



Original: English

No. ICC-02/04-01/05 OA4

Date: 26 March 2025

THE APPEALS CHAMBER

Before:

Judge Erdenebalsuren Damdin, Presiding

Judge Solomy Balungi Bossa

Judge Kimberly Prost

Judge Joanna Korner

Judge Gocha Lordkipanidze

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. JOSEPH KONY

Public document

Decision on the Defence's request for leave to reply

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

☒ **The Office of the Prosecutor**

☒ **Counsel for the Defence**

Kony Defence

☒ **Legal Representatives of the Victims**
Kony case

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

☐ **Unrepresented Applicants
(Participation/Reparation)**

☒ **The Office of Public Counsel for
Victims**

☐ **The Office of Public Counsel for the
Defence**

☐ **States' Representatives**

☐ **Amicus Curiae**

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations
Section**

☐ **Other**

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Joseph Kony against the decision of Pre-Trial Chamber III entitled “Decision on the criteria for holding confirmation of charges proceedings *in absentia*” of 29 October 2024 (ICC-02/04-01/05-532),

Having before it the “Request for Leave to Reply” of 24 February 2025 (ICC-02/04-01/05-569),

Pursuant to regulation 24(5) of the Regulations of the Court,

Renders, the following

DECISION

The Defence may file a reply to the “Prosecution response to ‘Defence Appeal brief against Pre-Trial Chamber III’s “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”” by 3 April 2025, as specified in paragraphs 14 and 17 of the present decision. The reply shall not exceed 5 pages.

REASONS

I. PROCEDURAL HISTORY

1. On 29 October 2024, Pre-Trial Chamber III (hereinafter: “Pre-Trial Chamber”) issued the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*” (hereinafter: “Impugned Decision”), in which it decided to proceed to hold a confirmation of charges hearing *in absentia*, finding *inter alia* that an “initial appearance” pursuant to article 60(1) of the Statute is not required in respect of persons, as Mr Joseph Kony (hereinafter: “Mr Kony”) “cannot be found”, within the meaning of article 61(2)(b) of the Statute.¹

2. On 4 November 2024, the Defence requested leave to appeal the Impugned Decision on three proposed issues.²

¹ [Decision on the criteria for holding confirmation of charges proceedings *in absentia*](#), ICC-02/04-01/05-532, para. 95, p. 46.

² [Kony Defence request for leave to appeal “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#), ICC-02/04-01/05-533.

3. On 8 November 2024, the Prosecutor and the Office of Public Counsel for the Victims (hereinafter: “OPCV”) filed their respective responses to the Defence’s aforementioned request for leave to appeal.³

4. On 28 January 2025, the Pre-Trial Chamber issued a decision, by majority, granting the Defence’s request for leave to appeal regarding one of the proposed issues, namely, whether an initial appearance by the person charged is required pursuant to article 60(1) of the Statute before a confirmation of charges hearing can be held *in absentia* under article 61(2)(b) of the Statute.⁴

5. On 7 February 2025, the Defence filed its appeal brief against the Impugned Decision (hereinafter: “Appeal Brief”), raising three grounds of appeal.⁵

6. On 20 February 2025, the OPCV⁶ and the Prosecutor⁷ filed their respective responses to the Appeal Brief.

7. On 24 February, the Defence filed a request for leave to reply in respect of five discrete issues arising from the Prosecutor’s Response to Appeal Brief (hereinafter: “Request”).⁸

8. On 26 February 2025, the Prosecutor filed his response to the Request (hereinafter: “Prosecutor’s Response to Request”).⁹

³ [Prosecution’s Response to the Defence Request for Leave to Appeal the Decision on the criteria for holding confirmation of charges proceedings *in absentia*](#), ICC-02/04-01/05-534; [Victims’ Response to the “Kony Defence request for leave to appeal ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’”](#), ICC-02/04-01/05-535.

⁴ [Decision on the ‘Kony Defence request for leave to appeal \[the\] “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#), ICC-02/04-01/05-551.

⁵ [Defence Appeal brief against Pre-Trial Chamber III’s “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”](#), ICC-02/04-01/05-557.

⁶ [Victims’ Response to the “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’” \(No. ICC-02/04-01/05-557\)](#), ICC-02/04-01/05-565.

⁷ [Prosecution response to “Defence Appeal brief against Pre-Trial Chamber III’s ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’”](#), ICC-02/04-01/05-566 (hereinafter: “Prosecutor’s Response to Appeal Brief”).

⁸ [Request for Leave to Reply](#), ICC-02/04-01/05-569.

⁹ [Prosecution response to the “Request for Leave to Reply” in support of the Defence appeal](#), ICC-02/04-01/05-570.

