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**No. ICC-02/04-01/05
Date: 23 November 2023**

PRE-TRIAL CHAMBER II

Before:

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

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

Public

Decision on the Prosecution's request to hold a confirmation of charges
hearing in the *Kony* case in the suspect's absence

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

The Office of the Prosecutor

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Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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States Representatives

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court, in relation to the Prosecution’s ‘Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’ (the ‘Prosecution Request’),¹ issues this decision, ruling on certain aspects of the request and ordering the Prosecution to submit a Document Containing the Charges.

I. PROCEDURAL HISTORY

1. On 8 July 2005, Pre-Trial Chamber II (the ‘Chamber’) issued an under seal warrant of arrest against Mr Kony for war crimes and crimes against humanity allegedly committed in 2003-2004 in Uganda.² The arrest warrant was amended on 27 September 2005 (the ‘Arrest Warrant’)³ and its existence was unsealed in October 2005, with the issuance of a public redacted version.⁴
2. On 6 February 2015, following his voluntary surrender the case against Dominic Ongwen was severed from the cases against Mr Kony and others, in order to proceed with a confirmation of charges hearing against Mr Ongwen (the ‘*Ongwen* Severance Decision’).⁵
3. On 23 November 2022, the Prosecution requested the Chamber to issue a lesser redacted version of the Arrest Warrant.⁶ The next day the Prosecution Request was filed.

¹ 24 November 2022, ICC-02/04-01/05-446 (public redacted version filed the same day, [ICC-02/04-01/05-446-Red](#)).

² Warrant of Arrest for Joseph Kony, 8 July 2005, ICC-02/04-01/05-2-US-Exp.

³ Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, ICC-02/04-01/05-28-US-Exp.

⁴ Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest, 13 October 2005, [ICC-02/04-01/05-52](#); Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, [ICC-02/04-01/05-53](#).

⁵ Decision Severing the Case Against Dominic Ongwen, 6 February 2015, [ICC-02/04-01/05-424](#). On 10 September 2015, the proceedings against Mr Odhiambo were terminated, following confirmation of his passing; Decision terminating proceedings against Okot Odhiambo, 10 September 2015, [ICC-02/04-01/05-431](#).

⁶ Request for lifting of certain redactions in the Arrest Warrant against Joseph Kony, 23 November 2022, ICC-02/04-01/05-445-Conf-Exp, confidential and *ex parte*, only available to the Prosecution (a public redacted version was issued on 20 February 2023, [ICC-02/04-01/05-445-Red](#)).

4. On 28 November 2022, the Office of Public Counsel for Victims (the ‘OPCV’) requested an extension of time to respond to the Prosecution Request.⁷ On 2 December 2022, the Chamber determined that the OPCV’s request would be considered in the context of an order on the conduct of the proceedings, to be issued in due course.⁸ On the same day, the Office of Public Counsel of the Defence (the ‘OPCD’) requested leave to appear before the Chamber in relation to the Prosecution Request, particularly to make submissions on the impact of *in absentia* proceedings for suspects and accused before the Court.⁹ On 8 December 2022, the Chamber ruled that the OPCD’s request would also be considered in the context of the forthcoming order on the conduct of proceedings.¹⁰

5. On 7 February 2023, the Chamber issued an order on procedural matters, in which it (i) granted the Prosecution’s request to issue a lesser redacted version of the Arrest Warrant, to be issued in due course; (ii) invited the OPCV to gather and report on the views and concerns in regard to the Prosecution Request of the victims authorised to participate in the case by 30 March 2023, and (iii) invited the OPCD to file observations by the same date.¹¹ In the same order, the Chamber also instructed the Registry to submit a report on the measures taken to locate Mr Kony, to notify him of the allegations against him and to secure his arrest or appearance since the issuance of the Arrest Warrant.

6. On 13 March 2023, the Chamber issued a lesser redacted version of the Arrest Warrant.¹²

⁷ 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](#).

⁸ 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](#).

⁹ 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 2023, [ICC-02/04-01/05-450](#).

¹⁰ 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](#).

¹¹ 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](#).

¹² Notification of the lesser redacted version of “Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005”, issued pursuant to the Pre-Trial Chamber II’s “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, 10 March 2023, [ICC-02/04-01/05-456](#).

7. On 30 March 2023, the OPCV submitted a report on the victims' views and concerns on the Prosecution Request¹³ and the OPCD submitted its observations.¹⁴

8. On 30 March 2023, the Registry reported on the efforts taken to locate Mr Kony and secure his arrest.¹⁵ On 6 April 2023, the Chamber instructed the Registry, via email, to submit an amended report, including a complete and detailed account of all relevant efforts to notify Mr Kony of the allegations therein and secure his appearance before the Court.¹⁶

9. On 12 April 2023, the Chamber rejected a request by the Prosecution¹⁷ for leave to reply to the observations of the OPCD.¹⁸

10. On 8 May 2023, the Registry filed an amended report on the measures taken to locate Mr Kony and inform him of the existence of the Arrest Warrant (the 'Registry Report').¹⁹

II. SUBMISSIONS

A. Prosecution's submissions

11. The Prosecution requests the Chamber to hold a confirmation hearing against Mr Kony in his absence. It submits that the requirements under article 61(2)(b) of the Statute are met, and that there is a strong and compelling case to authorise a confirmation hearing *in absentia*.²⁰

12. As regards the statutory requirements, the Prosecution submits that Mr Kony is a 'person who cannot be found', despite extensive efforts to locate and arrest him. It

¹³ Victim's Views and Concerns on the 'Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence', 30 March 2023, [ICC-02/04-01/05-457](#) (the 'OPCV Report').

¹⁴ OPCD Observations on the Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 30 March 2023, [ICC-02/04-01/05-458](#) (the 'OPCD Observations').

¹⁵ Registry's Report on the measures to locate Joseph Kony, 30 March 2023, ICC-02/04-01/05-459-SECRET-Exp.

