

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **24 November 2022**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN UGANDA

THE PROSECUTOR v. JOSEPH KONY AND VINCENT OTTI

Public

Public Redacted Version of the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A.A. Khan KC

Mr Mame Mandiaye Niang

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 Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution respectfully requests the Pre-Trial Chamber (“Chamber”) to hold a hearing on the confirmation of charges against Joseph KONY in his absence (“Request”).
2. Article 61(2)(b) of the Statute allows the Chamber to hold a hearing *in absentia* where a suspect has fled or cannot be found, provided that there is “cause” pursuant to rules 123(2) and 125(1) of the Rules to hold such a hearing in the suspect’s absence.
3. The arrest warrant against Mr KONY was issued under seal in July 2005,¹ and made public in October 2005.² Mr KONY is aware of the warrant and has publicly commented on it.³ Yet, despite all reasonable efforts by the Prosecution and the Registry to locate and apprehend Mr KONY—assisted to an unprecedented degree by States, international organisations and civil society—the arrest warrant has remained unexecuted. Mr KONY has therefore successfully evaded judicial proceedings at this Court for more than 17 years.
4. There is—at this juncture—not only cause to hold a hearing to confirm charges against Mr KONY in his absence, but this cause is strong and compelling.
5. *First*, having evaded justice for 17 years, Mr KONY is not only this Court’s longest standing suspect at large but also the second longest of *any* international criminal court or tribunal.⁴ Confronted with similar challenges, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) took measures to publicise the evidence against persons seeking to evade justice, at an appropriate juncture within their own procedural frameworks. In a similar spirit, the Prosecution considers that the case against Mr KONY has reached the point where a hearing in the absence of the suspect under article 61(2)(b) is justified and appropriate “to guarantee lasting respect for and enforcement of international criminal justice”.⁵
6. *Second*, a public hearing to confirm the charges against Mr KONY in his absence, and the resulting judicial decision, will enhance the Court’s proceedings. It is likely to galvanise efforts

¹ ICC-02/04-01/05-2-US-Exp (“[Kony Arrest Warrant](#)”). The warrant was amended on 27 September 2005, *see* ICC-02/04-01/05-28-US-Exp (“[Kony Amended Arrest Warrant](#)”).

² ICC-02/04-01/05-52 (“[Kony Arrest Warrant Unsealing Decision](#)”); ICC-02/04-01/05-53 (“[Kony Amended Arrest Warrant \(PRV\)](#)”).

³ *See below* paras. 43-46.

⁴ This does not include persons in respect of whom proceedings were transferred to national jurisdictions. Félicien Kabuga remained at large from the International Criminal Tribunal for Rwanda and the International Residual Mechanism for Criminal Tribunals for 23 years; Ratko Mladić and Radovan Karadžić were at large from the International Criminal Tribunal for the former Yugoslavia for 16 years and 13 years, respectively.

⁵ Preamble of the [Statute](#).

to locate and apprehend Mr KONY, by further underlining the depth of evidence supporting the allegations of his criminal activities. Moreover, if the charges are confirmed, this will help ensure that Mr KONY faces trial expeditiously upon arrest or surrender in accordance with rule 126(3).

7. *Third*, holding a confirmation hearing *in absentia* will provide an opportunity for victims in this case to present their views and concerns, through their legal representatives, pursuant to article 68(3) of the Statute in the context of judicial proceedings. Such a hearing will constitute a meaningful milestone for victims of Mr KONY's alleged crimes who have waited for justice for almost two decades.
8. In this application, the Prosecution sets out the considerations militating in favour of an *in absentia* confirmation hearing, which it considers to be the most compelling in this case. It notes, however, that other cases may also justify proceeding in this fashion, based on a different combination of relevant circumstances.

Confidentiality

9. This Request is classified as confidential and *ex parte* under regulation 23bis of the Regulations of the Court, because it refers to information classified as such, as well as confidential activities related to executing the arrest warrant against Mr KONY. A public redacted version of the Request is filed simultaneously.
10. Subject to any further direction by the Chamber, and consistent with rule 123(2), this Request is filed *ex parte* in the absence of any information that Mr KONY has counsel for the purpose of proceedings before the Court.

Submissions

11. This is the first time that the Prosecution makes a request for holding a confirmation of charges hearing under article 61(2)(b).
12. In 2015, when determining whether to sever proceedings against Dominic Ongwen from this case immediately after his initial appearance, the then Single Judge considered the possibility of an *in absentia* confirmation hearing for other suspects in the case who could not be found,

including Mr KONY.⁶ Given the Prosecution’s reservations that an *in absentia* hearing for the remaining suspects would have prolonged proceedings against Mr Ongwen, the Single Judge decided to sever Mr Ongwen’s case and to proceed with a confirmation hearing against him alone⁷ without ruling on the possibility of *in absentia* proceedings for the suspects still at large.⁸

13. Having completed the trial of Mr Ongwen, in which more than 4,000 victims participated, the circumstances have now significantly evolved. Mr KONY is the only suspect at large in the Uganda situation who is still alive.⁹ The present facts and circumstances are therefore different from those on which the then Single Judge based the Severance Decision.

