



Original: English

No. ICC-02/04-01/05

Date: 18 April 2024

PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor

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

Public

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'

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
Ms Leonie Von Braun

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
Ms Sarah Pellet

**The Office of Public Counsel
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Ms Marie O’Leary

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
ICC Bar Association

JUDGE ALTHEA VIOLET ALEXIS-WINDSOR, acting as a Single Judge on behalf of Pre-Trial Chamber III of the International Criminal Court,¹ issues this ‘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”’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 23 November 2023, following a request by the Prosecution to hold a hearing on the confirmation of charges against Mr Kony in his absence,² Pre-Trial Chamber II found that Mr Kony qualifies as a person who cannot be found within the meaning of article 61(2)(b) of the Rome Statute (the ‘Statute’), and that, under the prevailing circumstances, there is cause to hold a confirmation hearing against him, in his absence.³
2. On 4 March 2024, following a decision in relation to Mr Kony’s notifications of the charges levelled against him and the report of the Registry’s on its related notification efforts,⁴ Pre-Trial Chamber II instructed the Registry, *inter alia*, to commence the process of selection of counsel to represent the rights and interests of Mr Kony during the confirmation process and the confirmation hearing, should this take place in Mr Kony’s absence, and to report back on the progress of this process by no later than 25 March 2024 (the ‘4 March 2024 Decision’).⁵
3. On 25 March 2024, the Registry submitted its report pursuant to the 4 March 2024 Decision: (i) informing the Chamber that it has not received any valid powers of attorney from counsel who claim to represent Mr Kony in the proceedings before the

¹ On 12 March 2024, the Presidency reassigned the situation in Uganda, from Pre-Trial Chamber II to Pre-Trial Chamber III (Presidency, [Decision assigning judges to divisions and recomposing Chambers](#), ICC-02/04-01/05-485, public) and on 15 March 2024, Pre-Trial Chamber III designated Judge Althea Violet Alexis-Windsor as Single Judge responsible for carrying out the functions of the Chamber in the present situation ([Decision on the designation of a Single Judge](#), ICC-02/04-01/05-487, public).

² [Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence](#), 24 November 2022, ICC-02/04-01/05-446-Conf, confidential (public redacted version filed the same day, ICC-02/04- 01/05-446-Red).

³ [Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence](#), ICC-02/04-01/05-466, public.

⁴ [Order to initiate notification efforts and related outreach activities](#), ICC-02/04-01/05-475, public, with public [annex](#) (ICC-02/04-01/05-475-Anx).

⁵ [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, public, para. 15.

Court; (ii) proposing a competitive 8-step process to select the counsel for Mr Kony, and (iii) estimating that the overall process would take around six weeks after the authorisation of the Chamber (the ‘Registry Report’).⁶

4. On 28 March 2024, the Prosecution submitted its observations on the Registry Report, requesting the Chamber to reject the Registry’s proposed selection process and to instruct the Registry to select counsel to represent Mr Kony from ICC List of Counsel (the ‘Prosecution Observations’).⁷

5. On 4 April 2024, the ICC Bar Association (the ‘ICCBA’) submitted the ‘Request for leave to file submissions under Rule 103 of the Rules of Procedure and Evidence’ on the Registry Report and Prosecution Observations, proposing to explain why the process proposed by the Registry is significantly more likely to lead to effective legal representation than the alternative suggested in the Prosecution Observations, in light of both the features of the ICC List of Counsel and best practices adopted by other national and international jurisdictions where persons are unable to select their own legal representation.⁸

6. On 5 April 2024, the Office of Public Counsel for the Defence (the ‘OPCD’) submitted the ‘OPCD Request for Leave to Make Submissions on the Registry Report of 25 March 2024’) pursuant to regulation 77(4)(d) of the Regulations of the Court (the ‘Regulations’), proposing to 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 (the ‘OPCD Request’).⁹

II. DETERMINATION

7. The Single Judge notes that both the ICCBA and the OPCD seek leave to make submissions on the process of selection of counsel for Mr Kony proposed in the

⁶ [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, public, paras 16-20.

⁷ [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, public.

⁸ [Registry Transmission of a Request to submit as Amicus Curiae](#), 8 April 2024, ICC-02/04-01/05-493, public, with [Annex 1](#), public (Request dated 4 April 2024 and notified on 8 April 2024).

⁹ [ICC-02/04-01/05-492](#), public. The Prosecution informed the Chamber that it did not intend to respond to the ICCBA Request or the OPCD Request (see Email from Prosecution to Pre-Trial Chamber III, 8 April 2024, at 17:23).

Registry Report and the Prosecution Observations, pursuant to rule 103 of the Rules of Procedure and Evidence (the ‘Rules’) and regulation 77(4)(d) of the Regulations, respectively.

8. The Single Judge notes that rule 103(1) of the Rules confers discretion to invite or grant leave to an *amicus curiae* to provide observations on any issue deemed desirable for the proper interpretation of the case. As determined previously, the Single Judge will permit *amicus curiae* observations only on an exceptional basis.¹⁰ Similarly, regulation 77(4)(d) of the Regulations provides the Single Judge with the discretion to instruct or grant leave to the OPCD to make submissions ‘on behalf of the person entitled to legal assistance when defence counsel has not been secured [...]’

9. The Single Judge observes that Mr Kony has not designated legal representation and that the process of selection of counsel has not yet commenced.¹¹ Moreover, the Single Judge notes that the decision on the process of selection of counsel may have an impact on Mr Kony’s rights under the Statute, including his right to effective representation under article 67(b) and (d) of the Statute. Therefore, considering the exceptional and novel circumstances constituted by the selection of counsel to represent a suspect which did not appear before the Court, the Single Judge concludes that the ICCBA and OPCD proposed observations are desirable for the determination of the matter at hand.

10. Accordingly, the Single Judge grants the ICCBA Request and the OPCD Request and orders them to file submissions of no more than 5 pages each by no later than 22 April 2024.

¹⁰ Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, [Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests](#), 20 May 2021, ICC-02/05-01/20-398, para. 71. See also Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision on the Application by the Redress Trust to Submit Amicus Curiae Observations](#), 18 February 2014, ICC-01/04-02/06-259, para 3; Pre-Trial Chamber I, *Situation in the State of Palestine*, [Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence](#), 20 February 2020, ICC-01/18-63, para. 49.

¹¹ [Registry Report](#), paras 16-20.

FOR THE ABOVE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the ICCBA Request;

GRANTS the OPCD Request;

ORDERS the ICCBA and the OPCD to file their respective observations of no more than 5 pages each, by no later than 22 April 2024; and

INSTRUCTS the Prosecution to file its responses to the ICCBA observations and to the OPCD observations, if any, by no later than 24 April 2024.

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



Judge Althea Violet Alexis-Windsor

Single Judge

Dated this Thursday, 18 April 2024

At The Hague, The Netherlands