¹⁶ Email from Pre-Trial Chamber II on 06 April 2023.

¹⁷ 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), 3 April 2023, [ICC-02/04-01/05-460](#).

¹⁸ Decision on the Prosecution request for leave to reply to the OPCD Observations, 12 April 2023, [ICC-02/04-01/05-462](#).

¹⁹ Registry's Report on the measures to locate Joseph Kony and notify him of the Warrant of Arrest, 8 May 2023, ICC-02/04-01/05-2047-SECRET-Exp.

²⁰ Prosecution Request, para. 4.

points to longstanding and ongoing undertakings by the Prosecution and the Registry, together with ‘unprecedented assistance’ from the international community and civil society, to obtain information about his whereabouts and execute the Arrest Warrant. The Prosecution also lists examples of instances in which it ‘sought to disseminate information about the arrest warrant for Mr Kony’ and publicly called for his arrest and surrender.

13. According to the Prosecution, the obligation to take all reasonable steps to notify Mr Kony of the charges against him and the fact that a confirmation hearing will be held, only arise if and when the Chamber decides to hold a confirmation of charges hearing *in absentia*. Should the Chamber grant the Prosecution Request, ‘Mr Kony would be informed – in advance of the hearing – of the charges brought for confirmation and that a hearing to confirm those charges will be held’.

14. Yet, the Prosecution claims that reasonable steps have already been taken to notify Mr Kony of the allegations against him. Among them is the issuance of a public redacted version of the Arrest Warrant in October 2005, listing 33 counts which specify ‘the approximate time, place and nature of the alleged crimes, as well as the alleged underlying conduct and its legal characterization.’ The Prosecution also asserts that there is reliable information that Mr Kony became aware of the existence and the content of the Arrest Warrant promptly after it was issued.

15. The Prosecution submits that ‘good cause’ exists for the Chamber to order a confirmation of charges hearing *in absentia* for the following reasons. First, Mr Kony has been at large for 17 years and it is now appropriate to advance proceedings ‘to the fullest extent compatible with the Statute’, to demonstrate that judicial proceedings will not be thwarted by attempts to evade justice. Second, a confirmation hearing *in absentia* would enhance the Court’s proceedings against Mr Kony, by, in particular (i) intensifying efforts by States and other stakeholders to apprehend Mr Kony; (ii) enabling the public airing of the evidence; and, if the charges were confirmed and Mr Kony brought before the Court, (iii) ‘facilitating [Mr Kony’s] expeditious committal for trial’. Third, victims of the alleged crimes would have the opportunity to present their views and concerns at the hearing through their legal representatives, thus making the hearing a ‘meaningful milestone’ for victims.

16. The Prosecution also informs the Chamber that, if a confirmation hearing *in absentia* is authorised, it intends to present ‘limited additional charges’ against Mr Kony, which do not form part of the allegations in the Arrest Warrant. The additional charges would, on the one hand, specify more precisely Mr Kony’s alleged responsibility adding crimes and modes of responsibility to reflect additional evidence and conform to recent charging practices. On the other hand, they would relate to alleged crimes committed against women and children and alleged crimes committed during two other LRA attacks, as charged in the *Ongwen* case. Should the Chamber grant the request, the Prosecutor would submit a document containing the charges, including a public version thereof that it will seek to publicise, along with other measures to inform Mr Kony of the charges and that a confirmation hearing will take place.

B. OPCD’s submissions

17. The OPCD submits that *in absentia* confirmation proceedings should only occur in exceptional circumstances, and that no grounds to derogate from the usual process exist in this case. It argues the Prosecution Request should be dismissed *in limine* to the extent that it seeks a fresh determination under rule 125(1) of the Rules of Procedure and Evidence (the ‘Rules’). As Pre-Trial Chamber II, in an earlier composition in 2015, determined not to proceed with a confirmation hearing in the absence of Mr Kony, the Prosecution should have sought a review of that decision under rule 125(3) of the Rules, on the grounds of a change in circumstances.²¹

18. Addressing the requirements of article 61(2)(b) of the Statute, the OPCD first submits that a confirmation hearing in the absence of a person who ‘cannot be found’ must be preceded by the person’s first appearance before the Court, in accordance with article 60(1) of the Statute. As Mr Kony has not had a first appearance, he does not fall in the scope of article 61(2)(b) of the Statute. Second, the OPCD submits that reasonable steps to inform Mr Kony of the charges against him have not yet been taken. It points to the Prosecution’s intent to present additional charges at the confirmation hearing, and emphasises that no proper notice of the charges can be assumed if the

²¹ OPCD Observations, paras 19-23.

charges are not yet available. In its view, rule 123(3) of the Rules requires the Prosecution to update the arrest warrant and broadcast it for a set period of time.

19. The OPCD also submits that the Prosecution does not establish ‘cause’ to hold a confirmation hearing *in absentia*. It argues that the reasons relied upon by the Prosecution to show good cause are derived from the International Criminal Tribunal for the former Yugoslavia’s Rule 61 practice²² and are not relevant to the decision to hold a confirmation of charges hearing at the ICC, because the latter is not intended to create a ‘historical record’ but rather to ‘protect the rights of the Defence’ by determining whether there is sufficient evidence to proceed to trial. Even if the reasons relied on by the Prosecution were found to be relevant, the OPCD also submits the Prosecution’s claims remain unsubstantiated. The OPCD argues, *inter alia*, that holding an *in absentia* confirmation of charges hearing would not enhance the efficiency of the proceedings; rather, it would risk adversely affecting Mr Kony’s right to be presumed innocent and his rights associated with participating in the hearing in person. Finally, the wishes of victims should be balanced against the rights of the suspect.