II. MERITS

A. Summary of the submissions

9. The Defence requests, pursuant to regulation 24(5) of the Regulations of the Court (hereinafter: “Regulations”), that the Appeals Chamber grant leave to reply in respect of “five discrete issues raised in the [Prosecutor’s] response”, on the basis that “none of these five issues could have been anticipated by the Defence when drafting its appeal”.¹⁰ In its view, the Request is “warranted and necessary for proper adjudication of the appeal”.¹¹ Should the Appeals Chamber grant its request, the Defence submits that, it would reply within five days of any such decision with its filing, not exceeding eight pages.¹²

10. The Prosecutor contends that the Request should be dismissed, stating that “[a]ll five of the issues identified [...] could reasonably have been anticipated by the Defence”, and that “the proposed reply is not necessary for the Appeals Chamber’s adjudication of the matters”.¹³

B. Determination by the Appeals Chamber

11. Regulation 24(5) of the Regulations provides:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

12. The Appeals Chamber may grant a request for leave to reply if the above-mentioned conditions are met, or if it considers that a reply would otherwise be necessary for the adjudication of the appeal.¹⁴

13. In the present case, the Defence seeks leave to reply in respect of five issues raised in the Prosecutor’s Response to Appeal Brief.¹⁵ The *first* issue relates to the Pre-Trial Chamber’s

¹⁰ [Request](#), paras 3-4, 6.

¹¹ [Request](#), para. 7.

¹² [Request](#), paras 3, 14.

¹³ [Prosecutor’s Response to Request](#), paras 1, 4-5, 7.

¹⁴ See, for example, *Situation in the Republic of the Philippines*, [Decision on the Republic of the Philippines’ request for leave to reply to the “Prosecution’s response to the Philippine Government’s Appeal Brief against ‘Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation’ \(ICC-01/21-65 OA\)”](#), 2 May 2023, ICC-01/21-72 (OA), paras 9-10; *Situation in the Islamic Republic of Afghanistan*, [Decision on the Prosecutor’s request for leave to reply](#), 23 December 2022, ICC-02/17-206 (OA5), para. 8; *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda’s request for leave to reply](#), 17 July 2017, ICC-01/04-02/06-1994 (OA6), para. 9; *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda’s request for leave to reply](#), 3 March 2017, ICC-01/04-02/06-1813 (OA5), para. 8.

¹⁵ [Request](#), paras 3, 7.

interpretation of the phrase “cannot be found” within the meaning of article 61(2)(b) of the Statute, as excluding persons whose whereabouts are known but who are inaccessible to the Court.¹⁶ The Appeal Chamber finds that this issue is not new, and the Defence not only could reasonably have anticipated it but effectively discussed it in its submissions before the Appeals Chamber.¹⁷ Given the low relevance of the issue for the determination of the present appeal, the Appeals Chamber considers that further submissions are unnecessary.

14. The *second* issue presented by the Defence relates to the Prosecutor’s submission that the phrase “subject to” in article 61(1) of the Statute must be interpreted as creating an exception to the requirement of an initial appearance in article 60(1) of the Statute.¹⁸ The Appeals Chamber notes that the issue raised in the Prosecutor’s Response to Appeal Brief is novel and will be addressed by the Appeals Chamber, in the present proceedings, for the first time. Recognising the importance of this issue to the consideration of the appeal as a whole, the Appeals Chamber considers that a reply in respect to this issue would assist in its determination of the appeal.

15. The *third* issue presented by the Defence relates to the Prosecutor’s assertion that the requirement in article 61(2) of the Statute to take reasonable steps to inform a person of the charges “would be redundant and unnecessary if the suspect’s initial appearance before the Pre-Trial Chamber under article 60(1) of the Statute was a prerequisite for confirmation *in absentia* under article 61(2)”.¹⁹ The Defence alleges that article 60(1) of the Statute uses the expression “crimes”, not “charges”, to describe the allegations of which the suspect must be informed at the initial appearance.²⁰ This issue is neither new nor unforeseeable, as the Defence has outlined in its submissions which information about the allegations that must be made available to the suspect.²¹ Furthermore, the Appeals Chamber is in a position to understand the difference between “crimes” and “charges” without further submissions.

16. The *fourth* issue addresses certain quotations offered by the Prosecutor from academic commentary, which the Defence intends to show, “are incomplete, taken out of context, or otherwise misleading as cited”.²² The Appeals Chamber considers that a reply is unnecessary

¹⁶ [Request](#), para. 8.

¹⁷ [Appeal Brief](#), paras 29-30.

¹⁸ [Request](#), para. 9.

¹⁹ [Request](#), para. 10.

²⁰ [Request](#), para. 10.

²¹ [Appeal Brief](#), paras 16-17, 28.

²² [Request](#), para. 11.

on this issue, as both parties have provided in the relevant sections of their respective submissions the specific references with hyperlinks to the academic commentary they cite, which the Appeals Chamber may review without any further assistance from the parties.²³

17. Finally, the *fifth* issue identified by the Defence relates to the Prosecutor's contention that the interpretation of the Pre-Trial Chamber is supported by the "object and purpose of the Statute".²⁴ The Appeals Chamber finds, for the same reasons noted with respect to the *second* issue presented by the Defence,²⁵ that a reply in respect to this issue would assist in the determination of the appeal.

18. For the reasons provided above, the Appeals Chambers grants leave to reply as specified in paragraphs 14 and 17 of the present decision. The reply shall be filed not later than 3 April 2025, and it shall not exceed 5 pages.

Done in both English and French, the English version being authoritative.



Judge Erdenebalsuren Damdin

Presiding Judge

Dated this 26th day of March 2025

At The Hague, The Netherlands

²³ [Appeal Brief](#), para. 36, fn. 52. See also [Prosecutor's Response to Appeal Brief](#), fns 82, 84, 90.

²⁴ [Request](#), para. 12.

²⁵ See paragraph 14 above.