

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/05
Date: 5 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

Public redacted version of "Prosecution's Reply to Defence Observations", ICC-02/04-01/05-520-Conf, 5 September 2024

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

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I. INTRODUCTION

1. The Prosecution hereby responds 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 within the parameters granted by the Single Judge.²

II. CONFIDENTIALITY

2. This Reply is classified as confidential under regulation 23*bis* of the Regulations of the Court, as it refers to information of the same designation. A public redacted version is filed simultaneously.

III. SUBMISSIONS

A. **First issue: A fugitive suspect is presumed alive lacking tangible proof of death**

3. According to well-established case law, a fugitive suspect is presumed alive, unless there is adequate proof to the contrary.³ For instance, as PTC II held, such proof should lead to “the *only* reasonable conclusion” that the person is no longer alive.⁴ To consider otherwise and to require proof of continued life would impose substantial burden on the Court as a whole, and risk creating a ‘revolving door’, in which arrest warrants are quashed and reinstated, with deleterious effects on State cooperation, as well as the efficiency of the proceedings.

4. Contrary to the Defence’s allegations,⁵ in the present case there is no tangible evidence suggesting that Mr KONY might have died. In fact, the intelligence received to date provides proof to the contrary. [REDACTED]⁶ [REDACTED]. The Prosecution and Registry continue to monitor. Should tangible evidence arise that Mr KONY is deceased, the Prosecution would notify the Chamber, Parties and Participants at the

¹ ICC-02/04-01/05-517-Conf.

² E-Mail decision, 3 September 2024.

³ ICC-02/04-01/05-465, para. 5; ICC-01/09-01/20-337, para. 7.

⁴ ICC-02/04-01/05-465, para. 5 (emphasis added).

⁵ Defence Observations, paras. 25-27.

⁶ [REDACTED].

earliest opportunity. Furthermore, and again contrary to the Defence's assertions, the Prosecution has not itself undertaken to provide updated information⁷ nor has the Prosecution been formally asked to provide information through the SALWG.

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

5. First, the Prosecution agrees with the Defence's assessment that the 15 October 2024 date for the hearing is no longer feasible and will make detailed submissions as ordered by the Single Judge by 6 September 2024 on the matter.⁸

6. However, the Prosecution submits that a postponement of the hearing - due to fairness considerations and procedural necessity – has no bearing on the fulfilment of the notification requirement set out in article 61(2)(b).⁹ In particular, the Chamber can be satisfied for the purpose of article 61(2)(b) that all reasonable steps have been taken to inform Mr KONY of the charges, and that a hearing to confirm those charges will be held, even if the date initially set for the hearing is postponed for practical reasons. Rule 125(1) states that the PTC shall “set a date for the hearing and make the date public”. The decision [to hold a hearing] shall be notified *if possible* to the person concerned or his or her counsel but nowhere does it state that the *date* itself must be notified, much less any postponements thereof.

7. While PTC II emphasised Mr KONY's potential interests in concluding that efforts should be taken to notify the date of the hearing,¹⁰ the Chamber was not required at the time to address the practical consequences if reason arose to order a postponement. It cannot be correct that the only solution is either to vacate the proceedings altogether, or to repeat part of the notification efforts already been undertaken with new information (in turn requiring a lengthier postponement).

⁷ ICC-02/04-01/05-519, para. 6.

⁸ E-Mail order, 4 September 2024.

⁹ *Contra* Defence Observations, paras. 40-43.

¹⁰ ICC-02/04-01/05-481, para. 13.

8. To the contrary, even if PTC II were correct that Mr KONY was entitled to notification of the date of the hearing *initially* set down, this condition has been satisfied. Any postponement does not invalidate the notification already taken place, since the protected interest (alerting that confirmation proceedings are likely to have commenced by a certain date) is satisfied. If that date turns out to be somewhat later, there is no appreciable prejudice to Mr KONY's potential interests.