A. Legal framework for confirmation proceedings *in absentia*

14. Pursuant to article 61(2)(b), holding a hearing on the confirmation of charges *in absentia* is a discretionary decision. This statutory provision allows the Chamber to hold a confirmation of charges hearing when a person has fled or cannot be found provided that “all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held”.

15. It is implicit that the required steps may be taken *after* the Chamber has determined that “there is cause to hold a hearing on confirmation of charges in the absence of the person concerned” in accordance with rules 123(2) and 125(1). This is because some of the conditions (such as measures to notify the suspect of convening a hearing) can only be carried out once the Chamber has decided that there is cause to hold an *in absentia* hearing.

16. The concept of reasonableness under both article 61(2)(b) and rule 123(3) entails an obligation of process rather than result,¹⁰ which should be tailored to the specific circumstances, including

⁶ ICC-02/04-01/05-424 (“[Severance Decision](#)”), paras. 7-9. *See also* [REDACTED].

⁷ [Severance Decision](#), para. 9. The Single Judge also referred to budgetary constraints and the interests of victims as relevant considerations. *See* [Severance Decision](#), para. 7. While the Single Judge consulted the Prosecution on the possible application of rule 123(2), she refrained from ruling on whether there was cause to hold a hearing on the confirmation of charges against Mr KONY *in absentia* within the terms of rule 125(1).

⁸ The operative part of the Severance Decision does not contain findings to this effect.

⁹ The Chamber terminated proceedings against Raska Lukwiya on 12 July 2007. *See* ICC-02/04-01/05-248 (“[Lukwiya Termination Decision](#)”). The Chamber terminated proceedings against Okot Odhiambo on 10 September 2015. *See* ICC-02/04-01/05-431 (“[Odhiambo Termination Decision](#)”). Although the proceedings against Vincent Otti have not been terminated so far, he is also believed to be deceased. *See e.g.* ICC-02/04-01/05-258 (“[Prosecution Submissions on Otti](#)”) and [Severance Decision](#), fn. 10. *See also* [REDACTED].

¹⁰ For example, it is implicit in the requirement that “all reasonable steps have been taken to secure [the suspect’s] appearance” that these steps need not have actually resulted in the suspect appearing before the Court. Likewise,

to the particular stage of the proceedings. This is consistent with internationally recognised human rights¹¹—as illustrated, for example, by the practice of the European Court of Human Rights¹²—and with the practice of other international criminal tribunals applying analogous provisions of their procedural framework.

17. The importance of the procedural context in determining the “all reasonable steps” requirement is informed by the approach of ICTY/ICTR and the Special Tribunal for Lebanon (“STL”). The ICTY and ICTR rules allowed for a public hearing before a Trial Chamber (“Rule 61 Hearing”) to present the evidence underlying an indictment if the Prosecutor could show that “all reasonable steps” had been taken to secure the arrest and ascertain the whereabouts of the accused person at large.¹³ However, the showing required to meet these conditions was relatively limited,¹⁴ consistent with the Judges’ emphasis (albeit expressed in a slightly different context) that a Rule 61 Hearing “cannot be interpreted as a trial” and that the accused persons would fully enjoy their procedural rights once they appeared before the tribunal.¹⁵ Similarly, the STL—where the legal framework allows for a full trial in the absence of the accused¹⁶ and thus entails a stricter approach to the “reasonableness” requirement¹⁷—has also

taking “all reasonable steps [...] to inform the person of the charges and [...] [the] hearing” does not entail the requirement that the absent suspect actually is aware of the charges and the imminent hearing.

¹¹ See [Statute](#), article 21(3).

¹² For example, although advanced in the context of the reasonable time standard as a key aspect of a fair trial pursuant to article 6(1) of the European Convention on Human Rights, the following case law provides useful guidance on the approach to “reasonableness” in line with internationally recognised human rights. See e.g. ECtHR, *Boddaert v. Belgium*, App. No. 12919/87, [Judgment](#), 12 October 1992, para. 36 (“reasonableness [...] is to be determined with reference to the criteria laid down in the Court’s case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment”); *Dobbertin v. France*, App. No. 13089/87, [Judgment](#), 25 February 1993, para. 39; *Kurzac v. Poland*, App. No. 31382/96, [Judgment](#), 22 February 2001, para. 30 (identifying as relevant factors “the complexity of the case, the conduct of the applicant and that of the relevant authorities, and the importance of what was at stake for the applicant in the litigation”).

¹³ See e.g. ICTY Rules of Procedure and Evidence (“[ICTY RPE](#)”), rule 61(A), (B); ICTR Rules of Procedure and Evidence (“[ICTR RPE](#)”), rule 61(A), (B).

¹⁴ See e.g. ICTY, *Prosecutor v. Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, [Transcript](#), 11 July 1996, pp. 918-919 (recalling that the indictment and arrest warrants had initially been issued for the two accused on 25 July and 16 November 1995 respectively, and that the Confirming Judges considered that the requirement for “all reasonable steps” to be taken had been satisfied by 18 June 1996); *Prosecutor v. Mrkšić et al.*, IT-95-13-R61, [Order for Review in Open Court of the Indictment by the Trial Chamber I](#), 6 March 1996, p. 3.

