

**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: 25 March 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

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)

Source: The Registry

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

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I. Introduction

1. Pursuant to the “Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence”, the Registry hereby submits its report on the progress of “the process of selection of counsel to represent the rights and interests of Mr Kony during the confirmation process and the confirmation hearing, should this take place in Mr Kony’s absence.”¹

II. Procedural history

2. On 23 November 2023, the Pre-Trial Chamber (“Chamber”), in its previous composition, issued its “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence” (“Decision”).² In the Decision, the Chamber found “that Mr Kony qualifies as a person who cannot be found, within the meaning of article 61(2)(b) of the Statute” and “that under the prevailing circumstances, there is cause to hold a confirmation hearing against Mr Kony, in his absence”.³

3. On 19 December 2023, the Chamber issued the “Decision rejecting the OPCD’s request to access the record of the *Kony* case”, in which it ruled that “[s]hould the Chamber in the future decide to proceed with confirmation proceedings which would – as a result of Mr Kony’s decision not to surrender himself to the Court – take place in Mr Kony’s absence, the Chamber will assign counsel to represent his interests.”⁴

4. On 15 February 2024, the Chamber issued the “Decision rejecting the OPCD request to make observations on the notification efforts and outreach activities”, in

¹ Pre-Trial Chamber II, “Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence”, 4 March 2024, ICC-02/04-01/05-481 (“Second Decision”), para. 15.

² Pre-Trial Chamber II, “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence”, 23 November 2023, ICC-02/04-01/05-466 (“Decision”).

³ Decision, p. 24.

⁴ Pre-Trial Chamber II, “Decision rejecting the OPCD’s request to access the record of the *Kony* case”, 19 December 2023, ICC-02/04-01/05-472, para. 4.

which it recalled that “at this stage, as well as during any other stage of the proceedings, it is among its duties to protect the interests of the suspect while ensuring the normal and timely conduct of the proceedings.”⁵ It further ruled that “the Chamber does not consider it necessary to assign a role to the OPCD at the current stage of the proceedings. Should the Chamber decide to hold a confirmation hearing *in absentia*, it will, at this stage of the proceedings, appoint counsel to represent Mr Kony’s interests in the context of the confirmation of charges proceedings.”⁶

5. On 4 March 2024, the Chamber issued the Second Decision, in which it instructed the Registry “to commence the process of selection of counsel to represent the rights and interests of Mr Kony during the confirmation process and the confirmation hearing, should this take place in Mr Kony’s absence” and “to report back on the progress of this process within three weeks of the notification of the present decision, with a view of a counsel being appointed by the time the Prosecution files the information on disclosure”.⁷

6. On 12 March 2024, the Presidency “[reassigned] the situation in Uganda, from Pre-Trial Chamber II to Pre-Trial Chamber III”.⁸

7. On 15 March 2024, Pre-Trial Chamber III designated “Judge Althea Violet Alexis-Windsor as Single Judge responsible for carrying out the functions of the Chamber in the present situation”.⁹

III. Applicable Law

8. The following provisions are of particular relevance to the present submissions: articles 61(1), 67(1)(d) of the Rome Statute (“Statute”), rule 21(2) and 22(2) of the Rules

⁵ Pre-Trial Chamber II, “Decision rejecting the OPCD request to make observations on the notification efforts and outreach activities”, 15 February 2024, ICC-02/04-01/05-478, para. 7.

⁶ *Ibid.*

⁷ Second Decision, para. 15.

⁸ Presidency, “Decision assigning judges to divisions and recomposing Chambers”, 12 March 2024, ICC-02/04-01/05-485.

⁹ Pre-Trial Chamber III, “Decision on the designation of a Single Judge”, 15 March 2024, ICC-02/04-01/05-487.

of Procedure and Evidence (“Rules”), regulations 73, 74, 75 and 76 of the Regulations of the Court (“RoC”), regulations 119, 120, 123(1) of the Regulations of the Registry (“RoR”) and paragraphs 50 to 52, 56 to 58 of the (Reformed) Legal Aid Policy.¹⁰

IV. Submissions

A. *Legal framework on the appointment of counsel*

9. The Registry notes that article 61(1) of the Statute provides that “[the confirmation] hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.”

10. The Registry further notes regulation 73 of the RoC, which provides as follows:

[...]

2. The Registrar may appoint duty counsel if a person requires legal assistance and has not yet secured that assistance, or when his or her counsel is unavailable and has consented to the appointment of duty counsel. The Registrar shall take into account the wishes of the person, the expertise of duty counsel, the geographical proximity of, and the languages spoken by, the counsel. Decisions taken pursuant to this sub-regulation may be reviewed by the relevant Chamber.

3. The Chamber may appoint duty counsel in situations of urgency when the person’s own counsel is unavailable or when it is necessary to appoint duty counsel in the interests of justice.

