

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **16 April 2025**

PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Iulia Antoanella Motoc
Judge Haykel Ben Mahfoudh

SITUATION IN THE REPUBLIC OF UGANDA

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

Public

Public Redacted Version of “Kony Defence Request for Leave to Reply to the ‘Prosecution’s response to “Request for Reconsideration of the ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’ (ICC-02/04-01/05-532)” (ICC-02/04-01/05-587)’ and the ‘Victims’ Response to the “Request for Reconsideration of the ‘Decision on the criteria for holding confirmation of charges proceedings in absentia’” (ICC-02/04-01/05-532) (ICC-02/04-01/05-588)’”

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

☒ Counsel for the Defence

☒ Legal Representatives of the Victims

☐ 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 Zavala Giler, Osvaldo

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and Reparations
Section

☐ Other

I. INTRODUCTION

1. Both the Prosecution and the Office of Public Counsel for Victims (“OPCV”) have filed responses¹ to the Defence Request for Reconsideration of the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*”.² The Defence seeks leave to reply on four discrete issues, which could not have been anticipated and to which a reply is otherwise warranted for the full and proper adjudication of the Defence Request.

II. LEVEL OF CONFIDENTIALITY

2. The Defence files this request as confidential, pursuant to regulation 23bis(1) and (2) of the Regulations of the Court, as it references a confidential document. A public redacted version is filed concurrently.

III. APPLICABLE LAW

3. Regulation 24(5) of the Regulations of Court provides that:

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.

4. A Pre-Trial Chamber may grant a request for leave to reply where these conditions are met.³

5. In addition, Pre-Trial Chambers have granted leave to reply where “the information [the party] might provide in respect of those issues might assist the Chamber in its

¹ [Prosecution’s response to “Request for Reconsideration of the ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’ \(ICC-02/04-01/05-532\)”](#), ICC-02/04-01/05-587, 14 April 2025 (“Prosecution Response”); [Victims’ Response to the “Request for Reconsideration of the ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’” \(ICC-02/04-01/05-532\)](#), ICC-02/04-01/05-588, 14 April 2025 (“OPCV Response”).

² [Request for Reconsideration of the “Decision on the criteria for holding confirmation of charges proceedings *in absentia*” \(ICC-02/04-01/05-532\)](#), ICC-02/04-01/05-583, 3 April 2025 (“Defence Request”).

³ *Situation in Ukraine*, [Decision on Mongolia’s request for leave to reply](#), ICC-01/22-103, 14 November 2024, para. 10 partially granting leave to reply in respect of two issues for which “it could have been difficult for Mongolia to anticipate the overall scope and the level of detail of the arguments provided in the Prosecution’s Response”; *Situation in the Bolivarian Republic of Venezuela I*, [Decision on Venezuela’s request for leave to reply](#), ICC-02/18-37, 3 April 2023, para. 11 partially granting leave to reply in respect of one issue that “could not have been anticipated by Venezuela.”; *Prosecutor v. Abd-Al-Rahman*, [Decision on Defence Request for Leave to Reply](#), ICC-02/05-01/20-99, 17 July 2020, para. 13 “The Single Judge notes that the novel arguments raised in the Prosecutor’s Response pertaining to article 58(1)(b)(ii) of the Statute could not have been reasonably anticipated by the Defence”; *Prosecutor v. Bemba*, [Decision on Mr. Bemba’s Request for Leave to Reply to Prosecution’s Response and Registry’s Observations to Mr. Bemba’s Claim for Compensation and Damages](#), ICC-01/05-01/08-3684, 13 May 2019, para. 3 “The Chamber, being aware of the novelty and complexity of several of the issues raised in these compensation proceedings, and noting that both the Prosecutor and the Registry raised new facts and information in their submissions, finds that there exist sufficient reasons to grant the Request.”

determinations [...]”,⁴ “to present evidence and/or arguments which were either not available or otherwise not foreseeable”,⁵ or “considering the importance of the issue under consideration” and “to enable the Chamber to have before it all the relevant information and arguments from the parties prior to its determination of the matter *sub judice*.”⁶

6. A Pre-Trial Chamber has also held that “in order to be granted leave to file a reply, a party needs to demonstrate that good cause exists, in particular when one or more issues arising from the response could not have been anticipated in its initial submissions or when it would be beneficial for the Chamber to receive further submissions prior to its disposal of the matter under consideration”.⁷