¹⁵ See e.g. ICTY, *Prosecutor v. Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, [Transcript](#), 27 June 1996, pp. 11-12.

¹⁶ [STL Statute](#), article 22. See also [STL Rules of Procedure and Evidence](#), rules 105bis-107.

¹⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012 (“[Ayyash et al. In Absentia Decision](#)”), para. 37.

consistently held that the “all reasonable steps” criterion must be tailored to the circumstances particular to each individual situation.¹⁸

18. Accordingly, the assessment under article 61(2)(b) and rule 123(3) should focus on the actual measures taken by the Court (the Prosecution and the Registry) in seeking to secure the appearance of a suspect who has fled or cannot be found, and to notify them of the charges and any hearing, in light of the nature and procedural significance of the confirmation of charges procedure itself. In the latter context, the Chamber should in particular take into account the summary nature and limited purpose of confirmation proceedings,¹⁹ as well as the possibility for the suspect against whom charges have been confirmed *in absentia* to request, on appearing before the Court, the referral of relevant issues from the Trial Chamber back to the Pre-Trial Chamber, in accordance with rule 126(3).

B. Mr KONY is a person who cannot be found and all reasonable steps have been taken to locate and arrest him

19. The arrest warrant against Mr KONY, the leader of the Lord’s Resistance Army (“LRA”), was issued on 8 July 2005 as one of five warrants against senior members of the LRA for crimes allegedly committed in Northern Uganda.²⁰ It was unsealed on 13 October 2005.²¹ Mr KONY is now approximately 60 years old and remains the leader of the LRA.
20. The Chamber has directed a specific request for the arrest and surrender of Mr KONY to the States on whose territory he is believed to have been located over the last 17 years. Specifically, such requests were transmitted to the governments of Uganda,²² the Democratic Republic of

¹⁸ [Ayyash et al. In Absentia Decision](#), para. 28. See also *Prosecutor v. Merhi*, STL-13-04/I/TC, [Decision to hold trial in absentia](#), 20 December 2013, para. 93.

¹⁹ On the limited purpose of the confirmation proceedings, see ICC-01/14-01/21-218-Red (“[Said Confirmation Decision](#)”), paras. 34-42; ICC-01/14-01/18-403-Red (“[Yekatom & Ngaïssona Confirmation Decision](#)”), paras. 13-19; ICC-01/04-01/10-514 (“[Mbarushimana Confirmation AD](#)”), para. 47; ICC-01/12-01/18-1562-Red (“[Al Hassan Regulation 55 AD](#)”), paras. 92-94.

²⁰ The other four warrants were issued against Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. Proceedings against Raska Lukwiya and Okot Odhiambo were terminated on account of their deaths; see [Lukwiya Termination Decision](#) and [Odhiambo Termination Decision](#). Although the proceedings against Vincent Otti have not been terminated so far, he is also believed to be deceased. See [Prosecution Submissions on Otti](#) and [Severance Decision](#), fn. 10. Dominic Ongwen made his initial appearance before the Court in January 2015. He was subsequently tried and, in 2021, convicted for 62 counts of war crimes and crimes against humanity and sentenced to 25 years in prison by Trial Chamber IX. His appeals against the conviction and sentence are currently pending before the Appeals Chamber.

²¹ [Kony Arrest Warrant Unsealing Decision](#); [Kony Amended Arrest Warrant \(PRV\)](#).

²² [REDACTED]; ICC-02/04-01/05-29 (“[Uganda Arrest Request](#)”).

the Congo (“DRC”),²³ Sudan²⁴ and [REDACTED].²⁵ Further, as early as 2006, and at the behest of the Court, a Red Notice was issued by INTERPOL, putting all its member States on alert to arrest the suspect.²⁶ The Red Notice remains in force [REDACTED]. The European Parliament also explicitly called for the development of effective plans to execute the ICC warrant of arrest against Mr KONY, including by utilising United Nations (“UN”) missions in the area.²⁷

21. Since the arrest warrant was issued, the Prosecution, working in close coordination with the Registry, has been conducting multiple activities to monitor Mr KONY’s movements, assess his current support network, and identify his location. It remains alert for possible arrest opportunities. Attempts have been made by the Prosecution and by States to arrest Mr KONY, aided by international organisations and civil society organisations. The Prosecution and the Registry have frequently reported to the Chamber concerning efforts to locate and arrest suspects at large in this situation, including specific efforts to locate and arrest Mr KONY.²⁸ The relevant reports conveyed information about the Court’s own activities as well as information received from States to which the request for arrest and surrender of Mr KONY had been transmitted.
22. Within Uganda, the Ugandan Government, in particular the Ugandan People’s Defence Force, has for years made a concerted effort to apprehend Mr KONY, and collaborated with other regional forces to track his whereabouts.²⁹ In 2012, the African Union launched an international task force, a 5,000-strong brigade, to look for Mr KONY.³⁰ The United States of America also

²³ ICC-02/04-01/05-30 (“[DRC Arrest Request](#)”).