C. OPCV’s submissions

20. In a joint report, the OPCV – of which certain members were appointed as legal representatives of the victims admitted to participate in the Kony *et al* case²³ – submits that the victims support the Prosecution Request. It indicates that the victims unanimously agreed that a confirmation hearing *in absentia* would be ‘a meaningful step in the right direction’, in terms of reviving the case and preparing for a potential trial, and potentially encouraging States to take measures to locate and apprehend Mr Kony.²⁴

²² Referring to rule 61 of the ICTY’s Rules of Procedure and Evidence (the ‘ICTY’s Rules).

²³ In its procedural order of 7 February 2023, the Chamber considered it appropriate to only receive the views and concerns of the victims authorised to participate in the Kony *et al* case. See 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. 14.

²⁴ OPCV Report, paras 2 and 19.

III. ANALYSIS

A. Preliminary issues

1. Legal basis for the Prosecution Request

21. The Prosecution frames its request under rule 125(1) of the Rules,²⁵ as a new application for the Chamber to decide whether to hold a confirmation hearing in the absence of Mr Kony.²⁶ In doing so, it argues that the *Ongwen* Severance Decision did not rule on the possibility of holding *in absentia* confirmation proceedings against Mr Ongwen's co-suspects still at large (including Mr Kony), because the 'operative part of the [s]everance [d]ecision does not contain findings to this effect'.²⁷ In contrast, the OPCD contends that the Prosecution Request ought to have been submitted as a request for review under rule 125(3) of the Rules.²⁸

22. Following the surrender of Mr Ongwen to the Court, the Chamber, on its own initiative, noted that the statutory framework allowed the Chamber to conduct *in absentia* confirmation proceedings against the other three co-suspects (including Mr Kony) and consulted the Prosecution in accordance with rule 123 of the Rules.²⁹ The Prosecution 'resolutely' opposed the idea³⁰ and, the Single Judge concluded that, in the circumstances, there was no cause to proceed with the confirmation of charges proceedings against Messrs Kony, Otti, and Odhiambo *in absentia*, as provided in article 61(2)(b).³¹

23. There is no apparent distinction in the Statute between the analysis required to address a new application under rule 125(1) *vis-à-vis* a review under rule 125(3) of the Rules. Furthermore, as the *Ongwen* Severance Decision did not make a determination on the requirements of article 61(2)(b) of the Statute, this is the first time the Chamber

²⁵ Rule 125(1) of the Rules provides that: '[a]fter 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.'

²⁶ Prosecution Request, paras 2 and 52.

²⁷ Prosecution Request, para. 12 and fn. 8.

²⁸ As regards the decision not to hold a confirmation hearing in the absence of the person concerned, rule 125(3) of the Rules provides that '[t]he Pre-Trial Chamber may review its decision at any time, at the request of the Prosecutor or on its own initiative.'

²⁹ [ICC-02/04-01/15-T-5-ENG ET WT 28-01-2015 1/47 SZ PT](#), pp. 25-26.

³⁰ During the status conference, the Prosecution manifested that the Office was 'resolutely against the idea' of proceeding with the confirmation of charges *in absentia* against the four co-suspects still at large; [ICC-02/04-01/15-T-5-ENG ET WT 28-01-2015 1/47 SZ PT](#), p. 26.

³¹ *Ongwen* Severance Decision, para. 7.

must assess whether such requirements are met in the present case, and it can therefore proceed to consider the Prosecution Request.

2. *A first appearance hearing is not necessary*

24. The OPCD contends that a pre-condition to hold a confirmation hearing *in absentia*, whether the person concerned ‘fled’ or ‘cannot be found’, is that the person had an initial appearance in court pursuant to article 60(1) of the Statute. In the view of the OPCD, this interpretation would be the one most favourable to the suspect, in light of the rights and safeguards conferred at the initial appearance, including the warning that a confirmation hearing could take place in their absence.

25. Article 61(1) of the Statute states that the confirmation hearing ‘shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel’. Confirmation hearings serve to protect ‘the suspect from wrongful and unfounded accusations, by ensuring that only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought are committed for trial’.³² The primary function and objective of the confirmation of charges procedure is the filtering out of unmeritorious cases by ensuring that only those that are properly substantiated proceed to trial.³³ In addition, for the substantiated cases, it sets the parameters of the case for trial and ensures that the charges are clear and not deficient in form.³⁴

26. Given the importance of the confirmation hearing, and the impact of the outcome of that hearing on any future trial, the ‘default position’ in the Statute is that the suspect must be present for the confirmation hearing. This general rule underlines the right of suspects to be present at the hearing³⁵ and reflects the importance of their involvement in the proceedings against them. Nonetheless, Article 61(2) of the Statute provides for

³² *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the confirmation of charges against Mahamat Said Abdel Kani, [ICC-01/14-01/21-218-Red](#) (the ‘*Said* Confirmation Decision’), para. 35; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the ‘Prosecution’s application to amend the charges’, 14 March 2022, [ICC-02/05-01/20-626](#) (the ‘*Abd-Al-Rahman* Article 61(9) Decision’), para. 16; and Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, [ICC-02/05-01/20-433](#), [ICC-02/05-01/20-433-Corr](#) (the ‘*Abd-Al-Rahman* Confirmation Decision’), paras 34, 39.

³³ See *Abd-Al-Rahman* Article 61(9) Decision, para. 16.

³⁴ See *Said* Confirmation Decision, para. 36; *Abd-Al-Rahman* Article 61(9) Decision, para. 16; *Abd-Al-Rahman* Confirmation Decision, para. 35.

³⁵ See *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on issues related to the hearing on the confirmation of charges, 17 November 2010, [ICC-02/05-03/09-103](#), para 4.

two exceptional situations in which a Pre-Trial Chamber has the discretion to hold the confirmation hearing in the absence of the suspect, stating:

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.

