

**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

**OPCD submissions on Registry's proposed process for selection of counsel
representing Mr Kony's rights and interests**

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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I. INTRODUCTION

1. On 4 March 2024, the Pre-Trial Chamber issued a Second Decision on the Prosecution’s request to hold a confirmation of charges hearing in the case against Mr Kony in his absence.¹ The Registry has proposed a six-week process (“Registry Proposal”) to identify an appropriate counsel to take on this task,² embracing the novelties of both *in absentia* representation and resrepresentaion of a defendant in the ICC’s confirmation of charges process.³ The Prosecution opposes this procedure and asks that a representative be selected “using the existing systems”.⁴
2. While the proceedings at hand may seem indistinguishable from other ICC confirmation of charges hearings, they are anything but that. The proceedings have been and will be entirely conducted without the input of the defendant himself, Mr Kony. Like “stag[ing] Hamlet without Hamlet”, as a recent report described *in absentia* proceedings,⁵ “[s]pecialist expertise is required to ensure fairness and a fair result”.⁶ The same report encourages “distinct processes and practical and proactive measures”⁷ to ensure the role of the suspect and the Registry Proposal provides just this – distinction on those existing processes to reflect the required specialist expertise.
3. With leave of the Chamber,⁸ the OPCD advances these submissions pursuant to Regulation of the Court [“RoC”] 77(4)(d) on behalf of the unrepresented suspect in the case, Mr Kony, due to “evident unavailability”.⁹ These submissions “on behalf of Mr Kony” endeavour to compensate, yet not replace, the absence of expression of Mr Kony’s wishes usually required pursuant to RoC 73(2). These intend to highlight the fair trial rights at issue in the core of this litigation.

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.

² 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 (“Registry’s Report”).

³ Registry’s Report, paras 17-18.

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, (“Prosecution’s observations”), para. 8.

⁵ [Trials in absentia](#), Global Rights Compliance Report-T.M.C Asser Institute, p. 2.

⁶ [Trials in absentia](#), Global Rights Compliance Report-T.M.C Asser Institute, p. 13.

⁷ *Ibid.*

⁸ 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.

⁹ See 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 and Registry’s Report, para. 17.

II. OBSERVATIONS

4. The choice to proceed in Mr Kony's absence, even where statutorily permissible, necessarily impacts the effective exercise of his fair trial rights enshrined in the ICC legal framework. At the forefront of these considerations is how to afford Mr Kony meaningful representation when his right to choose such representation is attenuated.¹⁰ Further, how to ensure that his rights of adequate time and facilities to present a defence and right of confrontation of the evidence can be made while assuring no undue delay.¹¹ The decision that is required will permeate the entirety of this proceeding and all those that flow from it.

A. The right to effective counsel

5. Mr Kony's right to be represented by effective counsel applies even if he does not attend the proceedings in person.¹² A 2016 IBA Report on *in absentia* proceedings outlines that “[t]he representation that is assigned needs to be at a level that is compatible with the crime that is charged against the accused and proportionate to the severity of the crime that is charged.”¹³ In short, Mr Kony needs a specialist.
6. The primary objective of the Registry's proposed selection process seeks to address this need while he is not here to exercise the right of free choice of counsel.⁸ Contrary to the Prosecution's assertion that the proposal is “a departure from already well-established systems to appoint counsel”,¹⁴ the Registry Report is relying on a process already in place for victim representation.¹⁵ Further, it submits that: “*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*”.¹⁶
7. The OPCD observes that adopting such form of additional process to retain counsel in this case is all the more warranted for absent suspect where his individual criminal

¹⁰ Respectively Articles 67(1)(d) and (b).

¹¹ Respectively Articles 67(1)(b), (e) and (c).

¹² ECtHR, *Neziraj v Germany*, Application no. 30804/07, (2012), para 50: “[...] although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, was one of the fundamental features of a fair trial. A person charged with a criminal offence did not lose the benefit of this right merely on account of not being present at the trial.”, citing to ECtHR, *Poitrimol v. France* (23 November 1993, Series A no. 277-A), para. 34; *Van Geyseghem v. Belgium* ([GC], no. 26103/95, ECHR 1999-I), para. 34; *Stroek v. Belgium*, nos. 36449/97 and 36467/97, 20 March 2001, para. 23; *Goedhart v. Belgium*, no. 34989/97, 20 March 2001, para. 26. See, Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para 36.

¹³ International Bar Association [Report on the “Experts’ Roundtable on trials in absentia in international criminal justice”](#), September 2016, (“IBA Report”), p. 6.

¹⁴ Prosecution's observations, para. 1.

¹⁵ Registry's Report, para. 18, and footnote 19 referencing process applied in five ICC cases.

¹⁶ Registry filing, para. 18.

responsibility is at the center of the proceedings.¹⁷ The Registry's proposal, although longer than a typical appointment process, appears to provide a template to identify counsel who would have many of the necessary attributes to defend Mr Kony in these proceedings – a ready understanding of the substantive and procedural laws of the ICC, as well as the conflict in Uganda; experience in complex litigation; and competence in international investigations. In fact, the OPCD would submit that the proposed process should also consider, at minimum, knowledge and/or experience in representing persons in cases of: (a) SGBV crimes; (b) crimes committed against children; and, (c) cases of international humanitarian law.

