

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **14 December 2023**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

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

Public

Request to access the confidential record of the case

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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Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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Amicus Curiae

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Victims and Witnesses Unit

Detention Unit

**Victims Participation and
Reparations Section**

Trust Fund for Victims

Other

1. The Office of Public Counsel for the Defence ('OPCD') requests access to the confidential record of the case to safeguard and monitor Mr Kony's rights in this unique period of the *in absentia* notice process as "*the Chamber has not yet rendered a final decision on the Prosecution Request and Mr Kony is not yet represented by a counsel*".¹ Such access will additionally assist the OPCD in making case file preparations for any Counsel who may be eventually appointed in any confirmation of charges proceedings. The OPCD recognises that the Pre-Trial Chamber has ruled that it "will consider whether to appoint counsel to represent the interests of the suspect in the context of the *in absentia* proceedings"² should it grant the Prosecution Request; however, in advance of such appointment pursuant to Regulation of the Court ('RoC') 73, the OPCD makes this distinct request pursuant to RoC 77(4)(d).
2. The creation of the OPCD and the establishment of its mandate aims particularly to ensure effective Defence participation in these early stages of a Situation or case as envisaged by the Rome Statute.³ Here, the litigation remains open and subject to the fulfilment of certain requirements from the Prosecution and Registry before a decision can be taken to proceed with any confirmation of charges hearing. As has been previously noted, the OPCD has, to date, been engaged in these proceedings⁴ and has held previous assignments in this Situation which afforded access to the confidential record of the case.⁵ OPCD access to the case file in this period is necessary to assist in its mandate of "[a]dvancing submissions, on the instruction or with the leave of the

¹ 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. 18 ('Decision on OPCD Leave to Appeal').

² Decision on OPCD Leave to Appeal, para. 24.

³ Article 55 of the Rome Statute.

⁴ OPCD Observations on the Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence; 30 March 2023, [ICC-02/04-01/05-458](#); 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", 29 November 2023, [ICC-02/04-01/05-467](#). See also Decision on OPCD Leave to Appeal, para. 18.

⁵ As example, OPCD has previously had confidential access to the Uganda Situation for the purpose of addressing the Regulations of the Trust Fund for Victims (2008).

*Chamber, on behalf of the person entitled to legal assistance when defence counsel has not been secured or when the mandate of temporary counsel is limited to other issues”.*⁶ Such access would be in line with Article 55 of the Rome Statute in providing fair trial rights and defence representation at the early stages of the proceedings. It further accords with the Pre-Trial Chamber’s note that “the outcome of the article 61(2)(b) litigation would have a significant impact on Mr Kony’s rights, as well as those of future defendants before the Court.”⁷ Finally, such access would be consistent with the general International Criminal Court (‘ICC’) practice of a counsel being on board during the issuance of a Prosecution Document Containing the Charges.

3. Granting the OPCD with access to the confidential record of the case will reinforce the principle of equality of arms that “each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”.⁸ In Mr Kony’s case, access to the confidential record will provide not only better equality of arms, but additional efficiencies in the next steps that may come in the proceedings; namely it will assure:

- Defence is available to provide an informed position on all reasonable steps to inform the suspect of the charges, especially given the significance of this requirement in Article 61(2)(b);
- Defence is engaged in this critical passageway into possible formal confirmation of charges proceedings; and,
- Defence will be equally armed with the necessary information to be in a position, when called upon, to make observations on the procedure to be set for any eventual Confirmation of Charges hearing.

⁶ RoC 77(4)(d).

⁷ Decision on OPCD Leave to Appeal, para. 17.

⁸ ECHR, *Case of Dombo Beheer B.V. v. The Netherlands*, [Judgment](#), No. 14448/88, 27 October 1993, para. 33.

4. Such access to the confidential record of the case at this stage would further ensure alignment with human rights jurisprudence which would encourage equal party access, as currently the defendant is “a party which is not informed about written submissions of the opposing party and [is] thus deprived from reacting thereto [putting it] at a substantial disadvantage vis-à-vis its opponent”.⁹
5. Finally, granting the OPCD access to the confidential record of the case is cost-neutral, as calling upon use of existing staffing of the Court. Further, such grant carries no risk as the OPCD staff are bound by both ICC Staff Regulations and the ICC Code of Professional Conduct for Counsel, both which imbue the highest standards of confidentiality and professionalism. At the same time, OPCD access at these early stages of the proceedings would provide an added imprimatur of fairness and additional assurance for the Pre-Trial Chamber that the rights of Mr Kony will be safeguarded and monitored in these important interim steps of this premier process.

RELIEF REQUESTED

6. For the foregoing reasons, the OPCD respectfully requests the Pre-Trial Chamber to grant it access to the confidential filings in the present case in the ongoing proceedings.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 14th day of December 2023
at Abidjan, Côte d'Ivoire

⁹ ECHR, *Case of Lanz v. Austria*, [Judgment](#), No. 24430/94, 31 January 2002, para. 62.