27. The difference between the two exceptions in article 61(2) of the Statute concerns the availability, or unavailability, of the suspect to the Court in order to take part in confirmation proceedings. In the first case, the suspect is before the Court and chooses to waive his or her right to be present at the confirmation hearing. To authorise the suspect's absence, the Pre-Trial Chamber must be 'satisfied that the person concerned understands the right to be present at the hearing and the consequences of waiving this right'.³⁶ By contrast, the exception envisioned in article 61(2)(b) of the Statute concerns a suspect who is not available to the Court, because he or she has 'fled or cannot be found'.

28. To date, the Pre-Trial Chambers of the Court have considered conducting a confirmation hearing *in absentia* on three occasions: when severing the cases in *Harun and Abd-Al-Rahman*,³⁷ *Gicheru and Bett*,³⁸ and in the present case,³⁹ each time after only one of the co-suspects was arrested or surrendered to the Court. In these three

³⁶ Rule 124(2) of the Rules. See *The Prosecutor v. Banda and Jerbo*, Decision on issues related to the hearing on the confirmation of charges, 17 November 2010, [ICC-02/05-03/09-103](#). For other decisions of the Court concerning article 61(2)(a) of the Statute, see: *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the "Defence Request pursuant to Rule 124(1) for Mr. William Ruto to Waive his Right to be Present for part of the Confirmation of charges Hearing", 29 August 2011, [ICC-01/09-01/11-302](#); *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision postponing the confirmation hearing and setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, 22 October 2010, [ICC-02/05-03/09-81](#).

³⁷ *The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') And Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision severing the case against Mr Ali Kushayb, 12 June 2020, [ICC-02/05-01/20-92](#) (the '*Harun and Abd-Al-Rahman* Severance Decision').

³⁸ *The Prosecutor v. Paul Gicheru and Phillip Kipkoech Bett*, Decision Severing the Case Against Mr Gicheru, 10 December 2020, [ICC-01/09-01/15-62](#).

³⁹ *Ongwen* Severance Decision.

instances, the relevant Pre-Trial Chamber, on its own motion, considered the possibility to hold a confirmation hearing against the absent co-suspects, ultimately reaching a negative determination due to practical considerations and the impact on the rights of the available suspect, without elaborating on article 61(2)(b) of the Statute. As this is the first time that a formal request is made by the Prosecution under this provision, it is necessary for the Chamber to elaborate on the legal requirements of article 61(2)(b) of the Statute.

29. The use of the conjunction ‘or’ in article 61(2)(b) of the Statute between “[f]led” and “cannot be found” indicates that the provision covers two different and independent situations:⁴⁰ 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’.

30. When the suspect is available to the Court, confirmation hearings are preceded by his or her surrender and subsequent initial appearance pursuant to article 60(1) of the Statute. Although such initial appearance will usually have taken place in the case of a person who ‘fled’ (because the appearance occurs within days after a suspect has become available to the Court), this is not the case when a person ‘cannot be found’, because in this situation the person concerned was never available to the Court. An initial appearance is thus not a requirement to hold a confirmation hearing pursuant to article 61(2)(b) of the Statute. If such a prerequisite were to exist, the two situations – i.e., a person having fled vs a person who cannot be found – would no longer be two separate and distinctive alternatives.

B. The statutory requirements

1. The person cannot be found

31. The phrase ‘cannot be found’ refers to the situation where: (i) the concerned person has never been available to the Court, because he or she has not been arrested, surrendered, or voluntarily appeared before the Court and (ii) all efforts made to locate

⁴⁰ Compare Trial Chamber II, *The Prosecutor v. Salim Jamil Ayyash*, [Decision to Hold Trial in Absentia](#), 5 February 2020 (the ‘*Ayyash Decision to Hold a Trial in Absentia*’), para. 45.

and arrest the person failed since his or her precise whereabouts were and remain unknown.

32. The concept of ‘cannot be found’ in article 61(2)(b) of the Statute does not cover a situation in which the approximate whereabouts of the person are known but the Court is unable to have an arrest warrant executed due to reasons unrelated to the identification of the suspect’s location, for instance due to lack of cooperation from relevant States. The Court relies on State cooperation to identify the whereabouts of the suspect with the aim to secure his or her apprehension and there are specific procedures in the Statute to address any non-cooperation in this regard.

33. Furthermore, to hold a confirmation hearing in the absence of a person who ‘cannot be found’, the Chamber does not need to be satisfied that he or she has actual knowledge of the proceedings at the Court.⁴¹ Instead, the Statute requires that all reasonable steps have been taken to inform the person of the charges and of the fact that a confirmation hearing will take place.

(i) Whether Mr Kony qualifies as a person who cannot be found

34. The Prosecution claims that Mr Kony is a person who ‘cannot be found’, even though all reasonable steps have been taken to locate him and secure his arrest, pursuant to article 61(2)(b) of the Statute and rule 123(3) of the Rules.

35. The information provided by the Registry shows that Mr Kony’s whereabouts remains unknown, despite substantial efforts by the Registry and other relevant stakeholders to trace him since the issuance of the Arrest Warrant. It cannot even be said for certain in which country Mr Kony is presently located. The Chamber is therefore satisfied that Mr Kony is a person who cannot be found within the meaning of article 61(2)(b) of the Statute.

2. All reasonable steps to secure the person’s appearance before the Court

36. The requirement in article 61(2)(b) of the Statute to take, or have taken, ‘all reasonable steps’ does not require positive results.⁴² The provision covers three different obligations, namely: a) all reasonable steps have been taken to secure the person’s appearance before the Court; b) all reasonable steps have been taken to giving

⁴¹ Compare *Ayyash Decision to Hold a Trial in Absentia*, paras 44-45.

⁴² This is evident in that, for instance, the measures to secure the person’s availability before the Court may be unsuccessful and not lead to the person’s actual apprehension.

notice of the charges; and c) all reasonable steps have been taken to informing the person that a hearing *in absentia* will be held. While it is clear that all three obligations must be met before a confirmation hearing *in absentia* may take place, their fulfilment does not need to happen at once and can be done consecutively.