8. In relation to the specificity of an absent defendant, the Registry should also seek experience in *in absentia* proceedings (and/or representing multiple clients and/or as counsel appointed to a disruptive client). The counsel should demonstrate her/his experience in dealing with the difficulty to represent in the absence of instructions from their clients, and how they addressed it in the preparation of the case and litigation. Contrary to the Prosecution's assertion of a ready list, those joining the ICC List of Counsel are not specifically asked if they are willing to take *in absentia* cases,¹⁸ a question specifically posed in the application process of the Special Tribunal for Lebanon.¹⁹ Such affirmation of willingness, and ability within the counsel's own ethical code, is a critical step to assure appropriate representation here.
9. While maintaining the integrity of the process, the OPCD imagines that the selection process could conceivably be shortened to three to four weeks if a model similar to recruitment for short-term appointment (STA) staff.²⁰ The Expression of Interest could, for instance, be advertised for one week (already including the envisaged short questionnaire), with desk review of the profiles and every effort made to arrange any interviews as quickly as possible. The OPCD is conscious, however, that the shorter the process, the less assurance there is that effective counsel can be found in the time. This could also be remedied by additional practitioner panellists with sufficient experience to be able to evaluate whether applicants are qualified – for example, inclusion of an additional ICCBA representative and/or OPCD representative.²¹

¹⁷ See also, *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, 2 February 2012, para. 14.

¹⁸ [Candidate application form for list of Counsel](#).

¹⁹ IBA Report, p. 9.

²⁰ See Administrative instruction on Short-Term Appointments, Ref. ICC/AI/2016/001, 28 January 2016.

²¹ The composition of the panel could also include a member of Defence support staff.

B. Right to adequate time and facilities

10. Distinct of his right of a counsel, Mr Kony is entitled to have adequate time and facilities to prepare his defence, something that must already be to mind. Without prejudice to any arguments Mr Kony may advance in the future, the OPCD observes that these proceedings are novel, voluminous, and complex. Mr Kony's counsel will not be in a position to receive his instructions and s/he will have to prepare the case and make strategic decisions potentially covering a wider array of legal arguments and investigations than when a suspect is present and more precise.²²
11. Given the breadth of charges and evidence indicated, the volume of work will be high. The Prosecution alleges 36 counts of war crimes and crimes against humanity over a time period of over 3.5 years.²³ The disclosure plan reveals around 140,000 pages of evidence, as well as written statements of around 170 witnesses and 220 hours of audio and video recordings, all of which will have to be reviewed. The Prosecution has virtually no potentially exculpatory evidence to disclose,²⁴ and only 634 pages in relation to the modes of liability Mr Kony has been charged with. It is highly likely that the defence counsel will need to conduct their own investigations to acquire some form of evidence which may be instructive for conducting Mr Kony's defence.
12. Given this as a backdrop, even with a short selection process, the remaining four or five months before the scheduled hearing will unlikely be enough.

C. The need to avoid delay

13. Central to the Prosecution's opposition is the risk of delaying the proceedings. The irony is not lost on the OPCD that these present arguments – started when the Prosecution opposed the Registry's proposal – themselves slow the progress of the case, but equally note that delay is not 'undue' when specifically necessary to safeguard the suspect's rights.²⁵

²² See Article 61(6), 67 Rome Statute and Rules 121, 122, 126 Rules of Procedure and Evidence; See also Article 8(D) [Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon](#).

²³ Document containing the charges, ICC-02/04-01/05-474, 19 January 2024.

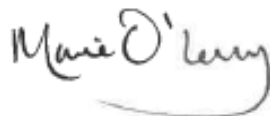
²⁴ Annex A to Prosecution's Observations on the conduct of the confirmation proceedings in absentia and Requests for the adoption of certain protocols and an in situ hearing in Uganda, ICC-02/04-01/05-490-AnxA.

²⁵ See, e.g., IRMCT, Appeals Chamber, MICT-13-55-A, Prosecutor v Radovan Karadžić, Judgement, 20 March 2019, para. 90; ICTR, Prosecutor v Nyiramasuhuko et al, ICTR-98-42-A15bis, Decision in the Matter of Proceedings under Rule 15bis(D), 24 September 2003, para. 24 ("The Appeals Chamber accepts that as between a speedy trial and an equitable trial preference should be given to the latter"); ECtHR, Kolomyiets v. Russia (App. no. 76835/01), 22 February 2007, para. 29.

14. Further, 'undue delay', in the current proceedings, must be examined in light of the overall timeline of the case. The ultimate decision of the Chamber to move forward in this proceeding, has only come in this year, just 7 weeks ago. The OPCD would submit that a methodical process to assign a effective counsel (even 4-6 additional weeks) is not a measure of 'undue' delay given the significance of these proceedings; even less so when considered in the context of the larger process that has gone on for over two years actively, and nearly 20 in inactive proceedings.
15. The deadlines are working against the more methodical process imagine that the Chamber intends to maintain 15 October 2024 as the start date for the confirmation hearing, a date set before knowing of this process of the Registry or even the full volume of the material submitted by the Prosecution. If it will be maintained, then the selection process should be shortened to the extent possible to preserve the maximum time possible for the eventual counsel to prepare Mr Kony's defence.
16. However, the OPCD respectfully suggests, at this juncture, that the best option to preserve the full battery of Rome Statute rights and ensure a measured Registry process for assignment of representation would be to temporarily vacate the start date of the confirmation hearing, and to set a new date only after having heard eventual arguments from Mr Kony's counsel.

RELIEF REQUESTED

17. For the foregoing, the OPCD respectfully requests that the Chamber accept these observations and:
 - a. Adopt the process proposed by CSS, with the additional suggestions as proposed by the OPCD in Section A; and,
 - b. Temporarily vacate the date of the commencement of the confirmation of charges hearing until assignment of a Counsel to represent Mr Kony's interests and with full access to the record of the case.



Marie O'Leary
Acting Principal Counsel of the OPCD

dated this 22nd day of April 2024
at The Hague, The Netherlands