

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **2 December 2022**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN UGANDA  
THE PROSECUTOR *v.* JOSEPH KONY AND VINCENT OTTI**

*Public*

**OPCD Request for Leave to Appear on 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:*

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**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Unit**

**Victims Participation and Reparations Section**

**Trust Fund for Victims**

**Other**

## I. INTRODUCTION

1. On 24 November 2022, the Prosecutor filed a request to utilise the Rome Statute to conduct *in absentia* proceedings against Mr Joseph Kony (“Prosecution Motion”).<sup>1</sup> This filing is both a novel and significant request<sup>2</sup> as the first of its kind before the ICC, and any decision on it will necessarily shape the law of Article 61 of the Rome Statute (“Statute”). Given its potential to have significant impact on the fair trial rights of all suspects and accused before the ICC, in particular, the progressive and particular rights of participation afforded in the confirmation process, the Office of Public Counsel for the Defence (“OPCD”) seeks leave to make submissions on such issues raised by the Prosecution Motion.
2. Specifically, the OPCD seeks leave to file a response on the limitations of *in absentia* proceedings in the context of Article 61 of the Statute and Rule 125 of the Rules of Procedure and Evidence. With respect to Mr Kony, the OPCD would make submissions outlining the lack of changed circumstances from a 2015 Pre-Trial Chamber Decision<sup>3</sup> and how such hearing could be not only of no benefit, but of actual detriment to the efficient use of resources. Finally, the OPCD would call for public circulation of an amended arrest warrant to fulfil the Office of the Prosecutor’s (“OTP”) stated purpose of advancing the case, while also meeting requirements of Article 67(1)(a) and as a necessary step of Rule 123(3).

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<sup>1</sup> *Prosecutor v. Kony & Otti*, Public Redacted Version of the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”, ICC-02/04-01/05-446-Red, 24 November 2022 (“Prosecution Motion”).

<sup>2</sup> See Decision regarding the ‘Legal Representatives’ Joint Request for an Extension of Time to Respond to the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”, ICC-02/04-01/05-449, 2 December 2022 (“Decision regarding the Legal Representatives’ Joint Request for an Extension of Time”), para. 4 (“The Chamber observes that this is the first time that the Prosecution requests a confirmation of charges hearing to be held in the absence of the person concerned under article 61(2)(b) of the Rome Statute.”).

<sup>3</sup> *Prosecutor v Kony et al.*, Decision Severing the Case Against Dominic Ongwen, [ICC-02/04-01/05-424](#), 6 February 2015 (“Severance Decision”).

## II. OPCD REQUEST FOR LEAVE TO APPEAR

3. The OPCD requests leave to file submissions pursuant to Regulation 77(4)(d) of the Regulations of the Court. Provision (d) allows for the Office to “[a]dvanc[e] submissions, on the instruction or with leave of the Chamber, on behalf of the person entitled to legal assistance when defence counsel has not been secured”.
4. As noted in previous proceedings, the OPCD has the duty to protect the rights of the Defence, which it is fulfilling by raising these issues and requesting to be heard. Principal Counsel of the Office is “entrusted with the power of representing and protecting the rights of the defence during the initial stages of the investigation”.<sup>4</sup> Pre-Trial Chamber A has previously authorised the OPCD to intervene in the applicability of Rule 165 to unrepresented suspects<sup>5</sup> and Pre-Trial Chamber I has permitted the OPCD to present observations on the interests of the Defence for an unrepresented suspect in the *Gaddafi and Al-Senussi* proceedings.<sup>6</sup> In the *Afghanistan Situation*, the Appeals Chamber considered that there may be circumstances that engage the mandate of OPCD at even earlier stages when “premised on an identifiable and specific need to represent and protect the rights of the defence”.<sup>7</sup>
5. Granting the OPCD standing is necessary to allow the Office to fulfil its mandate to represent the interests of the Defence in this case. The subject of

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<sup>4</sup> See e.g. Pre-Trial Chamber I, *Situation in Darfur, Sudan*, Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings, [ICC-02/05-85](#), 23 July 2007, p. 3. See also Regulation 77(4)(a) of the Regulations of the Court.

<sup>5</sup> *Prosecutor v. Gicheru & Bett*, Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, [ICC-01/09-01/15-43](#), 12 November 2020.

<sup>6</sup> *Prosecutor v Gaddafi & Al-Senussi*, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, [ICC-01/11-01/11-39-Red](#), 6 December 2011, para. 10.

