

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **22 April 2024**

PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Single Judge

SITUATION IN UGANDA

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

Public

**ICCBA observations on the process of selecting counsel to represent the rights
and interests of Joseph Kony during *in absentia* confirmation proceedings**

Source: ICC Bar Association

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

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I. INTRODUCTION

1. The International Criminal Court Bar Association (“ICCBA”), officially recognised by the Assembly of States Parties as an independent representative body of private lawyers who represent defendants, victims and others before the Court,¹ respectfully presents its observations on the process of selecting counsel to represent the rights and interests of Joseph Kony during *in absentia* confirmation of charges proceedings.
2. On 18 April 2024, the Single Judge granted the ICCBA leave to file these observations, of no more than five pages, by 22 April 2024.²
3. The ICCBA supports the approach proposed by the Registry in its report filed on 25 March 2024 (“Registry Report”)³ over that proposed by the Prosecution in its observations filed on 28 March 2024 (“Prosecution Observations”).⁴

II. OBSERVATIONS

(i) *Effective representation is best served by an open and competitive process*

4. The ICCBA endorses the Registry’s proposal for an open and competitive process to select counsel to represent Mr Kony’s rights and interests during the *in absentia* confirmation of charges hearing, currently scheduled to commence on 15 October 2024.⁵ The Registry recommends adopting a process which is “transparent, objective and fair”, building on successful past Registry practice in the selection of common legal representatives of victims.⁶
5. The ICCBA is of the view that a competitive process, commencing with an invitation for expression of interest from the widest range of candidates possible, represents the greatest likelihood of creating a large pool of qualified, experienced and competent counsel. The Registry proposes advertising the call for expression of interest to all counsel on the ICC

¹ [ASP Resolution ICC-ASP/18/Res.6](#), 6 December 2019, paras. 78-81

² [Decision on the ICC Bar Association’s ‘Request for leave to file submissions under Rule 103 of the Rules of Procedure and Evidence’ and the ‘OPCD Request for Leave to Make Submissions on the Registry Report of 25 March 2024’](#), ICC-02/04-01/05-495, 18 April 2024

³ [Registry’s Report on the implementation of “Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence” dated 4 March 2024 \(ICC-02/04-01/05-481\)](#), ICC-02/04-01/05-488, 25 March 2024

⁴ [Prosecution’s observations on the “Registry’s Report on the Implementation of “Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence”, 25 March 2024 \(ICC-02/04-01/05-488\)](#), ICC-02/04-01/05-489, 28 March 2024

⁵ Registry Report, para. 20

⁶ Registry Report, para. 18

List of Counsel,⁷ and on platforms such as the Court’s own website, via the ICCBA,⁸ the International Bar Association, and through the Uganda Law Society. To this list the ICCBA would respectfully suggest the addition of (i) the Association of Defence Counsel practising before the International Courts and Tribunals, which was created in 2002 as an association for defence counsel appearing before the International Criminal Tribunal for the former Yugoslavia, (ii) the Barreau Pénal International/International Criminal Bar, and (iii) the East African Law Society.

6. The ICC List of Counsel was created and is maintained by the Registry.⁹ It contains approximately 975 lawyers who have been assessed as meeting the criteria for inclusion as set out in Rule 22 of the Rules and Regulation 67 of the Regulations of the Court:
 - (i) established competence in international or criminal law and procedure;
 - (ii) relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings;
 - (iii) experience of at least 10 years for Lead Counsel, and 8 year for Associate Counsel;
 - (iv) excellent knowledge of and fluency in at least one of the working languages of the Court (English or French); and
 - (v) no convictions for serious criminal or disciplinary offences considered to be incompatible with the nature of the office of counsel before the Court.

7. In principle, anyone on the ICC List of Counsel has the *minimum* requisite competence to represent a theoretical defendant or participating victim. However, a selection process of the kind proposed by the Registry is required to identify which of these counsel is *best suited* to provide effective representation in specific proceedings – in this instance, to represent Mr Kony in *in absentia* confirmation proceedings. The information collected by the Registry for maintenance of the list is insufficient to make such a selection. It is general in nature and will not touch upon all specific experience which may be relevant for a specific appointment. In many cases the information will also have been provided many years ago.

8. Additionally, it is worth underscoring that representing the rights and interests of an absent client presents unique challenges. Not everyone on the ICC List of Counsel will have

⁷ <https://www.icc-cpi.int/sites/default/files/2024-02/list-of-counsel-eng.pdf>, up to date to 26 February 2024

⁸ The ICCBA website is at <https://www.iccba-abcp.org/>

⁹ Pursuant to Rule 21(2) of the Rules of Procedure and Evidence (“Rules”)

experience of conducting *in absentia* proceedings, or will have particular insight into the challenges of representation in such cases.