37. A confirmation hearing *in absentia* is an extraordinary procedural step. Normally, the person concerned is available to the Court and can exercise the rights conferred upon him or her by the Statute during the confirmation of charges proceedings. In light of its exceptional nature, the requirements for authorising a confirmation hearing pursuant to article 61(2)(b) of the Statute must be narrowly construed.

38. Besides informing and seeking cooperation from States,⁴³ the Statute does not indicate specific actions aimed at securing the suspect's appearance before the Court. Nevertheless, rule 123(3) of the Rules prescribes that, when a warrant of arrest against a suspect has not been executed within a reasonable period of time after its issuance, the Chamber must ensure that all 'reasonable measures have been taken to locate and arrest the person'. Evidently, these measures ought to have been taken before the Chamber considers whether to hold a confirmation hearing *in absentia*.

39. What the Court will assess, when considering holding a confirmation hearing *in absentia*, is the sufficiency and adequacy of all actions taken to locate, arrest and notify the person of the charges and that a hearing will take place. It does so, irrespective of those actions having led to the intended result, i.e., the appearance of the suspect before the Court.

40. Reasonable steps to locate and arrest the suspect may include transmission to States of the arrest warrant and a request for cooperation to locate and to surrender the person; law enforcement operations; publication of the arrest warrant in the Court's website and media outlets; public campaigns to receive information regarding the person's whereabouts. Outreach activities, such as the publication and broadcast of the

⁴³ Articles 89 and 90 of the Statute set forth the procedure to transmit arrest warrants and seek cooperation from States to execute them. In addition, the Chamber's Practice Manual provides that, upon information that a person subject to an arrest warrant is traveling to the territory of a State party, the Registrar shall transmit to the concerned State a 'request for arrest or surrender of the person or, in case such request has already been transmitted, a *note verbale* containing a reminder of the State's obligation to cooperate with the Court'. In case of non-State Parties, a request for cooperation in the arrest and surrender shall be made in accordance with article 87(5)(a) of the Statute. See [Chambers Practice Manual](#), 6th Ed., para. 6.

arrest warrant and the allegations contained therein, are, among others, relevant measures to secure the person's appearance before the Court. This is because it may be assumed that informing the suspect of the proceedings could encourage a voluntary surrender.

(i) *Whether all reasonable steps have been taken to secure Mr Kony's appearance*

41. The Prosecution indicates that requests to arrest Mr Kony have been sent to the authorities of those countries where he is believed to have been located,⁴⁴ and that the government of Uganda has for years attempted to apprehend Mr Kony and track his whereabouts. Since 2006 there is a request to law enforcement authorities worldwide to locate and arrest Mr Kony (INTERPOL «Red Notice»), and there has been 'unprecedented cooperation' from the international community and civil society to locate and apprehend him.⁴⁵

42. The Registry's Report details the measures taken since 2005 to execute the Arrest Warrant and inform Mr Kony of its existence and the allegations contained therein, as well as to locate and to secure his appearance before the Court. These include cooperation and diplomatic efforts with relevant States, public information campaigns, outreach activities and communication attempts through intermediaries.⁴⁶

43. Outreach activities, such as the dissemination and publication of the Arrest Warrant in Acholi and in English⁴⁷ and press releases concerning the current case, issued by the Registry and distributed to journalist in different countries since October 2005,⁴⁸ appear suitable to enhance the likelihood of getting information on Mr Kony's whereabouts. In addition, measures aimed at informing Mr Kony of the existence and content of the Arrest Warrant would presumably have allowed him to make an informed

⁴⁴ Including but not limited to Uganda, the Democratic Republic of Congo, and Sudan.

⁴⁵ In 2008, the European Parliament explicitly called for the development of effective plans to execute the Arrest Warrant. In 2012 the African Union launched an international task force to locate Mr Kony, whilst the US has deployed special forces to locate him and included Mr Kony in the 'War Crimes Rewards Program' offering a reward of up to USD 5,000,000 for information leading to his arrest. In addition, civil society organisations have launched public campaigns to encourage the apprehension of Mr Kony.

⁴⁶ Registry Report, para. 12.

⁴⁷ Registry Report, para 14.

⁴⁸ Registry Report, para 29.

decision as to whether surrender himself and appear before the Court to participate in the proceedings.

44. Based on the information before it, the Chamber is satisfied that all reasonable steps were taken to secure Mr Kony's appearance. Given Mr Kony's evident unavailability, the first requirement of article 61(2)(b) of the Statute is met.

3. All reasonable steps to inform the suspect of the charges and that a confirmation hearing will be held

45. The third requirement of article 61(2)(b) of the Statute, namely to try to inform the suspect that a confirmation hearing *in absentia* will take place, only needs to be assessed after the Chamber has decided to hold such a hearing. That decision therefore shall be understood as a preliminary or interim one, as the Chamber can only satisfy itself that the third legal requirements is met once it has been explained the efforts made to inform the suspect of the hearing. It is not until then that the Chamber can assess whether the notification efforts satisfy the standard of 'all reasonable steps' and render a final decision on whether it will hold a confirmation hearing *in absentia*.

46. The second requirement, namely that all reasonable steps to inform the concerned person of the charges have been taken, can only be assessed once the Prosecution presents the charges it intends to have confirmed at the hearing, and reasonable time is given to the Registry to try to notify the suspect thereof. Article 61(3)(a) of the Statute and rule 121(3) of the Rules stipulate that it is the document containing the charges (the 'DCC'), as submitted by the Prosecution, which formally informs a suspect and provides detail of the nature, cause and content of the charges.⁴⁹

47. Although allegations against a suspect need to be clearly defined for a Pre-Trial Chamber to issue a warrant of arrest or summons to appear, the integral reading of the statutory framework indicates that the term 'charges' in article 61(2)(b) of the Statute refer to those formalised in the DCC. This is so because the word 'charges' first appears in article 61 of the Statute, whilst the provisions related to the stages preceding the

⁴⁹ *The Prosecutor v. Ali Muhammad Abd-Al-Rahman*, Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 9 July 2021, [ICC-02/05-01/20-433](#), para 23, *The Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, [ICC-01/04-01/10-465-Red](#), para. 90. See also *The Prosecutor v. Muthaura and Kenyatta*, Decision on the content of the updated document containing the charges, 28 December 2012, [ICC-01/09-02/11-584](#), para. 18.

confirmation hearing, namely articles 58 and 59 of the Statute on arrest warrants and article 60 of the Statute on initial appearances, refer to ‘the crimes which [the person concerned] is alleged to have committed’.

