



Original: English

**No. ICC-02/04-01/05
Date: 19 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

Decision rejecting the OPCD's request to access the record of the *Kony* case

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Mr Mame Mandiaye Niang

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

Ms Paolina Massidda

**The Office of Public Counsel
for the Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court (the ‘Chamber’) issues this decision on the ‘Request to access the confidential record of the case’ (the ‘Request’), filed by the Office of Public Counsel for the Defence (the ‘OPCD’).¹

1. On 23 November 2023, following a request by the Prosecution to hold a hearing on the confirmation of charges pursuant to article 61(2)(b) of the Statute (the ‘Prosecution Request’),² the Chamber issued its ‘Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence’.³

2. On 14 December 2023, the OPCD filed the Request, submitting that it requires 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’ and to make ‘case file preparations for any Counsel who may be eventually appointed in any confirmation of charges proceedings’.⁴

3. The OPCD grounds its request on regulation 77(4)(d) of the Regulations of the Court.⁵ However, the Chamber has, at present, neither instructed the OPCD, nor granted it leave, to ‘advanc[e] submissions’ on behalf of Mr Kony beyond those already made by the OPCD in the context of the Prosecution Request. Article 55 of the Statute, which is also relied on by the OPCD, does not apply to the present situation because whilst Mr Kony is a suspect, he is not being questioned as such.

4. The OPCD avers that ‘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’, and gives several examples.⁶ Yet, none of the issues raised in the Request requires intervention by the OPCD at this point in time. The reason Mr Kony presently does not have a counsel is because he is at large and no confirmation proceedings are taking place against him. Should the Chamber in the future decide to

¹ ICC-02/04-01/05-471

² 24 November 2022, ICC-02/04-01/05-446 (a public redacted version was filed the same day: ICC-02/04-01/05-446-Red).

³ ICC-02/04-01/05-466.

⁴ Request, para. 1.

⁵ Regulation 77(4)(d) of the Regulations of the Court states, in relevant part that ‘the tasks of the Office of Public Counsel for the defence shall include [...] [a]dvancing submissions, on the instruction or with the leave of the 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 See para. 3 of the Request.

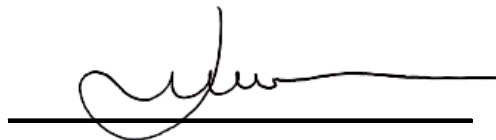
proceed with confirmation proceedings which would – as a result of Mr Kony’s decision not to surrender himself to the Court – take place in Mr Kony’s absence, the Chamber will assign counsel to represent his interests. Naturally, counsel will then be given access to the case record, and be provided sufficient time to prepare and make submissions.

5. In the circumstances of a suspect not present before the Court, and prior to an actual decision that confirmation proceedings in the *Kony* case ought to be held in the suspect’s absence, or indeed, even before a document containing the charges being available, it is premature to grant anyone access to the case record.

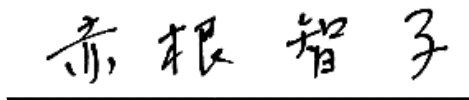
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Rosario Salvatore Aitala
Presiding



Judge Tomoko Akane



Judge Sergio Gerardo Ugalde Godínez

Dated this Tuesday, 19 December 2023

At The Hague, The Netherlands