

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **09/09/2024**

PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Single Judge

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

THE PROSECUTOR v. JOSEPH KONY

Public

With Public Annex A

**Public Redacted Version of Kony Defence Reply to Prosecution's Submissions in
Response 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

Mr Peter Haynes KC
Ms 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. DEFENCE REPLY

A. First issue: The central question was ignored: is Mr Kony alive?

1. Despite asserting in its request for leave to reply that it “could make updated submissions” on whether Mr Kony is still alive,¹ the Prosecution offers no new evidence or information. Instead, it cites only to the same previously-disclosed [REDACTED].² The observation that these [REDACTED]³ has to be contextualised. As the most recent [REDACTED].⁴ The Prosecution does not address the multitude of reports of Mr Kony’s death, parlous state of health, or that he is now beyond Ugandan male life expectancy.

2. The Prosecution’s principal claim, however, is that there is no requirement for ongoing proof of continued life. According to the Prosecution, this would impose a substantial burden on the Court, and risks “creating a ‘revolving door’, in which arrest warrants are quashed and reinstated”.⁵ The Defence does not suggest that the arrest warrant should be quashed, nor the proceedings terminated. The question is an entirely different one: how can the criteria for an *in absentia* confirmation possibly be met when doubts exist as to whether the person is alive? The arrest warrant and the proceedings against Mr Kony can continue; the Defence does not suggest otherwise. Rather, the Defence Observations addressed whether Pre-Trial Chamber II (“PTC II”) could reasonably say that an *in absentia* hearing would “reinvigorate efforts to locate Mr Kony”, for example, without even turning its mind to whether he is still alive.⁶ The Prosecution has misdirected its response. This is about the criteria for an *in absentia* confirmation hearing; the spectre of a “revolving door” of arrest warrants being quashed and reinstated does not arise.

3. The so-called “well established case-law” cited by the Prosecution does not assist. This case-law, which is put forward to support a purported presumption that a fugitive is alive in the absence of contrary proof, comprises two ICC decisions concerning termination of proceedings.⁷ They are not authority for the proposition advanced by the Prosecution. On the contrary, there are legal presumptions concerning the death of missing persons in most national

¹ [ICC-02/04-01/05-518](#), para. 6.

² [ICC-02/04-01/05-520-Conf](#), para. 4.

³ [ICC-02/04-01/05-520-Conf](#), para. 4.

⁴ [ICC-02/04-01/05-520-Conf](#), para. 4, fn. 6, citing [REDACTED].

⁵ [ICC-02/04-01/05-520-Conf](#), para. 3.

⁶ [ICC-02/04-01/05-517-Conf](#), para. 27.

⁷ [ICC-02/04-01/05-520-Conf](#) para. 3, fn. 3 citing [ICC-02/04-01/05-465](#), para. 5; [ICC-01/09-01/20-337](#), para. 7.

systems, including in Uganda, whereby a person who has not been seen or heard of for *e.g.*, seven years, is presumed dead in the absence of proof of life.⁸

B. Second issue: Notification of the correct date of the confirmation hearings is a legal requirement

4. The Prosecution now concedes that the confirmation of charges hearing will not commence on 15 October 2024, something which the Defence submits has been evident for some time.⁹ Having made this concession, the Prosecution advances the novel submission that the obligation to notify the person of the “date of the confirmation hearing” does not involve notifying him of the *actual* date. An incorrect date will suffice.¹⁰

5. The Single Judge was unequivocal: the confirmation of charges hearing can only proceed when Pre-Trial Chamber III (“PTCIII”) is satisfied that “Mr Kony has been sufficiently informed of the date on which the hearing has been scheduled”.¹¹ Indeed, in previous submissions, the Prosecution has referred to the notification of the charged person of the date of the hearing as a statutory obligation, calling it “the notification process with respect to the date of the hearing pursuant to article 61(2)(b).”¹² Notably, the Prosecution opposed the OPCD request to vacate the 15 October 2024 date, and set a new date after hearing from Mr Kony’s appointed counsel, by arguing that “[t]he notification of the hearing date is an element of article 61(2)(b) of the Statute”.¹³ The Prosecution had every opportunity to submit that this was not a real requirement, or that “the date of the hearing” does not mean the precise date of the hearing. It repeatedly said the opposite. For the Prosecution now to suggest that Rule 125(1) “does not state that the *date* itself must be notified”¹⁴ is inconsistent and at odds with its own previous submissions and the Single Judge’s ruling, for which no appeal was sought.

