be dismissed *in limine*. Should the Chamber nonetheless be minded to entertain its merits, the Legal Representatives submit the following observations.

## 2. Applicable law

24. Article 82(l)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

25. For the purposes of the first prong of this test, the Appeals Chamber defined an “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.<sup>31</sup> Accordingly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.<sup>32</sup> Moreover, the Appeals Chamber ruled that “the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”.<sup>33</sup>

26. The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either

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<sup>30</sup> See the “Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’”, *supra* note 26, para. 26.

<sup>31</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 9.

<sup>32</sup> See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-817](#), 18 July 2013, para. 12.

<sup>33</sup> *Idem*, para. 20.

a) *'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'.*<sup>34</sup> According to established jurisprudence, in analysing whether an appealable issue would 'significantly affect' the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Statute, the notion of 'fairness' must be understood as making reference to situations *"when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision"*.<sup>35</sup> In turn, 'expeditiousness' must be read as *"closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned"*.<sup>36</sup>

27. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the "outcome of the trial" under article 82(1)(d) of the Statute, *"[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence"*.<sup>37</sup>

### **3. The Request does not meet the criteria of article 81(1)(d) of the Statute**

28. The Request fails on the merits, because it does not satisfy the requirements of article 82(1)(d) of the Statute.

a) *The OPCD fails to identify an appealable issue that would significantly affect the fair and expeditious conduct of proceedings*

29. The OPCD seeks leave to appeal the Impugned Decision on the following issue:

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<sup>34</sup> See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 31, para. 10.

<sup>35</sup> See *e.g.* the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

<sup>36</sup> *Idem*, para. 18.

<sup>37</sup> See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 34, para. 13.

*“Whether the Pre-Trial Chamber erred in law in failing to address and properly consider the primacy of Rome Statute rights of a suspect – namely Articles 55, 66, and 67 – in establishing a novel legal framework for a confirmation of charges hearing in absentia pursuant to Article 61(b)(2)”.*<sup>38</sup>

30. The Legal Representatives submit that the alleged issue is premised on a misinterpretation of the nature of the Impugned Decision and represents at best, a mere disagreement with the Chamber’s ruling. The Impugned Decision did not rule on whether a confirmation of charges hearing will take place in the absence of Mr Kony, nor did it establish a “*novel legal framework*” in relation to proceedings under article 61(2) of the Statute. In this regard, the Chamber made clear that it was not yet in the position to decide on the matter and that it deferred its ruling to a later stage.<sup>39</sup>

31. In this vein, the alleged issue does not have any potential to affect the fairness or the expeditiousness of the proceedings. Any examination of the impact of *in absentia* proceedings on the Suspect’s rights and the balancing of said rights with others enshrined in the founding texts of the Court will be carried out at the time of the issuance of the Chamber’s final decision on the matter. Accordingly, granting leave to appeal on the alleged issue, would not expedite the proceedings.<sup>40</sup> In turn, if a party were to fulfil the requirements of article 82(1)(d) of the Statute, any arguments with regard to the final decision would then be considered at that stage.

***b) Intervention by the Appeals Chamber will not materially advance the proceedings***

32. Without prejudice to the Chamber concluding that the OPCD has not in fact identified any ‘appealable’ issue genuinely arising from the Impugned Decision, which would significantly affect the fair and expeditious conduct of these

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<sup>38</sup> See the Request, *supra* note 1, para. 11.

<sup>39</sup> See the Impugned Decision, *supra* note 2, paras. 49-52 and operative part of the Decision.

<sup>40</sup> See *e.g.* the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), *supra* note 35, para. 18.

proceedings – the Request does not show that an intervention by the Appeals Chamber will materially advance these proceedings.

33. On the contrary, there are clear indications that certifying any portion of the Impugned Decision for appeal will impede the progress of the present proceedings, to the detriment of Mr Kony's interest in being promptly and fully informed of the charges against him. This is even more relevant since the Prosecutor expressed his intention to include two additional charges against the Suspect,<sup>41</sup> and an amended Document Containing the Charges needs to be issued and publicised.<sup>42</sup> It will also be detrimental to the interests of the victims who have been waiting for justice for some 20 years and to whom the start of judicial proceedings marks an important opportunity to voice their sufferings and victimisation.

**FOR THE FOREGOING REASONS**, the Legal Representatives respectfully request the Chamber to dismiss the Request.



**Paolina Massidda**



**Sarah Pellet**

Dated this 1<sup>st</sup> day of December 2023

At The Hague (The Netherlands)

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<sup>41</sup> See the Prosecution's Request, *supra* note 15.

<sup>42</sup> See the Impugned Decision, *supra* note 2, para. 52.