²⁴ ICC-02/04-01/05-35 (“[Sudan Arrest Request](#)”).

²⁵ [REDACTED].

²⁶ INTERPOL, “Interpol issues first red Notices on behalf of International Criminal Court”, 1 June 2006, available at <https://www.interpol.int/News-and-Events/News/2006/INTERPOL-issues-first-Red-Notices-on-behalf-of-International-Criminal-Court> [last accessed 22 November 2022]. See also ICC-02/04-01/05-116-Corr2 (“[Arrest Warrant Status Report](#)”), para. 7.

²⁷ European Parliament, [Resolution P6_TA\(2008\)0496 on the indictment and bringing to trial of Joseph Kony at the International Criminal Court](#), 21 October 2008.

²⁸ See e.g. [Arrest Warrant Status Report](#); [ICC-02/04-01/05-118-tENG](#) with annexes; [ICC-02/04-01/05-122-tENG](#); [ICC-02/04-01/05-132](#) with annex; [REDACTED]; [ICC-02/04-01/05-218](#) with annex; [REDACTED] with annexes; [ICC-02/04-01/05-286](#) with annexes; [ICC-02/04-01/15-294](#); [ICC-02/04-01/05-305](#) with annexes; [ICC-02/04-01/05-348](#) with annexes. See also [REDACTED].

²⁹ [Arrest Warrant Status Report](#), paras. 15-20; [ICC-02/04-01/05-118-Anx2](#); [REDACTED]; [ICC-02/04-01/05-286-Anx2](#), [ICC-02/04-01/05-305-Anx2](#).

³⁰ See e.g. “Joseph Kony: African Union brigade to hunt down LRA leader”, *The Guardian*, 24 March 2012, available at <https://www.theguardian.com/world/2012/mar/24/joseph-kony-african-union-brigade> [last accessed 22 November 2022]; “African Union launches U.S.-backed force to hunt Kony”, *Reuters*, 24 March 2012,

deployed forces to locate Mr KONY.³¹ Despite these efforts, Mr KONY remains at large. While he reportedly sought to negotiate his surrender in the Central African Republic (“CAR”) in 2013,³² this did not materialise.

23. Furthermore, various attempts have been made to incentivise individuals and communities to provide information about Mr KONY’s location so that he may be apprehended. Mr KONY is listed, for example, in the “War Crimes Rewards Program” where a reward of up to \$5,000,000 is offered by the U.S. State Department for information leading to his arrest.³³ Such rewards are offered to individuals who provide information leading to the arrest, transfer, or conviction of designated persons accused of crimes against humanity, genocide, or war crimes by an international criminal tribunal, including hybrid or mixed tribunals.
24. Civil society organisations have also launched public campaigns to encourage the apprehension of Mr KONY. The most widely known is the campaign led by the organisation Invisible Children, titled “Kony 2012”, which was based on a short documentary whose purpose was to make Mr KONY globally known, and to encourage his arrest. The film reportedly received over 100 million views in just six days and galvanised significant action around arresting Mr KONY.³⁴ A similar documentary released in 2009, “The Reckoning”, had also highlighted efforts to arrest Mr KONY.³⁵

available at <https://www.reuters.com/article/us-southsudan-kony-idUSBRE82N08T20120324> [last accessed 22 November 2022]; Invisible Children, “Kony 2012: Unprecedented Awareness”, available at <https://invisiblechildren.com/kony-2012/> [last accessed 22 November 2022].

³¹ See e.g. “Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord’s Resistance Army”, *The White House. President Barack Obama*, 14 October 2011, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore> [last accessed 22 November 2022]; Helene Cooper, “More U.S. Troops to Aid Uganda Search for Kony”, *The New York Times*, 23 March 2014, available at <https://www.nytimes.com/2014/03/24/world/africa/obama-is-sending-more-resources-for-joseph-kony-search.html> [last accessed 22 November 2022].

³² “Kony in surrender talks with CAR government”, *Monitor*, 21 November 2013, updated on 22 January 2021, available at <https://www.monitor.co.ug/uganda/news/national/kony-in-surrender-talks-with-car-government-1558942> [last accessed 22 November 2022].

³³ U.S. Department of State, “War Crimes Rewards Program”, available at <https://www.state.gov/war-crimes-rewards-program/> [last accessed 22 November 2022].

³⁴ Invisible Children, “KONY 2012”, available at <https://invisiblechildren.com/kony-2012/> [last accessed 22 November 2022].

³⁵ Human Rights Watch, “The Reckoning: The Battle for the International Criminal Court”, 2009, available at <https://ff.hrw.org/film/reckoning-battle-international-criminal-court> (trailer) [last accessed 22 November 2022].

