

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/05**

Date: **03/09/2024**

PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

THE PROSECUTOR v. JOSEPH KONY

Public

**Kony Defence Response to Prosecution's Request for Leave to Reply to Defence
Observations**

Source: Defence for Mr Joseph Kony

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

The Office of the Prosecutor Mr Karim Khan Mr Mame Mandiaye Niang Ms Leonie von Braun	Counsel for the Defence Peter Haynes KC Kate Gibson
Legal Representatives of the Victims	Legal Representatives of the Applicant
Unrepresented Victims	Unrepresented Applicants for Participation/Reparation
The Office of Public Counsel for Victims Ms Paolina Massidda Ms Sarah Pellet	The Office of Public Counsel for the Defence Ms Marie O’Leary
States’ Representatives	Amicus Curiae

REGISTRY

Registrar Mr Osvaldo Zavala Giler	Counsel Support Section Mr Juan Escudero
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

I. SUBMISSIONS

1. On 28 August 2024, the Kony Defence (“Defence”) filed its Observations on holding a confirmation of charges hearing *in absentia*,¹ asking Pre-Trial Chamber III to vacate the present proceedings.

2. The Single Judge had already advised in respect of the Observations that “[F]urther submissions by the Prosecution and/or the Office of Public Counsel for Victims on the aforementioned matters **shall not be entertained**.”² The Prosecution did not appeal this ruling. Having not done so, the Prosecution now seeks leave to reply to the Observations, in a request which already places the substance of its proposed arguments both in the public record and before the Pre-Trial Chamber.

A. The legal basis of the Prosecution’s request is incorrect

3. The Prosecution purports to seek leave to reply “[p]ursuant to regulation 24(5) of the Regulations of the Court.”³

4. Regulation 24(5) permits replies only in respect of documents that are ‘a response.’ The Defence’s submissions were not ‘a response’, but rather, as specified by the Single Judge, ‘observations’.⁴ Furthermore, these ‘observations’ were distinguished by the Single Judge from the ‘responses’ to be submitted on other matters.⁵ As the Observations are not a response, the Prosecution’s invocation of Regulation 24(5) is misconceived and the application could be dismissed *in limine* on this basis alone.

5. Given that the Pre-Trial Judge had previously ruled that further submissions by the Prosecution and/or the Office of Public Counsel for Victims on the aforementioned matters “shall not be entertained”,⁶ the appropriate avenue for requesting leave to respond to the Defence Observations is not Regulation 24(5), but rather a request for reconsideration. Although in the absence of such a request the Prosecutor’s application could be rejected *in*

¹ [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](#), ICC-02/04-01/05-517, 28 August 2024 (“Observations”).

² [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024, para. 28 (“Appointment of Counsel Decision”) (emphasis added).

³ [Prosecution’s Request for Leave to Reply to Defence Observations](#), ICC-02/04-01/05-517, 2 September 2024 (“Request for Leave”), para. 1.

⁴ Appointment of Counsel Decision, para. 27(a).

⁵ Appointment of Counsel Decision, paras 27(b) and (c).

⁶ Appointment of Counsel Decision, para. 28.

limine, the Defence, nevertheless, invites the Single Judge to exercise her discretion to consider the merits of the Request for Leave. The absence of prior *inter partes* litigation on these and other matters militates in favour of a flexible approach to ensure that, in the interests of justice, all relevant arguments and information are put before the Single Judge and/or Pre-Trial Chamber.