IV. SUBMISSIONS

A. First Issue: The information was not previously available

7. The Prosecution and OPCV both submit that the Defence has failed to demonstrate that the information relied upon in support of the reconsideration request was “not previously available.”⁸ It is suggested that if the Defence did not have sufficient time to make these arguments and obtain the annexed documents to supplement its original observations, “it should have requested an extension of time limit pursuant to regulation 35 of the Regulations of the Court.”⁹ This issue could not have been foreseen because the impossibility of obtaining this information should have been clear to the Prosecution and OPCV who, unlike the Defence, have been actively working on this case for over 20 years. Should leave to reply be granted, the Defence will explain (i) the circumstances in which this new information came into the Defence’s possession subsequently; (ii) the impossibility of obtaining or even becoming aware of this information, given the timing of the initial submissions, and the relatively belated appointment of counsel to represent Mr

⁴ *Prosecutor v. Bemba et al.*, [Decision on “Narcisse Arido’s request for leave to reply to the ‘Prosecution’s Response to Arido’s request for Interim Release’”](#), ICC-01/05-01/13-543, 7 July 2014, p. 3 (“Decision on Arido’s Request for leave to reply on interim release”).

⁵ *Prosecutor v. Gaddafi & Al-Senussi*, [Decision on the request of Abdullah Al-Senussi for leave to reply](#), ICC-01/11-01/11-324, 26 April 2013, para. 11.

⁶ *Prosecutor v. Gaddafi & Al-Senussi*, [Decision on Libya’s application for leave to reply to the Defence of Abdullah Al-Senussi](#), ICC-01/11-01/11-335, 10 May 2013, para. 8. See also *Prosecutor v. Mbarushimana*, [Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”](#), ICC-01/04-01/10-61, 24 February 2011, p. 4 “CONSIDERING the importance and potential effect of the issues raised in the Prosecution Request and the Defence Response [...]”.

⁷ [Decision on Arido’s Request for leave to reply on interim release](#), p. 3.

⁸ [Prosecution Response](#), para. 5.

⁹ [OPCV Response](#), para. 22.

Kony's interests; and (iii) the propriety in presenting information relevant to the exercise of the Pre-Trial Chamber's discretion.

B. Second Issue: The Defence was entitled to rely on annexed statements

8. Both the Prosecution and OPCV criticise the Defence's reliance on the annexed statements. The Prosecution asserts that the statements "may not be understood as any independent legal intervention in this case by the persons named in those statements, either for the purpose of representing the views and concerns of victims or as *amici curiae*".¹⁰ The OPCV goes further and characterises the statements as de facto *amicus curiae* submissions and asks for them to be "rejected *in limine*".¹¹ It was not foreseeable that the annexes would be misconstrued by the Prosecution and OPCV as legal submissions, rather than as providing a factual basis for the request for reconsideration itself. Should leave be granted, the Defence will show that the Prosecution and OPCV have mischaracterised the annexes, misunderstood their relevance to the motion, and incorrectly asserted that such annexes could only have been submitted to the Pre-Trial Chamber pursuant to Rule 103.

C. Third Issue: The Pre-Trial Chamber is entitled to hear from the community in northern Ugandan

9. OPCV represents 35 victims in the present case.¹² It submits in response that it has "since met and engaged, during missions conducted in Northern Uganda, with **thousands of victims** who have made it clear that they equally, and overwhelmingly, support the holding of a confirmation hearing in the absence of Joseph Kony",¹³ and that these thousands of victims have "clearly stated that the Court must put an end to impunity".¹⁴ OPCV also asserts that the northern Ugandan religious, political and cultural leaders "do not speak on behalf of the thousands of Ugandan victims nor do they have a right to represent – formally or informally – the best interests of the victims participating in these proceedings".¹⁵ The Defence could not have anticipated that OPCV would rely on the views of thousands of victims whom it does not represent, nor claim that the voices of religious, political or cultural leaders who live in northern Uganda, have lived through the conflict in question, and who engage daily with victim communities and are

¹⁰ [Prosecution Response](#), paras 5-6.

¹¹ [OPCV Response](#), paras 16-19.

¹² *Id.*, para. 30.

¹³ *Id.*, para. 30 (emphasis added).

¹⁴ *Id.*, para. 31.