<sup>7</sup> Appeals Chamber, *Situation in Afghanistan*, Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims, [ICC-02/17-97](#), 24 October 2019, para. 47.

the Prosecution Motion outlines a process that could entirely re-shape the landscape of Confirmation of Charges litigation, and there is currently no assigned representative to advance a Defence perspective on the significant departure from practice that is being proposed by the Prosecution. Mr Kony has no appointed Counsel to litigate this issue on his behalf and it is therefore necessary for OPCD to make this request to ensure fulfilment of its mandate.

6. Furthermore, the general applicability of *in absentia* Confirmation of Charges proceedings remains one that is in the interest to all other defendants subject to arrest warrant or summons of the ICC. Future suspects who may eventually be party to proceedings will unlikely be able to be heard on the issue, despite their rights potentially being affected in this litigation. It is therefore vital that the arguments representing their interests are presented in the context of the applicability in this case. To find otherwise would curtail the rights of Mr. Kony and other potential suspects in their ability to challenge this development.

### **III OPCD PROPOSED SUBMISSIONS**

#### **A - Confirmation proceedings *in absentia* should be exercised in only exceptional circumstances**

7. If granted leave, the OPCD would submit observations on the contours of *in absentia* proceedings in international criminal law and their impact on fair trial rights. The OPCD would seek to highlight the rights of the suspects implicated in such procedural request of the Prosecutor and the dangers of engaging in this criminal law process for purposes of publicity to effect cooperation.

*(i) ICTY/R Rules 61 and 71bis are not analogous to ICC Article 61(2)(b)*

8. As a large portion of the Prosecution Motion focuses on processes implemented at the *ad hoc* Tribunals, the OPCD will submit that ICTY/R Rule

61 and 71*bis* are not good comparators in the context of ICC proceedings. Namely, submissions will detail why ICTY Rule 61 is of limited relevance to the ICC. The use of this provision twice at the beginning of the ICTY's lifespan, and the lack of use in the two decades thereafter indicates that it fell out of favour and its utility is clearly considered to be limited.

9. Further, ICTR Rule 71*bis* relates to taking depositions with the view that evidence "can be preserved for a future trial".<sup>8</sup> This provision is not applicable to charging, but rather, to collecting evidence. The use of ICTR Rule 71*bis* in the proceedings against Mr Kabuga does not support the contention that a hearing on the confirmation of charges should be held *in absentia* in this case. The ICC Prosecutor possesses a number of textual tools to preserve evidence for future trials, such as Article 56.

*(ii) The specific provisions and intent of the ICC legal framework*

10. The OPCD would submit that Article 61(2) "presupposes the initial appearance of the person before the PTC, under Article 60",<sup>9</sup> and that, therefore, it could be argued that the intent of the drafters of the Rome Statute was that an *in absentia* confirmation hearing can only be held if there has been an in-person initial appearance.
11. This is consistent with the interpretation that Confirmation of Charges Proceedings serve as a part of a judicial charging process, rather than an avenue of publicising a case. The purpose of criminal proceedings is to determine individual criminal responsibility and these proceedings are governed by principles guaranteeing fair trial rights to suspect before the Court at every stage from the initial appearance until the end of a case. The

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<sup>8</sup> 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, para. 15.

<sup>9</sup> Michele Marchesiello, "[Chapter 30.2: Proceedings before the Pre-Trial Chambers](#)", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary: Volume II* (Oxford University Press, 2002), pp. 1231–1246, at p. 1244.

OPCD would demonstrate that Prosecution assertions that holding proceedings will ‘galvanise’ the international community are not appropriate factors to take into account when considering whether there is “cause” for an *in absentia* confirmation hearing, especially without clear examples of how such a hearing would accelerate efforts to apprehend Mr Kony.

**B - *In absentia* proceedings are not justified in the present case**

*(i) Preliminary issue: Rule 125(3), not rule 125(1), is applicable in the present case*

12. If granted leave to make response, the OPCD would argue why the Prosecutor’s request actually falls under Rule 125(3), rather than Rule 125(1), in that it is a review of a previous 2015 Severance Decision.<sup>10</sup>

13. Rule 125(3) states:

*If the Pre-Trial Chamber decides not to hold a hearing on confirmation of charges in the absence of the person concerned, and the person is not available to the Court, the confirmation of charges may not take place until the person is available to the Court. The Pre-Trial Chamber may review its decision at any time, at the request of the Prosecutor or on its own initiative.*

14. In the Severance Decision, the Pre-Trial Chamber specifically ruled against holding *in absentia* proceedings against Mr Kony. The Single Judge “*opine[d] that under these circumstances, there is no cause to proceed with the confirmation of charges proceedings against [Mr Ongwen’s] three co-suspects in absentia, as provided in article 61(2)(b)*”.<sup>11</sup> The Prosecution’s assertion that the Single Judge severed Mr Ongwen’s case without ruling on the possibility of *in absentia* proceedings for the suspects is, therefore, wrong.<sup>12</sup> Even though this determination was not included in the operative part of the decision, this does not nullify the fact that a decision was made in the main body of the

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<sup>10</sup> Severance Decision, para. 7.