25. The Prosecution has also repeatedly sought to disseminate information about the arrest warrant for Mr KONY in areas where he was believed to have been located, and has continuously and publicly called for his arrest and surrender. For example:

- In October 2008, the Office of the Prosecutor (“Office”) called for renewed efforts to arrest Mr KONY, ensuring that such calls were widely reported in the region and elsewhere.³⁶
- In March 2013, the Office urged Mr KONY to surrender rather than risk capture by the military forces searching for him, by means of a radio broadcast transmitted in Uganda and areas of the DRC, CAR and South Sudan, which was interpreted into French, Acholi, Sango, Swahili, and Lingala.³⁷
- In September 2015, following confirmation of the death of LRA commander Okot Odhiambo, the Office again called on all States to renew and refocus their efforts to secure Mr KONY’s arrest.³⁸
- In April 2016, the Office issued a post on the Court’s website and on YouTube, calling on Mr KONY to surrender to the Court. The Office also encouraged people with information about the whereabouts of Mr KONY to contact the Prosecution directly via e-mail or a local Ugandan number.³⁹

26. The Prosecution continues to collaborate both with the Registry and a variety of external partners in order to obtain updated information about Mr KONY’s whereabouts with a view to locating and apprehending him. [REDACTED].⁴⁰

³⁶ “ICC calls for Kony’s arrest”, *news24*, 6 October 2008, available at <https://www.news24.com/news24/icc-calls-for-konys-arrest-20081006> [last accessed 22 November 2022]; “ICC renews call for Ugandan rebel leader Kony’s arrest”, *Uganda Watch*, 6 October 2008, available at <https://ugandawatch.blogspot.com/2008/10/icc-renews-call-for-ugandan-rebel.html> [last accessed 22 November 2022]; “ICC Renews Calls for Kony Arrest”, *Uganda Radionetwork*, 6 October 2008, available at <https://ugandaradionetwork.net/story/icc-renews-calls-for-kony-arrest> [last accessed 22 November 2022].

³⁷ “ICC Prosecutor’s message to the LRA”, *International Criminal Court*, 18 March 2013, available at <https://www.icc-cpi.int/news/icc-prosecutors-message-lra> [last accessed 22 November 2022]. The message was disseminated through the ICC Outreach Unit. Seven radio stations broadcast the programme in the local language for a period of seven days between 18 and 24 March 2013 (two official broadcasts per day) reaching a total of 98 broadcasts. Subsequently, compact discs containing the message were distributed to a number of radio stations in Northern Uganda.

³⁸ “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the confirmed death of LRA commander Okot Odhiambo”, *International Criminal Court*, 10 September 2015, available at <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-following-confirmed-death-lra> [last accessed 22 November 2022].

³⁹ “Message from the Prosecutor of the International Criminal Court, Fatou Bensouda, calling for defection by LRA fighters”, *International Criminal Court*, 1 April 2016, available at <https://www.icc-cpi.int/news/message-prosecutor-international-criminal-court-fatou-bensouda-calling-defection-lra-fighters> [last accessed 22 November 2022]; “Uganda situation: ICC Prosecutor, Fatou Bensouda, 1 April 2016”, *YouTube*, available at <https://youtu.be/seeZmmj2S0M> [last accessed 22 November 2022].

⁴⁰ [REDACTED].

27. [REDACTED].

28. [REDACTED].

29. All the above demonstrates that, since the arrest warrant was issued against Mr KONY, extensive measures have been taken—and continue to be taken—to locate him and secure his arrest. The international community has also joined forces to that purpose. Despite all these measures, Mr KONY has not been located and arrested. In such circumstances, Mr KONY is undoubtedly a person who cannot be found within the meaning of the Statute even though all reasonable steps have been taken to locate him and secure his arrest pursuant to article 61(2)(b) and rule 123(3).

C. There is cause to proceed with a confirmation of charges hearing in Mr KONY's absence

30. There is cause pursuant to rules 123(2) and 125(1) to proceed with the confirmation of charges hearing in Mr KONY's absence.

31. While the rules do not define circumstances which might show “cause” for an *in absentia* confirmation hearing, the practice of the ICTY in conducting Rule 61 Hearings may be of assistance.⁴¹ This procedure arguably served similar functions to an *in absentia* confirmation hearing under article 61(2)(b), namely, reminding the public and the international community of the serious nature of the alleged crimes, underscoring the nature and strength of some of the underlying evidence, and providing at least some victims an opportunity to be heard.⁴²

32. Accordingly, proceeding pursuant to article 61(2)(b) of the Statute is favoured by: Mr KONY's lengthy history as a suspect at large; the potential benefits in advancing the Court's proceedings against him (to further galvanise the efforts towards his apprehension, to provide an opportunity for the evidence of Mr KONY's alleged crimes and his criminal responsibility to be aired publicly and to facilitate his expeditious trial if he appears before the Court); and the opportunity for victims to present their views and concerns under article 68(3), having waited so many years for judicial proceedings in this case.

⁴¹ See e.g. [ICTY RPE](#), rule 61; [ICTR RPE](#), rule 61.