⁸ Uganda Legal Information Institute, [Registration of Persons Act, 2015](#), Section 47; Uganda Legal Information Institute, [The Evidence Act of Uganda](#) and legal guidelines on missing persons; Kenya, [Kenya’s Evidence Act](#), Chapter 80; Rwanda, [Rwanda’s Civil Code](#) and legal documents on family law, Article 28; South Sudan, [Law of Southern Soudan, The Code of Evidence Act, 2006](#), Section 119; UK [Presumption of Death Act 2013](#), Section 1; for the United States, see, *e.g.*, Code of Virginia, [§ 64.2 – 2300 Presumption of death from absence or disappearance; when applicable](#); Code of Delaware, Title 12, [Chapter 17 Absentees; Presumed Decedents](#), § 1701. See also, French Civil Code, [Article 88](#); German [Missing Person Act](#), Section 1; [Spanish Civil Code](#), Article 193; [Italian Civil Code](#), Article 58; [Brazilian Civil Code](#), Article 6, [Japanese Civil Code](#), Article 30.

⁹ [ICC-02/04-01/05-489](#), para. 2; [ICC-02/04-01/05-494](#), para. 18; [ICC-02/04-01/05-497](#), para. 15; [ICC-02/04-01/05-498](#), para. 4.

¹⁰ [ICC-02/04-01/05-520-Conf](#), paras 6-8.

¹¹ [ICC-02/04-01/05-T-012-CONF-ENG ET](#), p. 3.

¹² [ICC-02/04-01/05-490](#) + Anxs, para. 30.

¹³ [ICC-02/04-01/05-498](#), para. 4.

¹⁴ [ICC-02/04-01/05-520-Conf](#), para. 6.

6. In the alternative, the Prosecution submits that even if he had been notified that the confirmation of charges hearing would take place on 15 October 2024, “there is no appreciable prejudice to Mr Kony’s potential interests”, if in fact the hearing does not take place on that date but rather some indeterminate future date.¹⁵ That is clearly wrong; the very purpose of ensuring that the person is notified of the date of the hearing is to allow them to follow the proceedings, or attend the hearing, or to instruct lawyers to attend and represent them. If the person has been given the wrong date, that is impossible, and the safeguard ceases to exist.

7. If the Prosecution’s suggestion is followed, the Court will convene the first *in absentia* confirmation hearing of a person, over the objections of Counsel appointed to represent him and having notified him of the wrong date. Even putting aside the legality, the optics alone are problematic. There is also the issue of location. The notified hearing on 15 October 2024 remains scheduled to take place in Courtroom I in The Hague.¹⁶ Following the Prosecution’s Rule 100 request,¹⁷ it appears that The Hague is one of four potential venues. Should the hearing in fact take place a year later in Kampala, or Gulu, or Lira, this renders the current notification procedure further removed from any kind of meaningful safeguard. The charged person must surely know when and where he needs to surrender or instruct his lawyers to attend. Notifying someone of the date of a hearing must mean notifying them of the actual date of the hearing.

C. Third issue: The admissibility of the proceedings is in doubt

8. The Prosecution asserts that there should be no consideration of potential or actual inadmissibility prior to the confirmation hearing, arguing that any such consideration would be prejudicial to Mr Kony’s rights.¹⁸ In support, the Prosecution cites a 2006 Appeals Chamber decision from the *Lubanga* case concerning the advisability of Pre-Trial Chamber ruling on admissibility as part of the *ex parte* arrest warrant application.¹⁹

9. The Prosecution’s solicitude for Mr Kony’s rights is misplaced. As PTCII stated in 2009 concerning the *Lubanga* decision:

The Chamber wishes to clarify that the judgment by the Appeals Chamber referred to the very specific procedural scenario of a Prosecutor’s application for a warrant of arrest [...] triggering *ex parte* proceedings where the suspect is not represented. Such a scenario profoundly differs from the one at stake in the

¹⁵ [ICC-02/04-01/05-520-Conf](#), para. 8.

¹⁶ [ICC Court Calendar](#), last accessed on 6 September 2024.

¹⁷ [ICC-02/04-01/05-490](#), paras 30-34.

¹⁸ [ICC-02/04-01/05-520-Conf](#), para. 11.

¹⁹ [ICC-02/04-01/05-520-Conf](#), para. 11, citing [ICC-01/04-169](#).

