

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/05
Date: 2 September 2024

PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Single Judge

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

Public

Prosecution's Request for Leave to Reply to Defence Observations

Source: Office of the Prosecutor

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

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**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. Pursuant to regulation 24(5) of the Regulations of the Court, the Prosecution hereby respectfully seeks leave to reply to the “Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence” (“Defence Observations”),¹ made at the invitation of the Single Judge,² with respect to three discrete issues. These are new issues raised in the Defence Observations, which the Prosecution could not reasonably have anticipated.

2. That the Prosecution seeks leave to reply only on this limited basis does not mean that it accepts the accuracy or merit of the remainder of the Defence Observations. To the contrary, the majority of the Defence arguments rehash propositions already advanced unsuccessfully by the Office of Public Counsel for the Defence (“OPCD”) and considered by Pre-Trial Chamber II (“PTC II”),³ misrepresent PTC II’s decisions,⁴ or are obviously erroneous interpretations of the legal framework.⁵

3. However, consistent with the general approach indicated by the Single Judge,⁶ the Prosecution seeks to address only the matters which are genuinely novel, and which relate to the ongoing conduct of these *in absentia* confirmation proceedings.

4. If leave to reply were granted, the Prosecution would file submissions not exceeding five pages on the identified issues succinctly and expeditiously.

¹ Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence, 28 August 2024, ICC-02/04-01/05-517-Red (“Defence Observations”).

² Decision on the Procedure for Appointing Counsel, 2 May 2024, ICC-02/04-01/05-499 (“Decision of 2 May 2024”), para. 27 (a).

³ 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 (“OPCD Observations”), paras. 12-17, paras. 25-28, paras. 29-34, paras. 43-45; Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence, 23 November 2023, ICC-02/04-01/05-466 (“Decision of 23 November 2023”), paras. 24-68.

⁴ Decision of 23 November 2023; Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence, 4 March 2024, ICC-02/04-01/05-481.

⁵ Defence Observations, paras. 18-24.

⁶ Decision of 2 May 2024, para. 28.

II. SUBMISSIONS

5. The Prosecution seeks leave to reply with respect to the following three issues arising from the Defence's Request:

A. First issue: A fugitive suspect is presumed alive unless tangible proof of death arises

6. The Defence alleges that Mr Kony's vitality is in question and asserts that PTC II should have considered that the "simplest" reason why he cannot be found is that he is deceased, and that such *in absentia* confirmation proceedings are inapposite.⁷ If the Prosecution were granted leave to reply, it would set out – in line with the relevant case law - that a fugitive suspect is presumed alive unless proof arises to the contrary.⁸ Further, if it would assist the Chamber, the Prosecution could make updated submissions on the basis for its view that the suggested "million-dollar question" whether Kony is alive⁹ does not arise.

B. Second issue: The changed circumstances in the proceedings do not render the notification efforts on the date of the hearing ineffective

7. The Defence argues that the notification efforts by the Registry have failed to meet the standard required by article 61(2)(b) due to changed circumstances in the proceedings.¹⁰ If the Prosecution were granted leave to reply, it would submit that the Defence's arguments conflate the legal issue of notification of the date of the hearing, set by PTC II, with the practical question of the feasibility of said date. Vacating the proceedings is not the appropriate answer if a postponement proves to be required. In particular, any such postponement does not invalidate the notification which has already taken place, nor does it require the repetition of the extensive notification measures which already took place.

⁷ Defence Observations, paras. 25-27.

⁸ Decision terminating the proceedings against Vincent Otti, 17 November 2023, ICC-02/04-01/05-465, para. 5.

⁹ Defence Observations, para. 25.

¹⁰ Defence Observations, paras. 40-43.

C. Third issue: The admissibility of the proceedings is neither relevant nor in doubt

8. The Defence is challenging admissibility through the back door by arguing that in its assessment of whether there is good cause to hold in absentia proceedings PTC II should have considered that the case is likely inadmissible.¹¹ If granted leave to reply, the Prosecution would set out why the determination of the admissibility of the case is not a prerequisite for the Chamber to proceed with a hearing on the confirmation of charges. Further, if it would assist the Chamber, the Prosecution could also make submissions on the basis for its view that there remain no circumstances showing that the case is clearly inadmissible.

III. RELIEF SOUGHT

9. For the reasons set out above, the Prosecution respectfully requests leave to reply to the Defence's Observations.



Karim A.A. Khan KC, Prosecutor

Dated this 2nd day of September 2024
At The Hague, The Netherlands

¹¹ Defence Observations, paras. 45-53.