

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **5 April 2023**

PRE-TRIAL CHAMBER II

Before:

**Judge Rosario Salvatore Aitala, Presiding
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Gordínez**

SITUATION IN UGANDA

THE PROSECUTOR v. JOSEPH KONY AND VINCENT OTTI

Public

OPCD Response to “Prosecution request for leave to reply to ‘OPCD Observations on the Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence’”

Source: Office of Public Counsel for the Defence

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

The Office of the Prosecutor

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Unrepresented Victims

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Reparations Section**

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1. On 24 November 2022, the Prosecution requested to hold a confirmation of charges hearing in the absence of Mr Joseph Kony (“Prosecution Request”).¹ On 7 February 2023, the Pre-Trial Chamber issued its Order on procedural matters, inviting the Office of Public Counsel for the Defence (“OPCD”) and Office of Public Counsel for Victims (“OPCV”) to file observations on the Prosecution Request by 30 March 2023, at the latest;² both OPCD and OPCV filed their observation on the Prosecution Request on that day.³ On 4 April 2023, the Prosecution filed its request seeking leave to reply to OPCD Observations.⁴

2. The OPCD is unclear as to what the Prosecution seeks to reply to that it could not have “reasonably anticipated”⁵ as there is no “consistent practice” in how Articles 58, 60, and 61 of the Statute operate in the context of a confirmation hearing *in absentia* because it is a novel proceeding. The Prosecution has long understood that the proper interpretation of Article 61(2)(b) is not settled,⁶ and interpreting a statutory provision usually requires reading its words “in their immediate surroundings” in the treaty to understand its context;⁷ here, the interplay between Article 61(2)(b) and Articles 58, 60, and the rest of Article 61.

3. Nevertheless, the OPCD defers to the discretion of the Pre-Trial Chamber to determine if further submissions would assist to understand the Prosecution position on this complex issue.

¹ Public Redacted Version of the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”, 24 November 2022, [ICC-02/04-01/05-446-Red](#).

² Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant, 7 February 2023, [ICC-02/04-01/05-453](#).

³ Victims’ Views and Concerns on the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”, 30 March 2023, [ICC-02/04-01/05-457](#); OPCD Observations on the Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 30 March 2023, [ICC-02/04-01/05-458](#) (“OPCD Observations”).

⁴ Prosecution request for leave to reply to “OPCD Observations on the Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence” (ICC-02/04-01/05-458), 4 April 2023, [ICC-02/04-01/05-460](#) (“Request to Reply”).

⁵ *Ibid.*, para. 3. Furthermore, the OPCD submits that the Prosecution is not specific about the parts it intends to reply to, and does not limit itself to even the seven paragraphs of the OPCD Observations to which it refers [*see* Request to Reply, fn. 5 (“*See e.g.*”)], making it difficult for the OPCD to fully respond to the Request to Reply.

⁶ *Prosecutor v. Gaddafi & Al-Senussi*, Prosecution’s Response to the Defence “Request for an order for the commencement of the pre-confirmation phase”, 30 August 2013, [ICC-01/11-01/11-425-Red](#), para. 15 and fn. 51 (“Indeed, the different stages of the proceedings before the Court are set out in the Statute and the Rules and follow certain logic”, and “[c]ommentators differ with respect to the possibility of holding a confirmation of charges without prior surrender and first appearance”). *See also* paras 27-31.

⁷ Richard Gardiner, *Treaty Interpretation* (2nd edition, Oxford University Press, 2015), p. 197.



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Dated this 5th Day of April 2023
at The Hague, The Netherlands