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Date: 28 March 2024

PRE-TRIAL CHAMBER II

Before: Judge Althea Violet Alexis-Windsor, Single Judge

SITUATION IN UGANDA

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

Public

**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)**

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I. INTRODUCTION

1. The Prosecution hereby provides its 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" ("Report").¹ The Prosecution respectfully submits that the Registry's approach as proposed in this Report is unnecessary and risks delaying the proceedings. While it is the first confirmation hearing *in absentia* before the Court, it does not require a departure from already well-established systems to appoint counsel to represent an individual and to protect their rights - whether as a witness, victim, suspect, or the person charged, or an accused engaged in proceedings before the Court.

II. SUBMISSIONS

2. In its Second Decision,² the Chamber instructed the Registry to commence the process of the selection of counsel to represent the rights and interests of Mr Kony and to report to the Chamber within three weeks, with a view of counsel being appointed by the time the Prosecution files its information on disclosure, for which the Prosecution received four weeks, i.e. until 2 April 2024.³ By contrast, the process for the selection of counsel now proposed by the Registry would delay appointment of counsel by several weeks, until at least mid-May 2024. Should counsel be appointed at that time, it would take further time until the Defence team would be fully operational. However, any Defence counsel appointed to the case will require adequate time and resources to prepare for the hearing set for 15 October 2024, which includes having sufficient time to review the materials to be disclosed by the Prosecution. The proposed process risks shortening this time unnecessarily.

3. The proposed process is also legally not required. While regulation 76(1) of the RoC is applicable, the regulation does not foresee the need for the proposed process. In particular, the provision does not require the Chamber to consider the wishes of the

¹ ICC-02/04-01/05-488.

² ICC-02/04-01/05-481 ("Second Decision").

³ Second Decision, para. 15.

person concerned.⁴ Furthermore, regulation 73(1) of the RoC mandates the Registry to identify a counsel from the List of Counsel and Assistant Counsel (the “List”),⁵ who are willing to represent any person before the Court or to represent the interests of the Defence. As such, this regulation requires the Registry to select a counsel from the established List.

4. As regulation 76 of the RoC cited by the Registry, together with regulation 73(1) of the RoC are the most relevant provisions for situations such as an *in absentia* proceeding, the Registry has sufficient legal basis to choose counsel from the List and to propose this counsel to the Chamber without an additional process.

5. The Registry already has a robust system for admitting counsel to the List. All counsel admitted to the List must demonstrate that they possess proven competence and expertise in international or criminal law and procedure. Furthermore, such counsel must possess a minimum of ten years of relevant experience. Moreover, the Registry has responsibility and control over the process of adding counsel to the List, where they convene panels to verify and approve the applicants.

6. On 24 February 2024,⁶ the List was published containing the names of about 900 counsel, representative of gender and diverse geographical experience. The List also contains the names of about nine advocates from Uganda. All counsel on the List have already been subjected to the Registry’s process for verifying their experience.

7. The Registry has already done a preliminary assessment of the legal needs in the Kony case and has established that the Defence team to be appointed to represent Mr Kony is on complexity level 1.⁷ Given this assessment, the Registry should be able to select counsel and support the setting up of a Defence team without further delay.

⁴ Regulation 76(1) of the RoC merely envisages that the Chamber hear from the person entitled to legal assistance “when appropriate”.

⁵ See [Guide for applicants to the ICC List of Counsel and Assistants to Counsel](#).

⁶ See [List of Counsel before the ICC](#).

⁷ Registry’s Report, paras. 21-22.

8. Examples from international courts and tribunals, where *in absentia* proceedings were held, also demonstrate that counsel were assigned to represent an absent suspect or accused, without any further distinction in requirements as envisioned by the Registry in this case, beyond ensuring that competent counsel is appointed.⁸ Thus, given that the responsibility for selecting counsel at the Court rests with the Registry, subject to any directions from the Chamber, the Registry can proceed with proposing counsel to the Chamber using the existing systems.

III. RELIEF SOUGHT

9. For the reasons set out above, the Prosecution respectfully requests the Chamber to reject the Registry's proposed process and to instruct the Registry to select counsel to represent Mr Kony, without further delay.



Karim A.A. Khan KC, Prosecutor

Dated this 28th March 2024
At The Hague, The Netherlands

⁸ *The Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, Assignment of Counsel for the Proceedings held *in Absentia* pursuant to Rule 106 of the Rules.