9. The experience of the Special Tribunal for Lebanon (“STL”), the only other international (or internationalised) tribunal that had jurisdiction to conduct *in absentia* proceedings against accused persons, is instructive.¹⁰ Applicants to the STL List of Counsel were required, firstly, to demonstrate that they fulfilled criteria similar to those for the ICC List.¹¹ Secondly, they then had to undergo an interview by an Admission Panel,¹² during which applicants were asked questions focussing on their professional experience, including their experience and appreciation of the practical and ethical challenges involved in representing clients in their absence. Counsel from the List were assigned to indicted (but absent) accused by the Head of the Defence Office when needed. But it bears repeating: this was only after an Admission Panel interview, a distinguishing feature of the process overlooked by the Prosecution.¹³
10. Ensuring effective legal representation for an accused person is not only in the interests of that accused, but also advances the credibility and legitimacy of the Court as a whole. This is best achieved by (i) establishing the widest possible pool of qualified candidates, including from potential Counsel who are not (yet) on the ICC List of Counsel, and in particular from potential Counsel in Uganda, and East Africa more broadly; (ii) using an open process to identify interest and availability; and (iii) applying transparent and appropriate criteria to select the best qualified of them. The approach proposed by the Prosecution not only neglects the latter requirements, but also fails to ensure the widest possible pool of candidates. The Prosecution Observations recognise that only about nine advocates on the List are from Uganda. It is important that efforts be taken to enlarge the pool of Ugandan lawyers, as well as other lawyers with expertise representing defendants *in absentia*, for consideration. It is also important to properly assess this pool to determine which counsel is *best* placed to represent Mr Kony, and this necessitates the use of fair and appropriate criteria. The ICCBA recommends that to ensure this, the Registry should

¹⁰ The STL website appears to no longer exist, although archived pages from the site can be found via the Wayback Machine archive, *see eg.* <https://web.archive.org/web/20121019184310/http://www.stl-tsl.org/en/>

¹¹ STL [Rules of Procedure and Evidence](#), Rules 58-59 STL [Directive on the Appointment and Assignment of Defence Counsel](#), Article 8

¹² STL [Rules of Procedure and Evidence](#), Rule 59(C); STL [Directive on the Appointment and Assignment of Defence Counsel](#), Article 9(D)

¹³ Prosecution Observations, para. 8

involve the ICCBA's President not only in its selection panel, but also in the development of the criteria to be used in this selection process.¹⁴

(ii) *Victim and defence rights not to be subject to undue delay in proceedings exist but should not override the need to ensure quality representation*

11. The ICCBA recognises and strongly supports the imperative for legal proceedings to occur without undue delay. Indeed, the right to be tried without undue delay is a *defence* right, and also a fundamental interest of *victims*. Defence and victims' counsel within the ICCBA are acutely aware of the need to avoid unnecessary delay.
12. However, as important as these rights are, the principle of expedition cannot be allowed to override other essential defence rights, including the right to effective representation. The Prosecution argue that "the Registry's approach [...] risks delaying the proceedings."¹⁵ However, it will be recalled that the Registry's estimates that the envisaged selection process would only take about six weeks.¹⁶
13. Even if the 15 October date needs to be put back, it is relevant to acknowledge that this is not a case where the suspect is in custody awaiting trial. Mr Kony is at liberty. His right not to suffer undue delay in pre-trial detention is not at issue.
14. Additionally, it is pertinent to note that the alleged crimes occurred between 1 July 2002 and 31 December 2005.¹⁷ Whilst it is right to recognise that an *in absentia* confirmation hearing is without precedent at the ICC, the availability of such a hearing has been always existed under Article 61(2)(b) of the Rome Statute. The Prosecution could have made its application many years before its request of 24 November 2022.¹⁸ It ill behoves the Prosecution to now raise the spectre of delay to justify following a less rigorous, less transparent, less objective and less open process for the selection of Defence Counsel than that proposed by the Registry. All other things being equal, the importance of identifying the very best candidate to represent the rights and interests of Mr Kony in such complex and historic proceedings outweighs the imperative of maintaining the date(s) of confirmation of charges hearing.

¹⁴ Registry Report, para. 19.

¹⁵ Prosecution Observations, para. 1

¹⁶ Registry Report, para. 20

¹⁷ [Document Containing the Charges](#), ICC-02/04-01/05-474, 19 January 2024, para. 2

¹⁸ [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

(iii) *An open and competitive process is necessary to ensure a diverse and representative legal profession at the Court and avoid negative perceptions*

15. Private lawyers play an essential part in the functioning of the Court by representing defendants, victims, witnesses, States and *amici* in the Court's proceedings. Just as the Court seeks to ensure maximum diversity in its employees across all offices and organs of the institution, the ICCBA believes that it should also strive to ensure diversity and opportunity among those private lawyers seeking access to work at the Court. This in turn strengthens the efficacy and legitimacy of the Rome Statute system.
16. The ICCBA has made observations above on why the transparent, objective and fair process proposed in the Registry Report is the path most likely to enable as wide a range of suitably qualified and competent lawyers as possible to be considered for the role of Counsel representing the rights and interests of Mr Kony, regardless of, for example, gender, ethnicity, religion, or nationality.
17. The selection process must also be vigilant to ensure that past or current connections with the ICC are not given undue weight. An open and transparent process is the only means by which to avoid *perceptions* that the Court exercises favouritism or preferential treatment among a relatively small circle of existing practitioners. Members of the ICCBA are all too familiar with complaints of frustration from colleagues that Defence work at the Court amounts to a closed shop.
18. It is important for the legitimacy of the ICC's work, therefore, that Defence lawyers with no previous experience of the Court have a fair opportunity to be considered for assignment, particularly lawyers from situation countries and the Global South. At the same time, regular infusions of "new blood" is vital to ensure the introduction of new ideas, fresh perspectives and innovative approaches to international defence work. The proposal in Registry's Report maximises the chances of such an infusion; the Prosecution's vision, by contrast, minimises those chances.

Respectfully submitted,



Marie-Hélène Proulx
President of the ICCBA

Dated this 22nd day of April 2024 at The Hague