⁴² ICTY, *Prosecutor v. Karadžić & Mladić*, IT-95-5-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 (“[Karadžić & Mladić Rule 61 Review](#)”); *Prosecutor v. Rajić*, IT-95-12, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996 (“[Rajić Rule 61 Review](#)”). See also [ICTY Manual on Developed Practices](#), p. 49, para. 9.

i) Mr KONY's lengthy history as a suspect at large calls for confirmation proceedings against him in his absence

33. Despite all reasonable efforts to locate and apprehend him, Mr KONY has successfully remained at large for more than 17 years. This can only be understood as his own free choice. Whilst the Prosecution will continue to work towards his arrest, it is now appropriate to advance the proceedings against Mr KONY to the fullest extent compatible with the Statute. This accords with the practice of the *ad hoc* tribunals, which responded to deliberate and entrenched attempts to evade justice by employing all appropriate means within their procedural frameworks to advance cases against persons at large. In the current circumstances, holding a hearing to confirm the charges against Mr KONY in his absence would demonstrate the Court's resolve that such behaviour will not thwart judicial proceedings. In this light, the Chamber's decision on this matter may be significant not only for this case but for the institution as a whole, including by flagging to other suspects at large that it would be in their interests to surrender themselves to the Court promptly, or confirmation proceedings may be held, and charges confirmed, in their absence.
34. For example, the ICTY conducted Rule 61 Hearings to publicise some of the key evidence underlying the indictments against Radovan Karadžić and Ratko Mladić—who became the ICTY's most high profile fugitives over the course of 13 years and 16 years, respectively. The ICTY took this step rather swiftly, based on the Judges' view that the particular circumstances already demonstrated its necessity.⁴³
35. While the ICTR did not elect to conduct a Rule 61 Hearing of the evidence underlying the indictment of Félicien Kabuga (who ultimately remained a fugitive for 23 years), it considered it appropriate instead to carry out "special deposition" hearings under rule 71*bis* after he had been on the run for 13 years. The purpose of this provision was "to prevent fugitive accused from avoiding effective prosecution and obstructing the proper administration of justice."⁴⁴ Thus, in deciding on this course of action, the Trial Chamber not only took into account the

⁴³ ICTY, [Karadžić & Mladić Rule 61 Review](#), paras. 1-3; [Rajić Rule 61 Review](#), pp. 1-2.

⁴⁴ ICTR, *Prosecutor v. Kabuga*, ICTR-98-44B-R71*bis*, Decision on the Prosecutor's Request for Preservation of Evidence by Special Deposition for a Future Trial, 15 March 2011 ("[Kabuga Special Deposition Decision](#)"), para. 15.

reasonable efforts of the ICTR Prosecution to execute the arrest warrant,⁴⁵ but was also “mindful of Kabuga’s position as a high-profile fugitive and [...] the importance of his apprehension and trial to the many victims of his alleged crimes.”⁴⁶

ii) A confirmation hearing in the absence of Mr KONY would enhance the proceedings against him

36. In the circumstances of this case, a confirmation hearing in the absence of Mr KONY would enhance the efficiency of the Court’s further proceedings. The hearing itself would lead States and other stakeholders to further galvanise and accelerate their efforts to apprehend Mr KONY and surrender him to the Court. Furthermore, convening a confirmation hearing in Mr KONY’s absence would be an opportunity for the evidence of Mr KONY’s alleged crimes and his criminal responsibility to be aired publicly and would facilitate his expeditious committal for trial (subject to the Chamber confirming the charges) if and when he appears before the Court in person, in accordance with rule 126(3).

37. Investment of the Court’s resources in carrying out confirmation proceedings in the absence of Mr KONY should be considered in this context. After a significant passage of time, the procedure not only enables the Chamber to verify that the resources required to continue seeking to apprehend Mr KONY remain justified, but also to progress the case beyond the confirmation hearing stage, thereby allowing any subsequent pre-trial proceedings to be conducted with greater procedural economy.

iii) A confirmation hearing in the absence of Mr KONY would permit the victims to put forward their views and concerns at this stage

38. Victims of Mr KONY’s alleged crimes have waited for further judicial proceedings in this case for 17 years. A confirmation of charges hearing in the absence of Mr KONY would be a meaningful milestone for these victims, both the survivors and the next of kin of those who passed away. In the current circumstances, where all reasonable measures have been taken to locate and arrest Mr KONY, holding such a hearing would demonstrate that the Court remains

⁴⁵ [Kabuga Special Deposition Decision](#), paras. 6-9. *See also* para. 12 (concluding, nonetheless, that arrest may not take place within a reasonable time).

⁴⁶ [Kabuga Special Deposition Decision](#), para. 17. *See also* *Prosecutor v. Mpiranya*, ICTR-00-56-A-71bis, [Decision on Motion for the Preservation of Evidence by Special Deposition for a Future Trial](#), 3 March 2011, para. 6.

steadfast in its resolve towards the enforcement of international criminal justice, in accordance with the Statute’s Preamble and the Court’s legal framework.