¹⁵ *Id.*, para. 32.

empowered to speak on their behalf, should not be heard. Should leave be granted, the Defence will address OPCV's submissions, including the suggestion that victims from the Lango and Teso regions support the convening of an *in absentia* ICC confirmation of charges hearing through, *inter alia*, the publicly available information indicating the opposite.¹⁶

D. Fourth Issue: The Defence properly relied on the public record of the case

10. The contents of Annex II of the Registry Report of 14 February 2025,¹⁷ remain classified as *ex parte* and confidential. The description of the Annex available to the Defence (and on the basis of which it was submitted to the Pre-Trial Chamber as a confidential and *ex parte* document) states that it contains "sensitive and detailed information on possible whereabouts and personal data of Mr Kony."¹⁸ This Pre-Trial Chamber has expressly held that an *in absentia* confirmation hearing is not permissible under the Statute where "the approximate whereabouts of the person are known but the Court is unable to have an arrest warrant executed due to reasons unrelated to the identification of the suspect's location."¹⁹ In addition, whether the Court knows Mr Kony's approximate whereabouts is of the highest importance and interest to the affected community in northern Uganda, and to their views concerning the implications of an *in absentia* confirmation hearing.

11. The Prosecution impugns the Defence's submission on the significance of the Registry Report on the basis that it had "specifically informed [the Defence] that Annex II to that report did *not* contain any information relevant to Mr Kony's whereabouts".²⁰ Despite this assertion, however, and despite the Registry reportedly agreeing that its own description of the annex to the Pre-Trial Chamber was erroneous,²¹ no correction was ever made, either by the Registry or by the Prosecution. Having been unforeseeably and unjustifiably criticised for its reliance on the Registry's description – which remains undisputed and uncorrected on the record of the case to this day – the Defence should now be entitled to explain the propriety of that reliance.

¹⁶ See, e.g., B. Oketch, "[Confirmation of Kony charges hearing will lead to fatigue, Ugandans tell ICC](#)", *The Monitor*, 25 January 2023.

¹⁷ [Annex II to the Registry's Report on the implementation of Pre-Trial Chamber III's "Decision Setting the Date of the Confirmation of Charges Hearing and Related Time Limits" dated 12 December 2024 \(ICC-02/04-01/05-539\)](#), ICC-02/04-01/05-563-AnxII-Red, 17 February 2025.

¹⁸ [Registry's Report on the implementation of Pre-Trial Chamber III's "Decision Setting the Date of the Confirmation of Charges Hearing and Related Time Limits" dated 12 December 2024 \(ICC-02/04-01/05-539\)](#), ICC-02/04-01/05-563, 14 February 2025, para. 12.

¹⁹ [Decision on the criteria for holding confirmation of charges proceedings in absentia](#), ICC-02/04-01/05-532, 29 October 2024, para. 96.

²⁰ [Prosecution Response](#), para. 19 (emphasis in original).

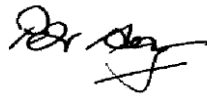
²¹ [Prosecution Response](#), [Annex](#), ICC-02/04-01/05-587-Conf-Anx, 14 April 2025, p. 3 [REDACTED].

12. *Per curiam*, the Defence regrets the tone of the Prosecution and OPCV responses. It finds such expressions as “alleged utterances of the Ugandan President”²² when the Defence submissions were easily verifiable,²³ and the reference to the annexed statements as being “purportedly written by the said leaders”²⁴ as falling below the minimum level of professional courtesy and respect and would welcome the withdrawal of these statements. Such situations, where the Prosecution has made similar allegations against the professionalism of the Defence, have been held without more to merit leave to reply “[t]aking into account fairness to the Defence and its request to set the record straight publicly”.²⁵

V. RELIEF REQUESTED

13. Leave accordingly is requested to submit a reply in respect of each of the above issues in a filing not to exceed five pages, within five days of a decision by the Pre-Trial Chamber.

The whole respectfully submitted



Peter Haynes, KC
Counsel for Joseph Kony

Dated this 16 April 2025

At The Hague, Netherlands

²² [Prosecution Response](#), para. 11.

²³ In fact, the Prosecution’s assertion that “the Ugandan authorities have made no official communication to the Court with the effect claimed by the Defence” is incorrect. See *e.g.*, [Annex 2 to Report by the Registrar on the Execution of the “Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest”](#), ICC-02/04-01/05-286-Anx2, 28 March 2008.

²⁴ [OPCV Response](#), para. 16.

²⁵ See *e.g.*, *Prosecutor v. Yekatom & Ngaïssona*, [Decision on the Yekatom Defence Request for Leave to Reply to the Prosecution Response to the Request for the Introduction of D29-5010’s Prior Recorded Testimony pursuant to Rule 68\(2\) of the Rules](#), ICC-01/14-01/18-2354, 12 February 2024, para. 6. See also, [Decision on the Yekatom Defence Request for Leave to Reply to the Prosecution Response to the Motion for Finding of Disclosure Violation](#), ICC-01/14-01/18-1168, 5 November 2021, para. 6.