48. Furthermore, regulation 52 of the Regulations of the Court provides that a DCC shall contain, *inter alia*, ‘a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person [...] to trial’ and a legal characterisation of the facts to accord with the crimes and the modes of liability under the Statute. In contrast, in its application for an arrest warrant the Prosecution must only submit a ‘specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed’, together with a ‘concise statement of facts which are alleged to constitute those crimes’.⁵⁰

49. Given the suspect’s right to be put on notice of the charges, the Statute requires that all reasonable steps are taken to inform him or her of the charges subject to confirmation *before* a hearing can take place in his or her absence. The Chamber can only determine whether this requirement has been fulfilled after the Registry has had sufficient time to take the necessary and adequate ‘steps’ to inform the person of the charges described in the DCC. However, in the present case, a DCC has not yet been submitted.

50. The Prosecution indicates that, if an *in absentia* confirmation hearing is authorised, Mr Kony will be informed – in advance of the hearing – of the charges brought for confirmation and that a confirmation hearing will be held. Yet, immediately thereafter the Prosecution also submits that the allegations in the Arrest Warrant have been publicly available since the issuance of a public version in 2005 and that, despite the redactions in place, ‘the 33 counts in the arrest warrant set out the approximate time, place and nature of the alleged crimes, as well as the alleged underlying conduct and its legal characterisation’. The Chamber notes, however, that in the initial public version of the Arrest Warrant essential information about the crimes attributed to Mr Kony is redacted, including the precise time and location of the alleged crimes for each count. In March 2023, following a request by the Prosecution, a lesser redacted version of the

⁵⁰ Article 58(2)(b) and (c) of the Statute; *The Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, [ICC-01/04-01/10-465-Red](#), para. 90.

Arrest Warrant was issued,⁵¹ but up to the time of this decision there is no information before the Chamber indicating any measures to inform Mr Kony of its content. The Chamber further notes that the Prosecution states that it intends to present *additional* charges unrelated to the allegations in the Arrest Warrant and *subsequently* inform Mr Kony of them.⁵²

51. Before being able to decide whether a confirmation hearing in the absence of Mr Kony ought to take place, the Chamber must be satisfied that all reasonable steps have been taken to inform him of the charges. The Prosecution is therefore ordered to first present the charges it seeks to have confirmed, should it wish to proceed with its request, in accordance with article 61(3)(a) of the Statute and regulation 52 of the Regulations.

52. Given that the purpose of having such a document containing the charges is to allow Mr Kony to be informed of any potential charge he would face, should the Chamber decide to hold a confirmation hearing in his absence, it follows that the document must be fully public.

53. Informing a suspect who is not physically present before the Court of the charges will require notification to be done using alternative means, such as local media outlets and social media. A very concise document would be easier to transmit for this purpose. However, for a suspect to be properly informed of the charges, the Prosecution must specify for each charge the place, time, and approximate number of victims, and it must provide the necessary particulars that comprise the elements of the crimes.⁵³ The document, whilst structured in a narrative style, with all relevant facts presented in sufficient detail and in chronological order,⁵⁴ should not contain references to the evidentiary items supporting the material facts underpinning the charges. In the event a

⁵¹ Notification of the lesser redacted version of “Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005”, issued pursuant to the Pre-Trial Chamber II’s “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, 10 March 2023, [ICC-02/04-01/05-456](#).

⁵² Prosecution Request, para. 49. In this regard, the OPCD avers that prospective notification does not meet the obligation in article 61(2)(b) of the Statute and argues that the Prosecution should include the new allegations in an updated arrest warrant and publicise it in the most unredacted version possible.

⁵³ See *The Prosecutor v. Maxime Joffroy Eli Mokom Gawaka*, Order on the conduct of the confirmation of charges proceedings, 27 June 2022, [ICC-01/14-01/22-62](#) (the ‘Mokom Order’), para. 35.

⁵⁴ See *Mokom Order*, para. 35; and *Prosecutor v. Ali Muhammad Abd-Al-Rahman (Ali Kushayb)*, Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines, 2 November 2020, [ICC-02/05-01/20-196](#), para. 41.

confirmation hearing *in absentia* is ultimately authorised, the Prosecution will be instructed to present a list of evidence⁵⁵ and a document that includes the abovementioned information⁵⁶ and material.

54. After the DCC is submitted, the Registry and the Prosecution must make their best efforts to put Mr Kony on notice of the charges for which confirmation is sought, and report to the Chamber on the measures taken.

55. Since the rules governing the notification of the charges and the order scheduling a confirmation hearing assume the suspect's availability to the Court,⁵⁷ there are no rules concerning the notification to a person who is absent. The Court's case law has so far not addressed the issue.⁵⁸

56. The standard of 'all reasonable steps' cannot be defined in the abstract, as what is reasonable to achieve an outcome may widely differ from one case to another. The practice of the ICTY⁵⁹ and the STL, which each allowed for certain proceedings to be held in the absence of the *accused*⁶⁰ assuming that 'all reasonable steps' were taken to apprehend the person and give notice of the charges, may provide some useful guidance.

⁵⁵ Article 61(3)(b) of the Statute and rule 121(3) of the Rules.