[current] Proceedings, where a counsel for the defence has been appointed, the relevant State is a participant and *amici curiae* observations have been submitted. Accordingly, the determinations by the Appeals Chamber as to the conditions warranting the exercise of a Chamber's *proprio motu* powers under article 19(1) are not of direct relevance to the Proceedings.²⁰

10. The alternative suggestion of “join[ing] the question to the confirmation hearings” reflects a profligate disregard of Court resources. It makes no sense to expend the substantial resources necessary for a confirmation hearing only to find the case inadmissible.

11. The basis for the Prosecution's submission that “it has no knowledge”²¹ concerning a Ugandan arrest warrant against Mr Kony should be a cause of concern to PTCIII. The transcript cited at footnote 15 of the Response, from 2015, does not concern admissibility.²² The Prosecution may have intended to cite instead “ICC-02/04-01/05-T-007-CONF-ENG”, [REDACTED].²³ In the latter event, the Prosecution's “knowledge” appears to be based on information that is now seventeen years out of date. In fact, it is hard to know how current the Prosecution's information might be, since it is apparently based on “having liaised” with the Ugandan authorities at some unspecified date “in the past.”²⁴

12. Rather than simply asking the Ugandan authorities about these matters to update its “knowledge,” the Prosecution instead speculates that any arrest warrant against Mr Kony has been withdrawn.²⁵ The Defence, in contrast, has been making additional inquiries and on 8 September 2024 received a copy of both a 1999 Uganda arrest warrant, and a 2001 “Withdrawal Form” which states that “the Director of Public Prosecutions has decided to discontinue proceedings against the accused persons in the cases listed on the attached certified list **pending re-arrest**.”²⁶ These documents show that: (i) there was enough of a criminal investigation against Mr Kony to result in an arrest warrant; (ii) a decision was taken in 2001 to “discontinue proceedings,” without indicating that this includes the outstanding arrest

²⁰ [ICC-02/04-01/05-377](#), para. 21.

²¹ [ICC-02/04-01/05-520-Conf](#), para. 12.

²² [ICC-02/04-01/15-T-5-EN](#) is a status conference on 28 January 2015 in which the Prosecution answers questions from the bench about proceeding *in absentia* against co-suspects. There is no discussion about proceedings or lack thereof in respect of Mr Kony, but rather about whether the Ugandan government can provide better proof of the death of Vincent Otti and Okot Odhiambo. This is the hearing in which the Prosecution submitted that *in absentia* proceedings against Mr Kony “could be an enormous expense of, well, time, money, effort for no benefit at all.”

²³ [ICC-02/04-01/05-T-007-CONF-ENG ET](#), pp 25-28.

²⁴ [ICC-02/04-01/05-520-Conf](#), para. 12.

²⁵ [ICC-02/04-01/05-520-Conf](#), fn. 15.

²⁶ Annex A, p. 6, received from Prof. Sarah Nouwen by email on 8 September 2024.

warrant; and (iii) in any event, the discontinuance was made subject to “pending re-arrest”.

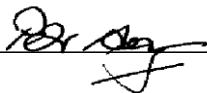
13. None of this was brought to the attention of PTCII by the Prosecution when these matters were addressed in 2007 and 2009.²⁷ These documents substantiate Uganda’s previous submissions to the ICC that, if ever arrested, Mr Kony will “have to be brought” before a Ugandan court.²⁸ Given these circumstances, the Pre-Trial Chamber should require the Prosecution to make further inquiries confirming that Uganda will not seek to put Mr Kony, if he is ever arrested, on trial for the matters that are the subject of the ICC case, which would render any confirmation hearings against him of no legal effect or significance.

14. The existence of a domestic court in Uganda that has the capacity to adjudicate and has jurisdiction over all of the charges against Mr Kony is not irrelevant.²⁹ It was not irrelevant to PTCII in the course of its reasoning during the First Admissibility Decision, and it is not irrelevant now given the continuing prospect – made more real in light of the *Kwoyelo* case – that Uganda would be willing and able to try Mr Kony if he is ever arrested.³⁰

II. LEVEL OF CONFIDENTIALITY

15. Pursuant to Regulation 23bis(2) of the Regulations of the Court, this reply is filed confidentially as it responds to a confidential filing. A public redacted version is also filed.

The whole respectfully submitted.



Peter Haynes KC
Counsel for Joseph Kony

The Hague, The Netherlands,
Monday, 9 September 2024

²⁷ [ICC-02/04-01/05-352](#), para. 9.

²⁸ See [ICC-02/04-01/05-517-Conf](#), paras 49-50.

²⁹ [ICC-02/04-01/05-520-Conf](#), para. 12.

³⁰ [ICC-02/04-01/05-517-Conf](#), paras 47-49.