39. Victims have their own independent *sui generis* standing before the Court—different to that of witnesses—carved out by the opportunity under article 68(3) to present their views and concerns where their personal interests are affected, in the context of a judicial forum.⁴⁷
40. The present circumstances are markedly different from the circumstances at the beginning of 2015, considered by the then Single Judge when deciding whether to sever the case against Mr Ongwen from the present case. In that context, when determining whether it would be appropriate to convene a confirmation of charges hearing for all suspects in which only Mr Ongwen would be present, the Single Judge noted concerns with regard to the potential impact on victims linked to the charges against absent suspects such as Mr KONY. In particular, the Single Judge was mindful of the scenario in which charges might be confirmed against all suspects—but then an apparent disparity would arise between the immediate committal of Mr Ongwen to trial (and the possibility for victims linked to the charges against him to participate at trial in accordance with article 68(3)) and the delay of such proceedings with regard to those suspects who continued to be at large.
41. Seven years later, the calculus is different. More than 4,000 victims, through their legal representatives, participated in the *Ongwen* proceedings. By contrast, persons who are victims in this case only, have still not had an opportunity to express their views and concerns (via a legal representative) in judicial proceedings at the Court. Confirmation proceedings in Mr KONY’s absence would give them such an opportunity, which can be managed so as to make clear the limited nature and purpose of the Chamber’s inquiry—not as an end in itself, but as a further step towards accountability for a suspect at large.

D. Informing Mr KONY of the charges and of the confirmation hearing

42. If an *in absentia* confirmation hearing is authorised, Mr KONY will be informed—in advance of the hearing—of the charges brought for confirmation and that a confirmation hearing will be held, pursuant to article 61(2)(b). Reasonable steps to inform Mr KONY of the allegations against him have already been taken and may be supplemented by further steps described below. The taking of such steps will also provide the requisite notice of the Court’s intention

⁴⁷ ICC-01/04-556 (“[DRC Victim Participation AD](#)”), para. 45 (finding that participation pursuant to article 68(3) of the Statute can take place only within the context of “judicial proceedings” and “proceedings” for the purposes of article 68(3) denotes “a judicial cause before a Chamber”).

to hold a confirmation hearing in Mr KONY's absence. By filing a public version of this Request, the Prosecution has also taken an initial step to inform Mr KONY that a confirmation of charges hearing in his absence is being contemplated.

i) Steps taken to inform Mr KONY of the allegations in the arrest warrant

43. The allegations in the arrest warrant for Mr KONY have been made available by the Court to the public—and hence to Mr KONY—since 13 October 2005, when the warrant was unsealed and publicised on the Court's website and in the media. Despite the redactions in place, the 33 counts in the arrest warrant set out the approximate time, place and nature of the alleged crimes, as well as the alleged underlying conduct and its legal characterisation. Specifically, they make clear that Mr KONY is wanted by the Court for crimes including murder, cruel treatment, enslavement, rape, attacks against the civilian population and pillaging as crimes against humanity and/or war crimes, allegedly committed in Uganda in 2003-2004, including by means of forcing civilians to march under armed guard and threat of death, inflicting serious bodily injury and suffering, and beating civilians.⁴⁸
44. While article 61(2)(b) does not require proof that an absent suspect has *actual* knowledge of the allegations against him, there is nonetheless reliable information that Mr KONY did indeed become aware of the warrant for his arrest and its underlying allegations very promptly after it was issued.
45. For example, in an exclusive interview with the BBC, in June 2006, Mr KONY protested his innocence of any and all allegations in the arrest warrant, saying "I am not guilty. I am not guilty".⁴⁹ Similarly, during a meeting on 12 November 2006—in which Jan Egeland, then UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, demanded that the LRA release non-combatants—Mr KONY reportedly denied that there were any abductees or children among his forces, and complained that the arrest warrants, issued by the Court, are a major obstacle to the peace talks with the Ugandan government.⁵⁰ Other

⁴⁸ See [Kony Amended Arrest Warrant \(PRV\)](#).

⁴⁹ BBC Documentary, UGA-OTP-0195-0038, at 00:12:10 – 00:12:35. See also Sam Farmar, "Uganda rebel leader breaks silence", *BBC News*, 28 June 2006, available at <http://news.bbc.co.uk/1/hi/programmes/newsnight/5124762.stm> [last accessed 22 November 2022].

⁵⁰ "No deal after U.N. official meets Ugandan rebel Kony", *OneIndia*, 12 November 2006, available at <https://www.oneindia.com/2006/11/12/no-deal-after-u-n-official-meets-ugandan-rebel-kony-1163346995.html> [last accessed 22 November 2022]; Opheera McDoom, "No deal after U.N. official meets Ugandan rebel Kony",

sources, including the then deputy leader of the LRA Vincent Otti, reportedly confirmed that the progression of the peace negotiations in Juba between the LRA and the Ugandan government in 2006 hinged on the withdrawal of the Court's arrest warrants against the LRA suspects.⁵¹ Likewise, in a speech in December 2006 in the LRA bush camp, Mr KONY recalled that: "One morning we wake up and are told we are now wanted in The Hague".⁵² Mr KONY's awareness of the ICC proceedings, including before the arrest warrant against him was issued, and the types of crimes investigated by the Prosecution are also demonstrated by intercepted evidence of LRA's radio communications, collected by the Prosecution during the investigation.⁵³