4. Where appropriate, counsel from the Office of Public Counsel for the defence or from the Office of Public Counsel for victims, as defined in regulation 77, sub-regulation 3, and regulation 81, sub-regulation 3, respectively, may be appointed as duty counsel. Sub-regulations 2 and 3 apply. When acting in accordance with sub-regulations 2, 3 or 4, the Registrar shall consult any prospective appointee prior to his or her appointment.

11. Pursuant to regulation 76 of the RoC: “[a] Chamber, following consultation with the Registrar and, when appropriate, after hearing from the person entitled to legal assistance, may appoint counsel in the circumstances specified in the Statute, Rules

¹⁰ Legal aid policy of the International Criminal Court, ICC-ASP/22/9, 22 November 2023 (“Legal Aid Policy”).

and these Regulations or where the interests of justice so require. This may include the appointment of standby counsel, if appropriate.”¹¹

12. The Registry also notes that in accordance with paragraph 56 of the Legal Aid Policy, “[u]nless the suspect has privately retained Counsel for the purpose of the initial proceedings or Counsel is acting *pro bono*, the OPCD shall be appointed as Counsel for the first appearance before the Court.”¹² In this regard, the Registry recalls the Chamber’s decision not to assign a role of representing Mr Kony’s interests at the current stage of the proceedings to the OPCD.¹³

13. For the purposes of appointing counsel for Mr Kony, as instructed by the Chamber, the Registry notes that in accordance with regulation 73(2) of the RoC, while appointing duty counsel, “[t]he Registrar shall take into account the wishes of the person, the expertise of duty counsel, the geographical proximity of, and the languages spoken by, the counsel.”¹⁴

14. In the normal circumstances, where the Registry has direct contact with the person who requires legal assistance, the Registry follows the standard procedure that involves, *inter alia*, the verification of “the wishes of the person” through communicating the full list of counsel and clarifying with the person concerned additional requirements in order to facilitate the selection process (*e.g.* counsel’s specific expertise, experience before the international tribunals, specific language proficiency, etc.).

15. In the circumstances where a person who requires legal assistance already has a counsel, the Registry normally verifies directly with the person his or her choice of counsel. Equally, in instances when the Registry receives a power of attorney (“PoA”) from the counsel directly pursuant to rule 22(2) of the Rules, the Registry normally

¹¹ Regulation 76 of the RoC.

¹² Legal Aid Policy, para. 56.

¹³ Pre-Trial Chamber II, “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence”, 23 November 2023, ICC-02/04-01/05-466, para. 44.

¹⁴ Regulation 73(2) of the RoC.

confirms the choice of counsel with the person who requires legal assistance directly. It is the view of the Registry that the acknowledgement of a PoA filed is not a mere formality, but rather a step of significant legal relevance. The Court must be certain that representations made by counsel reflect the position of his or her client. In the circumstances, where the abovementioned procedure is not possible due to person's whereabouts, the Registry requires that a PoA is authenticated by a person with the public authority to do so in the appropriate State, such as a public notary. Absent such verification, the Registrar is unable to acknowledge the issuance of the PoA or the appointment of counsel in accordance with regulation 123(1) of the RoR.

B. Process of selection of counsel for Mr Kony

16. In the present case, the Registry submits that it has not received any valid PoA from counsel who claim to represent Mr Kony in the proceedings before the Court as required under rule 22(2) of the Rules.

17. Despite the Registry's firm commitment to the principle of free choice of counsel, given "Mr Kony's evident unavailability"¹⁵ and the fact that he is considered as "a person who cannot be found within the meaning of article 61(2)(b) of the Statute",¹⁶ the Registry cannot proceed with its regular practice of facilitating the selection of counsel for Mr Kony on the basis of the latter's freedom of choice as envisaged under rule 21(2) of the Rules. Likewise, the Registry is unable to verify with Mr Kony whether he already has a counsel nor present him with the full list of counsel and clarify the exact criteria on the basis of which he wishes to make a selection.

18. Given the exceptional nature of *in absentia* hearings¹⁷ and considering the Registrar's "primary responsibility for [...] the determination of matters relating to

¹⁵ Pre-Trial Chamber II, "Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence", 23 November 2023, ICC-02/04-01/05-466, para. 44.

¹⁶ Pre-Trial Chamber II, "Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence", 23 November 2023, ICC-02/04-01/05-466, para. 35.

¹⁷ Pre-Trial Chamber II, "Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence", 23 November 2023, ICC-02/04-01/05-466, para. 64.

qualification, appointment or assignment of counsel”,¹⁸ the Registry proposes to follow the process of selection of counsel previously adopted in instances of organisation of legal representation of victims before the Court.¹⁹ This process is organised in a transparent, objective and fair manner, which aims to ensure the highest quality of legal representation from a sufficiently large pool of candidates. This approach is based on the understanding that all capable and competent counsel should be provided with a fair and equal opportunity to seek involvement in the legal representation of persons entitled to legal representation before the Court.²⁰

19. The Registry proposes the following process to be followed in the present case:

- a. Beyond considering the minimum requirements set out in the Court’s texts,²¹ the Registry circulates a call for expression of interest (“EOI”) specifying the selection criteria to be used and the particular expertise or skills sought²² to all counsel on the list of counsel and publishes said EOI on various platforms, such as the websites of the Court, ICCBA and IBA, and through the Uganda Law Society for the period of two weeks;
- b. Counsel who are interested and available, and who consider themselves qualified to take on the role of counsel, apply by providing their Curriculum Vitae as well as a declaration of their qualification against the identified criteria;

¹⁸ The Presidency, “Decision on the “Demande urgente en vertu de la Regie 21-3 du Reglement de procedure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively”, 29 June 2007, ICC-01/04-01/06-937, para. 16.