<sup>11</sup> *Ibid.*

<sup>12</sup> Prosecution Motion, para. 12.

reasoning. The entire premise of the Prosecution's request under Rule 125(1) is therefore misplaced, because a ruling already exists not to hold a hearing on confirmation of charges in the absence of Mr Kony. This alone warrants the dismissal of the Prosecution's application for having requested the hearing under the incorrect provision.

15. Should the PTC decide to consider the Prosecution's request under Rule 125(3) and review the earlier Severance Decision, the OPCD would submit that there are no significant changed circumstances showing that there is now cause to hold an *in absentia* confirmation hearing. The OPCD would highlight the continuing factors of the reasoning in the Severance Decision that remain relevant now, namely:

*(i) currently, the Court lacks the necessary resources to proceed against the other co-suspects in absentia; and that (ii) this course of action would have significant but unjustified budgetary implications, considering the circumstances of the case; and (iii) victims linked to the charges concerning the other co-suspects, who remain at large, would not continue to participate in any trial proceedings. Such course of action would not meet the valid expectations of victims, who will have participated during the pre-trial proceedings and remain possibly highly disappointed.*<sup>13</sup>

16. Most compellingly, it will also be shown how the Prosecution position now is entirely contrasted from the position it held then when it was "resolutely against the idea" of holding an *in absentia* proceeding of Mr Kony alongside Mr Ongwen.<sup>14</sup> In 2015, the OTP stated that "there is no realistic prospect that Mr Kony is about to step forth and surrender himself" and that such proceedings, therefore, "could be an enormous expense of, well, time, money, effort for no benefit at all".<sup>15</sup>

17. In the current submissions, the Prosecution has not given persuasive arguments as to how the circumstances of the case have changed since that

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<sup>13</sup> Severance Decision, para. 7. The Single Judge also noted that "there is no real prospect that the other suspects will appear nor certainty that they will be apprehended in the near future [...]" *Ibid.*, para. 8.

<sup>14</sup> *Prosecutor v Ongwen*, Transcript, [ICC-02/04-01/15-T-5-ENG](#), 28 January 2015, p. 26.

<sup>15</sup> *Ibid.*

PTC Decision – especially noting their arguments of an unprecedented international campaign to arrest to date<sup>16</sup> – or how, concretely, driving ahead to confirmation proceedings will produce the surrender of Mr Kony.

*(ii) There is no cause to hold a confirmation hearing in Mr Kony's absence*

*a. Length of time does not justify in absentia confirmation hearing*

18. While this case may be the most longstanding of those at the ICC, it is not the longest in international criminal law and, in fact, is not significantly longer than others on the ICC OTP's shelf. The OPCD will demonstrate that this case is not distinguishable from other notable outstanding arrest warrants, as for example, a 14 July 2008 arrest warrant against Mr Al Bashir for the alleged crime of genocide or, in fact, the joined arrest warrant against Mr Otti.<sup>17</sup> The OPCD will submit that using Mr Kony's longstanding absence as a precedent would lead to a significant opening of Article 61(2)(b). Many other open arrest warrants could qualify to be treated in this way, entirely changing the intent and purpose of Article 61 of the Rome Statute in its unique process of permitting defendant participation in the charging process.

*b. In absentia confirmation hearing would not achieve efficiency of limited resources*

19. If granted leave, the OPCD will make submissions that show that no efficiency of resource will be achieved by holding these *in absentia* proceedings. The OPCD would rely on examples of other ICC cases to demonstrate that a dormant case coming to Court, even confirmed, will likely take just as much time to prepare with the defendant in custody; in practice, most ICC cases have taken 12 to 24 months to progress to trial following confirmation, even with the Prosecution active on the case and a Defence team assigned. As there is no reason given to demonstrate that Mr

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<sup>16</sup> Prosecution Motion, paras 19-29.