⁵⁶ In some cases, the Prosecution included such information in a so-called "pre-confirmation brief". In the *Mokom* case, it was recently ordered to include the information in an annex filed at the same time as the Document Containing the Charges. *Mokom* Order, para. 35.

⁵⁷ Article 61(3) of the Statute. See also Article 60(1) of the Statute, providing that '[u]pon 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 [...]'].

⁵⁸ None of the three ICC cases where article 61(2)(b) proceedings were considered (the *Kony et al.* case, the *Harun and Abd-Al-Rahman* case and the *Gicheru and Bett* case) elaborated on the steps taken to secure the suspects or inform them of the charges.

⁵⁹ Rule 61 of the ICTY Rules of Procedure and Evidence (the 'ICTY Rules') allows an already confirmed indictment to be reviewed in open court by the Trial Chamber in case of failure to execute an arrest warrant, providing that the Single Judge is satisfied that:

'(i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and

(ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisements pursuant to Rule 60 [of the ICTY Rules]'

⁶⁰ The proceedings at these *ad hoc* tribunals differ from a confirmation hearing in the absence of the suspect. For instance, the standard at the STL was set high because its result was to commit an accused person to a trial *in absentia*. See STL, Appeals Chamber, *The Prosecutor v. Ayyash et al*, [Corrected version of decision on Defence appeals against Trial Chamber's decision on reconsideration of the trial in absentia decision](#), 1 November 2012 (STL-11-01/PT/AC, F0012), para. 33.

57. For instance, efforts to notify the suspect of the charges and that a confirmation hearing will take place may include: publication and advertisement measures in the States where the concerned person is believed to be located;⁶¹ formal notification attempts at the person's last known place of residence or through family members; publication of a public version of the document containing the charges on the Court's website and dissemination of the charges in various media outlets and official press releases.⁶² In the present case, and mindful that the DCC, if submitted, will also have to be translated, the Chamber considers it may be necessary to allow for a reasonable amount of time to undertake all reasonable steps to inform Mr Kony of the charges. In order to estimate how much time is required, the Chamber instructs the Registry to submit a plan indicating the outreach activities and notification efforts it would pursue to inform Mr Kony of the charges against him, if the Prosecution files a DCC before the Chamber, within four weeks of the present decision.

4. *Whether there is cause to hold a confirmation hearing in absentia*

58. Even if the legal requirements discussed above are met, the decision to hold a confirmation of charges hearing *in absentia* is discretionary. This is clear from the use of the word 'may' in article 61(2) of the Statute, and the first part of rule 125(1) of the Rules, which states that 'the Pre-Trial Chamber shall decide whether there is *cause* to hold a hearing on confirmation of charges in the absence of the person concerned' (emphasis added). Mindful of the resources that must be engaged to comply with the abovementioned obligations and instructions, the Chamber finds it appropriate to advance its consideration of whether cause exist in the present case.

⁶¹ For instance, in *Mrksic et al.*, the Single Judge found that the Prosecution had taken all reasonable measures to inform the suspect of the existence of the indictment after it confirmed, among other, that the Registrar had sent, through diplomatic channels, a form of advertisement for publication in domestic newspapers to inform the accused persons of the existence of the indictment; and the indictment was publicised in several newspapers and in a television program and one of the accused acknowledged publicly that he had been indicted. See ICTY, *The Prosecutor v. Mile Mrksic, Miroslav Radic and Veselm Sljivancanin*, [Order for review in open court of the indictment by the Trial Chamber I](#), (Rule 61 of the Rules of Procedure and Evidence) 6 March 1996, p. 3.

⁶² See STL, Trial Chamber, *The Prosecutor v Salim Jamil Ayyash et al.*, [Decision to Hold Trial in absentia](#), 1 February 2012 (STL-11-01/1/TC), paras 67 and 70.

59. Neither the Statute nor the Rules explain the rationale for conducting confirmation of charges proceedings *in absentia*.⁶³ When confronted with a situation meeting the criteria in article 61(2)(b) of the Statute, it is therefore for the Pre-Trial Chamber to determine if the circumstances prevailing at the time of its assessment justify a departure from the general rule of holding confirmation hearings in the presence of the person charged.

60. So far Pre-Trial Chambers dismissed holding confirmation of charges proceedings against absent co-suspects based on its manifest inconvenience. Particularly, the decisions considered the prejudice that doing so would have caused on the right of the suspect that was before the Court to be tried fairly and without undue delay.⁶⁴ Other factors contemplated were (i) the availability of Court resources to proceed against the co-suspects in their absence; (ii) whether the budget implications were justified by the circumstances of the case; (iii) the expectations of victims if charges were confirmed but a trial could not take place due to the continued absence of the person(s); and (iv) the prospect that the absent persons were apprehended in the future.⁶⁵

61. Additional considerations may play a role when assessing whether there is cause to hold a confirmation hearing *in absentia*, such as (i) the impact on the defence rights of the concerned person, in particular those linked to the right to be informed of and participate in the proceedings before the Court; (ii) whether, based on the circumstances of the specific case, including the types and scale of the alleged crimes and the alleged role of the concerned person in their perpetration, a confirmation hearing *in absentia* would serve the interests of justice; (iii) the consequences of a potential use of rule 126(3) of the Rules on any efficiency achieved by holding a confirmation hearing in the absence of a suspect; (iv) the implications of the disclosure of evidence, including the risks to witnesses and the need for protective measures;⁶⁶ and (v) whether there is

⁶³ The revised French proposal of the Rules – which was used as the basis for the discussions at the second session of the Preparatory Commission – included some factors for the PTC to consider, such as the seriousness of the crime and the interests of the victims. However, these conditions were dropped in the subsequent versions of the Rules. 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](#).

⁶⁴ *Ongwen Severance Decision*, para. 8; *Harun and Abd-Al-Rahman Severance Decision*, para. 8.

⁶⁵ *Ongwen Severance Decision*, para. 7.