¹⁹ Registry, “Proposal for the common legal representation of victims”, 1 August 2011, ICC-01/09-01/11-243, para. 16. Registry, “Recommendation for the position of Common Legal Representative of victims”, 5 November 2012, ICC-01/09-01/11-467, paras. 10-13. Registry, “Recommendation for the position of Common Legal Representative of victims”, 5 November 2012, ICC-01/09-02/11-517, paras. 5, 10-13, Registry, “Proposal for the common legal representation of victims”, 16 May 2012, ICC-02/11-01/11-120-Anx1, para. 12. Registry, “Registry Observations pursuant to Pre-Trial Chamber II’s “Order seeking observations on matters related to the conduct of the confirmation Proceedings” (ICC-01/14-01/22-50)” 25 May 2022, ICC-01/14-01/22-55, para. 30.

²⁰ Registry, “Proposal for the common legal representation of victims”, 16 May 2012, ICC-02/11-01/11-120-Anx1, para. 11.

²¹ Rule 22 of the Rules and regulation 67 of the RoC.

²² The proposed selection criteria including, but not limited to, absence of conflict of interest, immediate and full-time availability, computer skills, experience before international tribunals experience in managing complex criminal cases, knowledge of Ugandan and/or Great Lakes culture.

- c. The Registry sets up a panel, taking into account gender and geographical representation, including three members of Registry Staff as well as the President of the ICC Bar Association (“ICCBA”) (“Panel”);
 - d. Upon expiration of the period as specified in point b above, the Panel, within a period of two weeks, conducts the shortlisting of counsel among those who expressed their interest, based on the criteria identified;
 - e. The Panel requests the individuals shortlisted to provide their reflections on a set of questions. The answers provided by the individuals shortlisted are reviewed and marked by the members of the Panel, and, based on the results, a selected number of candidates are invited to an interview;
 - f. The Panel conducts interviews using standardized questions and evaluates the potential of each candidate to represent Mr Kony by reference to the pre-identified criteria;
 - g. The Panel reaches the agreement regarding recommendations on the most qualified candidates, taking into account gender and geographical representation, and prepares a confidential report which sets out these recommendations. This report details the process followed and provides a summary of the candidates’ respective strengths;
 - h. The Chamber appoints the selected counsel considering the recommendations of the Panel.
20. The Registry estimates that the overall process would take an estimated six weeks following the authorization of the Chamber, which would put the Registry in an optimal position to constitute a pool of qualified and available candidates and appoint counsel to represent Mr Kony’s interests in a timely manner and sufficiently ahead of the confirmation of charges hearing currently scheduled on 15 October 2024.

C. The scope of legal assistance during the confirmation proceedings

21. With regard to the scope of legal assistance, the Registry has made a provisional assessment of the complexity level taking into account all applicable parameters as

stipulated in the (Reformed) Legal Aid Policy.²³ As a result, the Registry assessed the defence team at a complexity level 1 at the pre-trial stage until any further submissions by the appointed defence team and any further developments in the case warranting the reassessment. In this case, the appointed counsel should have the burden to demonstrate that a specific parameter impacts their workload. Therefore, any final assessment of the complexity level should only be made by the Registry following the submissions by the appointed counsel.

22. The Registry notes that under the (Reformed) Legal Aid Policy, the defence team at this stage is composed as follows: Counsel, Assistant to Counsel, Legal Assistant, Case-Manager, Case-Manager, Language Assistant (50%). In addition, the Registry notes that the OPCD could play a supporting role and provide assistance to this team, as appropriate.

V. Conclusion

23. Based on the above, the Registry respectfully recommends that, unless instructed otherwise, it proceeds with the process proposed and launches an EOI to identify a pool of qualified and available counsel and subsequently appoint counsel “to represent the rights and interests of Mr Kony during the confirmation process and the confirmation hearing, should this take place in Mr Kony’s absence”.

²³ Legal Aid Policy, paras. 50-52.

24. The Registry proposes to submit a report with its conclusions and recommendations to the Chamber within six weeks following Pre-Trial Chamber III's authorisation to issue the EOI.



Marc Dubuisson, Director, Division of Judicial Services
on behalf of Osvaldo Zavala Giler, Registrar

Dated this 25 March 2024

At The Hague, The Netherlands