46. References to Mr KONY and his alleged individual criminal responsibility were also made throughout the *Ongwen* proceedings, which themselves have been widely covered by the media, streamed over the internet and transmitted in Uganda. For example, screening centres and radio listening clubs enabled approximately 10,000 people to follow the *Ongwen* trial in Northern Uganda. As of July 2017, the Access to Justice Project launched by the Court's Registry and the Embassy of Denmark in Kampala enabled the outreach programme to increase the screening centres from six to twenty-five, extending deeper into the remote locations where the victims resided and thus reaching an even wider audience.⁵⁴ As such, while it was not the goal of the *Ongwen* proceedings to provide information about the factual and legal contours of the allegations involving Mr KONY, they have nonetheless been effective in this respect.
47. [REDACTED],⁵⁵ [REDACTED].⁵⁶ [REDACTED].⁵⁷

Reuters, 19 January 2007, available at <https://www.reuters.com/article/us-sudan-uganda-egeland-idUSL1260431220061112> [last accessed 22 November 2022].

⁵¹ Transcript of 15 September 2006 KFM Hot Seat show, 'Otti insists on lifting of the ICC indictments', UGA-OTP-0263-1720 at 1721. *See also* "SPLA Goes After Kony's Rebels", *The Monitor*, UGA-OTP-0221-0679 at 0680.

⁵² M. Schomerus, *The Lord's Resistance Army: Violence and Peacemaking in Africa* (Cambridge University Press, 2021), p. 274.

⁵³ *See e.g.* UGA-OTP-0152-0002 at 0174 and UGA-OTP-0232-0623 at 0875; UGA-OTP-0163-0007 at 0026. *See also* UGA-OTP-0163-0292 at 0341.

⁵⁴ Lino Owor Ogora, "Over 10,000 Community Members in Northern Uganda Follow Ongwen's Trial", *International Justice Monitor*, 16 December 2019, available at <https://www.ijmonitor.org/2019/12/over-10000-community-members-in-northern-uganda-follow-ongwens-trial/> [last accessed 22 November 2022].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

ii) Further reasonable steps to inform Mr KONY of new allegations, and the convening of a confirmation hearing in his absence

48. The above demonstrates that reasonable steps have already been taken to inform Mr KONY of the allegations against him insofar as it is possible at this stage of proceedings. This is, however, without prejudice to further steps being taken at a later stage to inform Mr KONY of the charges to be brought for confirmation and that a confirmation hearing will take place (and its date).
49. In particular, the Prosecution not only intends to present charges relating to crimes allegedly committed during the [REDACTED] incidents included in the arrest warrant against Mr KONY, but also intends to present limited *additional* charges. This is consistent with the established practice of the Court, as reflected for example in the *Chambers Practice Manual*.⁵⁸
50. The additional charges would relate to the following:
- First, they would specify more precisely Mr KONY’s alleged responsibility for crimes committed in the context of the incidents already included in the arrest warrant, in order to reflect additional evidence collected since the issuance of the arrest warrant, and to conform to more recent charging practices, namely to include additional crimes and modes of liability to fully reflect the evidence, facts and circumstances.
 - Second, they would relate to crimes allegedly committed against women and children abducted and forced into the LRA, and crimes committed during the LRA attacks against the Odek IDP camp on 29 April 2004 and against the Abok IDP camp on 8 June 2004, as charged in the *Ongwen* case. To streamline its case against Mr KONY, the Prosecution intends to rely, to the maximum extent possible under the Statute and the Rules, on evidence presented in the *Ongwen* proceedings, assessed as credible and relied upon by the *Ongwen* Trial Chamber to make findings beyond reasonable doubt.
51. If the Chamber grants the Request, the Prosecution will submit a Document Containing the Charges (“DCC”) in accordance with rules 121 and 126(1), including a public version thereof, in line with article 61(3).
52. The Prosecution also proposes the following steps to inform Mr KONY of the charges presented for confirmation, of the decision to hold an *in absentia* confirmation hearing, and the date of such hearing once determined under rule 125(1):

⁵⁸ [Chambers Practice Manual, 5th Ed.](#), para. 31.

- Seek to publicise the DCC and/or an appropriate summary thereof, and the decision to convene a hearing to confirm the charges against Mr KONY in his absence through advertisement including in appropriate national/local newspapers and/or *via* radio, television and/or other media broadcast, including the internet, and through appropriate promotional materials (such as posters, social media, etc.);
- Request the onward transmission, through the Registrar, of the DCC and the Chamber's decision to convene a hearing to confirm the charges against Mr KONY in his absence, together with any appropriate promotional materials, to the national authorities of relevant States, together with a request to use their good offices to publicise it through appropriate official channels; and
- Carry out other such measures as may be agreed with the Registry as reasonable and appropriate in the particular circumstances of Mr KONY's case, and his personal situation as it is understood by the Court.

Conclusion

53. For all the reasons above, the Prosecution respectfully requests the Chamber to grant the Request. The Prosecution remains available for consultations.



Karim A. A. Khan KC, Prosecutor

Dated this 24th of November 2022

At The Hague, The Netherlands