B. The Defence does not oppose the Prosecution’s request for leave to respond in respect of the three issues

6. The Defence does not oppose the Prosecution’s request to make further submissions in respect of the three issues identified. However, the Prosecution implies that it will provide new factual information in its submissions, and that new arguments will be made. In particular, a suggestion is made that the reponse will contain “updated submissions” on Mr Kony’s whereabouts,⁷ and that additional submissions will be made on the Prosecution’s view that “there remain” no circumstances showing that the case is inadmissible.⁸ Furthermore, the Prosecution appears intent on making new legal arguments, concerning, *inter alia*; (i) the burden of proof in respect of whether a suspect is alive; (ii) the suggestion that a change of date of the confirmation hearing is irrelevant for the purpose of assessing the validity of notification to the suspect of the date of the hearing; and (iii) that determining the admissibility of the case is not “a prerequisite” for holding a confirmation hearing.⁹

7. The Prosecution’s Request for Leave has already set out over two pages the substance of the arguments it proposes to make. This is a practice which, incidentally, has been extensively criticised by the Prosecution in the past.¹⁰ In the circumstances, a further three pages should suffice for the prosecution to amplify the submissions it has already canvassed.

⁷ Request for Leave, para. 6.

⁸ Request for Leave, para. 8.

⁹ Request for Leave, paras 6-8.

¹⁰ See *Prosecutor v. Yekatom*, [Public redacted version of “Prosecution Response to the “Yekatom Defence Request for Leave to Reply to the Prosecution’s Response to the Yekatom Defence’s request for the \[REDACTED\] \(ICC-01/14-01/18-2321\), 31 January 2024, ICC-01/1401/18-2336-Conf” \(ICC-01/14-01/18-2343-Conf\)”, ICC-01/14-01/18-2347-Conf, 6 February 2024, ICC-01/14-01/18-2347, 23 May 2024, para. 3: “Unfortunately, the Defence has once again sought to use the mechanism of a request for leave to reply in order to argue points that it could have anticipated and should have put forward in its Motion. AS the Prosecution has stated on several occasions and the Chamber has previously noted, this alone is grounds to dismiss the request”; *Prosecutor v. Ruto and Sang*, Prosecution response to \[“Defence Application for Leave to Reply to ‘Prosecution’s response to the Defence request to appoint an amicus prosecutor”\]\(#\)”, ICC-01/09-01/11-2033, 27 May 2016, para. 7: “this Chamber has previously admonished the Parties that ‘for future applications \[they were\] to refrain from including submissions of reply in the request for the leave to reply itself.’ The Defence has clearly not heeded the requirements of regulation 24\(4\) and \(5\) or the directions of the Chamber”; *Prosecutor v. Ntaganda*, \[Response to the Defence request for leave to reply to the “Prosecution’s response to the ‘Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision\]\(#\)](#)

8. Having seen the substance of the Prosecution's proposed response, the Defence is already able to submit that it will wish to advance new arguments or information that could not reasonably have been addressed in its Observations. The Defence, accordingly, hereby requests pursuant to Regulation 24(5) that it be granted leave to offer five pages of submissions in reply to any Prosecution response. Such permission would, in the event that leave is granted to the prosecution to respond, be consistent with spirit of the Single Judge's original order in which the Defence "had the last word".

II. CONCLUSION AND RELIEF REQUESTED

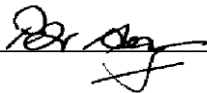
9. The Defence invites the Single Judge to

CONSIDER the merits of the Prosecution Request for Leave and, if appropriate;

GRANT leave to the Prosecution to make submissions in respect of the three issues not exceeding three pages in length; and in that event:

GRANT the Defence leave to file a reply the Prosecutor's submissions not exceeding five pages in length.

The whole respectfully submitted.



Peter Haynes KC
Counsel for Joseph Kony

The Hague, The Netherlands,
Tuesday, September 03, 2024

[on Defence request for stay of proceedings with prejudice to the Prosecution' \(ICC-01/04-02/06-1888\), 9 May 2017, ICC-01/04-02/06-1898", \(ICC-01/04-02/06-1904\), ICC-01/04-02/06-1911, 18 May 2017, para. 2: "the application to Reply contains submissions on the merits of the issues \[...\] contrary to regulation 24\(4\) and \(5\) \[...\] \[t\]hese submissions should be disregarded." This criticism must apply with even greater force in respect of substantive submissions that have been made notwithstanding the Single Judge's instruction that "\[f\]urther submissions by the Prosecution \[...\] shall not be entertained."](#)