9. Accordingly, the Prosecution submits that this Chamber could set a new hearing date in a public decision, taking into account the changed circumstances in the proceedings and ensuring the Defence's right to have adequate time for its preparation under article 67(1)(b) and rule 126(1). This date should be sufficiently far into the future to render a further postponement unlikely, and to ensure the Defence has adequate time to prepare. Further submissions will follow on this practical matter as ordered by the Single Judge.

10. Alternatively, if the Chamber considers necessary, it could not only set a new date but also order further notification efforts of the same nature as implemented by the Registry previously, to be completed at least 30 days prior to the commencement of the hearing (rule 121(3)).

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

11. The Defence avers that PTC II should have considered that the case is likely inadmissible when assessing whether there is good cause to hold *in absentia* proceedings.¹¹ However, contrary to the Defence's arguments, there was no need for a determination of the admissibility of the case at that time. First, the Chamber's *proprio motu* determination of admissibility under article 19(1) is discretionary.¹² As the Appeals Chamber has held, this discretion should be exercised with restraint at preliminary stages of the proceedings, including to avoid anticipating the content of

¹¹ Defence Observations, paras. 45-53.

¹² In contrast, article 19(1) requires the Chamber to satisfy itself that it has jurisdiction over the case at hand.

any later challenge to admissibility under article 19(2).¹³ As the Defence has already conceded, lacking instructions from Mr KONY, it is not in a position to make such a challenge.¹⁴ Second, consistent with rule 58(2), even if the Chamber were to consider it necessary to determine admissibility at this stage, it may join the question to the confirmation proceedings. Consequently, it was wholly reasonable and legally correct not to address admissibility when determining whether to proceed with confirmation proceedings *in absentia*.

12. Moreover, to the Prosecution's knowledge, there is no material change in circumstances, concerning the admissibility of the case.¹⁵ In particular, the Prosecution notes that: a) it has no knowledge of a warrant of arrest in Uganda for Mr KONY despite having liaised with the Ugandan authorities on this matter in the past, and b) Uganda has neither challenged the admissibility of the case, nor expressed any intention of doing so. In these circumstances, it is no more than speculation whether or not Uganda might itself be willing to institute proceedings against Mr KONY. Furthermore, domestic proceedings against persons other than Mr KONY are wholly irrelevant since - even if they might potentially satisfy the "same conduct" test - they do not relate to the "same person".¹⁶

¹³ See e.g. ICC-01/04-169, paras. 48-52 (concluding that "the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect", as well as "the rights of other participants", and concluding that in the circumstances of a decision under article 58 this discretion should only be exercised where there are "uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review").

¹⁴ Defence Observations, para. 53 ("Counsel appointed to represent Mr Kony's interests has no instructions to elect to challenge the admissibility on his behalf"). See also Statute, art. 19(2)(a) (standing for accused or suspect).

¹⁵ ICC-02/04-01/15-T-5-ENG, p. 25, lns. 12-25, pp. 26-27, p. 28, 1-10. *Contra* Defence Observations, para. 50, fn. 118. Incidentally, it seems this portion of the article was cited incompletely and reads in its entirety as follows: "The present author found these in the archives of the Buganda Road Court in Kampala. See Warrants of Arrest for Otti Lagony, Kony Joseph and Matsanga David Nyekorach. See also Charge Sheet Otti Lagony, Kony Joseph and Matsanga David (Terrorism) and Otti Lagony, Kony Joseph and Matsanga David Nyekorach DPP Withdrawal Form." [Emphasis added], Nowen, Sarah M.H, *Complementarity in the Line of Fire* (Cambridge University Press: 2013), p. 122, fn. 54.

¹⁶ ICC-01/09-01/11-307, para. 40; ICC-01/09-02/11-274, para. 39.

IV. CONCLUSION

13. For the reasons set out above, the Prosecution respectfully submits that the Defence's Observations should be rejected.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A.A. Khan KC, Prosecutor

Dated this 5th day of September 2024
At The Hague, The Netherlands