

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **5 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

**OPCD Request for Leave to Make Submissions
on the Registry Report of 25 March 2024**

Source: Office of Public Counsel for the Defence

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
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Amicus Curiae

REGISTRY

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Counsel Support Section

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Detention Unit

Victims Participation and Reparations Section

Trust Fund for Victims

Other

1. The Pre-Trial Chamber, in its previous constitution, issued a Second Decision on 4 March 2024, scheduling the first ever *in absentia* confirmation of charges hearing before the ICC and directing that a counsel be assigned “to represent the rights and interests of Mr Kony during the confirmation process and the confirmation hearing”.¹ One month later, Mr Joseph Kony remains unrepresented in the proceedings and without a designated interlocutor to intervene in the decisions being taken in the case. The ICC Regulations of the Court (“RoC”) mandate the Office of Public Counsel for the Defence (“OPCD”) to seek leave to make submissions “on behalf of the person entitled to legal assistance when defence counsel has not been secured”;² through RoC 77(4)(d), the OPCD seeks such leave to file at this critical juncture of the Registry-proposed counsel-assignment process³ and the Prosecution opposition of it.⁴
2. The subject-matter of the sought intervention is significant — “legal assistance assigned by the Court in any case where the interests of justice so require”.⁵ In the current litigation, the OPCD appreciates that, at this stage of the case, the timeframe proposed in the Registry Report to assign a defence counsel has the potential to create undue delay in the framework of the existing deadlines.⁶ In fact, the process outlined by the Registry has not commenced and envisages a minimum of six additional weeks following this Chamber’s authorisation.⁷ By this estimate, the earliest a counsel could be assigned would be mid-May 2024 and does not reflect that, even upon assignment, a counsel will first need to recruit a team, set up a system of work, and achieve all required IT accesses to get to the actual case materials.⁸

¹ Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence, ICC-02/04-01/05-481, 4 March 2024, para. 15.

² Regulations of the Court, Regulation 77(4)(d).

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 Rome Statute, Article 67(1)(d).

⁶ The Confirmation of Charges hearing is scheduled for 15 October 2024. Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence, ICC-02/04-01/05-481, 4 March 2024, paras 12-13 and relief.

⁷ 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, paras 20, 24.

⁸ While taking adequate preparations to intervene or assist, the OPCD has had no information, to date, from the Registry as to what supporting role it envisages in these unique proceedings. In a typical case, however, the RoC 77(4)(b) mandate would dictate a supplemental role guided by the defence team much like the supporting sections and units of the OTP to the directly assigned pre-trial team.

3. Only thereafter can he or she meaningfully engage in the enormous task that lies ahead. This includes reviewing the written statements of approximately 170 witnesses, the non-testimonial evidence relied on by the Prosecution (approximately 65,000 pages of documentary evidence and over a week's worth of the audio and video recordings), as well as 106,858 pages of unredacted evidence.⁹ The defence counsel would also have to learn the context of the conflict, and apprise him or herself of the relevant ICC law on the complex crimes and modes of liability (indirect co-perpetration and ordering and inducing) charged. The defence counsel will likely also have to conduct investigations on behalf of Mr Kony given the paucity of potentially exonerating evidence (728 pages¹⁰) collected by the Prosecution. Thus, the OPCD would submit that the “risks [of] delaying the proceedings”¹¹ may already be upon us.
4. However, considering the paramount importance of an effective defence counsel in a procedure that would normally be undertaken in Mr Kony's presence, the OPCD would identify the rights-based approach that should be adopted in the framework of the model proposed by CSS. Such submissions would clarify how the Registry can make an appropriate choice of counsel which adequately takes into account the rights of a suspect who, due to his absence, is unable to exercise the right to choose counsel himself.¹² In doing so, the proposed submissions would outline the Rome Statute rights of Mr Kony that warrant consideration and suggest the weight to be ascribed to each given the specificity of an *in absentia* proceeding; in particular, the OPCD would submit on the right to competent counsel, the right to adequate time and facilities, and the right of confrontation and provide suggestion as to how such rights could be balanced against the concerns of undue delay, for example, shortening the CSS process, but retaining an appropriate process to select a defence counsel “to represent his interests”¹³ and provide effective representation.

⁹ Prosecution's Observations on the conduct of the confirmation proceedings in absentia and Requests for the adoption of certain protocols and an in situ hearing in Uganda, ICC-02/04-01/05-490, 28 March 2024, paras 7-11, 17.

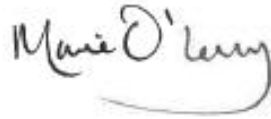
¹⁰ *Ibid.*, para. 13.

¹¹ 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, para. 1.

¹² See Decision on the OPCD Request for Leave to Appeal the ‘Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence’, 11 December 2023, ICC-02/04-01/05-470, para. 17.

¹³ 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.

5. Thus, for the foregoing, the OPCD respectfully requests that it be granted leave to advance submissions on the Registry Report and/or appear on behalf of Mr Kony under regulation 77(4)(d) of the Regulations of the Court.



Marie O'Leary
Acting Principal Counsel of the OPCD

dated this 5th day of April 2024
at The Hague, The Netherlands