<sup>17</sup> The OPCD recognises that the case of Mr Otti would need to be severed from the case of Mr Kony if Confirmation of Charges proceedings were to take place for one, but not the other.

Kony would, in fact, be brought before the Court by holding an *in absentia* confirmation hearing, it is likely to become a shelved case again and the costs of publicising, tracking, and cooperation will continue. The same efforts can continue now without a confirmation hearing, while preserving precious Court resources to advance active Situations and cases.

20. Even if Mr Kony were to appear directly following any confirmed charges, Rule 126(3), allowing reversion of issues, could create even more complicated, lengthy litigation likely involving appellate processes that would negate any advances of *in absentia* Confirmation of Charges proceedings.

***c. In absentia confirmation hearing would irrevocably deny Mr Kony the opportunity to fully participate in his own confirmation hearing***

21. The OPCD would also outline how Article 64(4) could restrict those Rule 126(3) issues that Mr Kony could refer back to the Pre-Trial Chamber should he appear before the Court for trial. As decided in the *Kenyatta* case, the conditions for referring preliminary issues are restrictive and limited to preliminary issues that are necessary for the “effective and fair functioning” of the Trial Chamber.<sup>18</sup> This may effectively preclude him from having a real opportunity to relitigate any charges decided in his absence by the Pre-Trial Chamber. The decision to hold a confirmation hearing in the absence of a suspect is therefore not one to be lightly decided, and should only be based on known facts as to why he has not yet appeared before the Court as it would entail a concrete loss of Rome Statute guarantees associated with being present.

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<sup>18</sup> *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013, para. 83.

*d. On balance, any potential relief for victims would not outweigh the prejudice against Mr Kony's fair trial rights*

22. While Article 68(3) permits the victims' views and concerns to be presented "at stages of the proceedings determined to be appropriate by the Court", they must be given "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". As a criminal court proceeding, the OPCD would advance how such engagement would, as held in the original Severance Decision, likely be limited,<sup>19</sup> and not outweigh the prejudice against Mr Kony's fair trial rights. In order to have an effective opportunity to make this argument, the OPCD requests that its response be sequenced after the submissions of the Office of Public Counsel for Victims ("OPCV") and any Legal Representative for Victims ("LRVs") in the anticipated order on the conduct of the proceedings.<sup>20</sup>

*(iii) Rule 123(3) is not yet fulfilled, as no steps have been taken to inform Mr Kony of the additional charges*

23. Aside from the publicly issued warrant being heavily redacted, the Prosecution Motion indicates that it does not even detail the correct or full charges against Mr Kony as they seek to present "limited additional charges" in an *in absentia* Confirmation of Charges hearing.<sup>21</sup> The OPCD would argue that the procedure of Article 61(2)(b) and Rule 123(3) would require the Chamber to ensure that the Prosecution has properly amended the arrest warrant with any additional allegations and issued it publicly for a period of time to allow adequate notice to the suspect.

24. Were he before the Court, an initial appearance would serve to ensure that Mr Kony had the ability to know the full charges against him. In this instance, Mr Kony has never even been informed of the existence of proposed additional allegations or charges until this Prosecution Motion.

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<sup>19</sup> Severance Decision, para. 7.

<sup>20</sup> Decision regarding the Legal Representatives' Joint Request for an Extension of Time, para. 5.

<sup>21</sup> Prosecution Motion, paras 49-50.

Rule 123(3) requires, at a minimum, that the Prosecution updates the arrest warrant, as alluded, and circulates. This action would not only fulfil the notice requirement of the texts, but would serve to achieve the publicity sought to generate cooperation and galvanisation as referenced throughout the Prosecution Motion.

#### **IV. RELIEF REQUESTED**

25. For the foregoing, the OPCD respectfully requests the Pre-Trial Chamber to grant it leave to file a response to the Prosecution Motion, after the OPCV and any LRVs have filed their submissions, on the following points:
- a. *In absentia* confirmation hearings should only be held in very limited circumstances;
  - b. The Prosecution should have requested a review of the original decision not to hold an *in absentia* confirmation hearing under Rule 125(3);
  - c. In any event, the Prosecution has not demonstrated that there is cause to hold an *in absentia* confirmation hearing;
  - d. No *in absentia* confirmation hearing can be held with respect to the proposed additional charges because no steps have been taken to inform Mr Kony of them.



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Xavier-Jean Keïta  
Principal Counsel of the OPCD

Dated this, 2<sup>nd</sup> Day of December 2022  
at The Hague, The Netherlands