⁶⁶ See in this regard *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the “Request for an order for the commencement of the pre-confirmation phase”, 10 September 2013, [ICC-01/11-01/11-440](#), para. 30.

any realistic expectation that the suspect, if charges are confirmed, will appear before the Court to face trial.

62. The Chamber notes that the current circumstances differ from the ones at the time of the *Ongwen* Severance Decision, when a former composition of the Chamber found that there was no cause to hold confirmation proceedings in the absence of Mr Kony. Mr Ongwen's trial has concluded, and his conviction is final. Although each case must be assessed independently, the conviction of Mr Ongwen indicates the availability of evidence in relation to crimes allegedly committed by the Lord Resistance Army, an armed group reportedly founded and led by Mr Kony,⁶⁷ and, as such, to some of the charges the Prosecution intends to bring against him.⁶⁸

63. In addition, proceedings against three of the original co-suspects in this case have been terminated following their deaths,⁶⁹ which means that Mr Kony is the only suspect still at large. In these circumstances, a confirmation hearing against Mr Kony in his absence would not prejudice any other co-suspect's rights under the Statute.

64. The Chamber recalls that a confirmation hearing *in absentia* pursuant to article 61(2)(b) of the Statute is exceptional. In determining whether to authorise such a hearing, the Chamber must balance the fair trial rights of the suspect, on the one hand, and the interests of justice on the other hand. The latter includes the gravity of the alleged crimes and alleged role of the suspect in their perpetration; the impact of the confirmation hearing on victims; and the prospect of the case further advancing should the charges be confirmed.

65. The Chamber considers that a confirmation hearing against Mr Kony, even in his absence, would have an impact on the victims of his alleged crimes, especially those who did not participate in the *Ongwen* case. According to the OPCV Report, the consulted victims support the Prosecution Request with a view to 'advancing the proceedings in the present case in preparation for a potential trial, and hope that it will revive the willingness of States to locate and apprehend Mr Kony'.⁷⁰

⁶⁷ Arrest Warrant, paras 5 and 7.

⁶⁸ See Prosecution Request, para. 50.

⁶⁹ On 11 July 2007, 10 September 2015 and 17 November 2023, the Chamber terminated the proceedings against Raska Lukwiya, Okot Odhiambo and Vincent Otti respectively, after their deaths were confirmed, [ICC-02/04-01/05-248](#), [ICC-02/04-01/05-431](#) and ICC-02/04-01/05-465.

⁷⁰ OPCV Report, para. 2.

66. For the victims of the alleged crimes of Mr Kony, a confirmation hearing would be an opportunity to express their views and concerns, in accordance with article 68(3) of the Statute. The Chamber observes that the Statute does not allow for trials to be conducted in the absence of the accused. Even if charges were to be confirmed following a hearing *in absentia*, the Court's ability to fully realise the objectives of the Statute and address the victims' interests in justice and accountability would remain limited, in the persistent absence of Mr Kony.

67. Nevertheless, the Chamber considers that, as expressed by the Prosecution and the OPCV, a confirmation of charges in the absence of Mr Kony will remind the international community that he is a wanted fugitive and may reinvigorate efforts to locate him and bring him before the Court. In assessing whether to trigger the exceptional procedure envisaged in article 61(2)(b) of the Statute, the Chamber has placed substantial weight on the facts that the victims of his alleged crimes have been waiting for justice for over 18 years and that Mr Kony is the only remaining suspect in the Uganda situation. Although the passing of time in and on itself cannot justify holding a confirmation hearing *in absentia*, the stagnation of this case is due to the persistent attempts of Mr Kony to evade justice. The Chamber is also mindful that, at the moment, a confirmation hearing *in absentia* may be the only way for the victims of Mr Kony's alleged crimes to voice their views and concerns.

68. The Chamber has also considered (i) that the rights of Mr Kony would not be unduly prejudiced if a confirmation hearing takes place in his absence; (ii) the scale of the alleged crimes and the centrality of the suspect's alleged participation in their perpetration; and (iii) that at present holding a confirmation hearing *in absentia* would not have a detrimental impact on the effectiveness and efficiency by which the Court must manage its resources. Based on its assessment, the Chamber concludes that there are sufficient reasons to advance the proceedings against Mr Kony, in the interests of justice.

69. Thus, in light of the particular circumstances of the case as examined, the Chamber determines that, at present, there would be cause to authorise a confirmation of charges in the absence of Mr Kony, if all the requirements in article 61(2)(b) of the Statute are fulfilled.

70. The Chamber recalls that the Statute does not allow proceedings *in absentia* to be held beyond the confirmation of charges hearing. In the view of the Chamber, to fully materialise the objectives outlined above, the statutory framework should have foreseen the possibility to conduct a trial *in absentia*, when charges are confirmed pursuant to article 61(2)(b) of the Statute and the interests of justice so demand. This, without prejudice to the rights of the defendant to have a re-trial if he or she later appears before the Court. Although this cannot relate to the present case, it would be valuable for States Parties to reconsider the discipline of *in absentia* trial proceedings before the Court, in this regard for any future instances.

FOR THE ABOVE REASONS, THE CHAMBER HEREBY

FINDS that Mr Kony qualifies as a person who cannot be found, within the meaning of article 61(2)(b) of the Statute;

FINDS that under the prevailing circumstances, there is cause to hold a confirmation hearing against Mr Kony, in his absence;

ORDERS the Prosecution, should it wish to proceed with its request to hold a confirmation hearing in the absence of Mr Kony, to submit a document containing the charges in accordance with the above instructions, within eight weeks from the present decision;

INSTRUCTS the Registry to submit a plan as set out in paragraph 57 above within four weeks from the present decision;

DEFERS its final decision on the remainder of the Prosecution Request.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Rosario Salvatore Aitala
Presiding



Judge Tomoko Akane



Judge Sergio Gerardo Ugalde Godínez

Dated this Thursday, 23 November 2023

At The Hague, The Netherlands