



Original: English

No. ICC-02/04-01/05

Date: 2 May 2024

PRE-TRIAL CHAMBER III

Before:

Judge Althea Violet Alexis-Windsor, Single Judge

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

THE PROSECUTOR v. JOSEPH KONY

Public

Decision on the Procedure for Appointing Counsel

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

The Office of the Prosecutor

Mr Karim Khan
Mr Mame Mandiaye Niang
Ms Leonie von Braun

Counsel for Mr Kony

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
for the Defence**

Ms Marie O’Leary

States Representatives

Amicus Curiae

International Criminal Court Bar Association

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Mr Juan Escudero

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

JUDGE ALTHEA VIOLET ALEXIS-WINDSOR, acting as Single Judge on behalf of Pre-Trial Chamber III of the International Criminal Court (the ‘ICC’ or ‘Court’),¹ issues this ‘Decision on the Procedure for Appointing Counsel’, pursuant to article 67(1)(d) of the Rome Statute (the ‘Statute’), rules 21(2) and 22 of the Rules of Procedure and Evidence (the ‘Rules’), and regulations 67, 73, and 76 of the Regulations of the Court (the ‘Regulations’).

I. PROCEDURAL HISTORY

1. On 4 March 2024, Pre-Trial Chamber II, *inter alia*, decided that the confirmation hearing in the present case will commence on 15 October 2024, and instructed the Registry to commence the process of selecting counsel to represent the rights and interests of Joseph Kony (‘Mr Kony’) (the ‘4 March 2024 Decision’).²
2. On 25 March 2024, the Registry submitted a report pursuant to the 4 March 2024 Decision (the ‘Registry Report’).³
3. On 28 March 2024, the Prosecution submitted its observations on the Registry Report (the ‘Prosecution Observations’).⁴
4. On 18 April 2024, the Single Judge granted the requests submitted by the Office of the Public Counsel for the Defence (the ‘OPCD’)⁵ and the International Criminal Court Bar Association (the ‘ICCBA’)⁶ to submit observations on the Registry Report.⁷

¹ [Decision on the designation of a Single Judge](#), 15 March 2024, ICC-02/04-01/05-487, public.

² [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, paras 12, 15.

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, public.

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, public.

⁵ [OPCD Request for Leave to Make Submissions on the Registry Report of 25 March 2024](#), 5 April 2024, ICC-02/04-01/05-492, public.

⁶ [Registry Transmission of a Request to submit as Amicus Curiae](#), 8 April 2024, ICC-02/04-01/05-493, with [Annex I](#), public.

⁷ [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, public.

5. On 22 April 2024, the OPCD and ICCBA submitted their observations on the Registry Report (the ‘OPCD Observations’ and ‘ICCBA Observations’).⁸
6. On 24 April 2024, the Prosecution responded to the OPCD Observations and the ICCBA Observations (the ‘Prosecution Response’).⁹

II. SUBMISSIONS

A. Registry Report

7. The Registry indicates that it has not received any valid power of attorney from counsel claiming to represent Mr Kony.¹⁰ It adds that, given that Mr Kony is considered to be a person who cannot be found, it cannot facilitate the selection of counsel for Mr Kony on the basis of his freedom of choice, verify with Mr Kony whether he already has a counsel, or present him with the full ICC List of Counsel.¹¹
8. The Registry, given the exceptional nature of *in absentia* hearings and the Registrar’s primary responsibility for the determination of matters relating to the qualification, appointment or assignment of counsel, proposes to follow a procedure mirroring the selection of counsel in relation to the legal representation of victims, namely issuing a call for expression of interest and setting up a panel to assess the applications.¹² It estimates that the overall process would take six weeks.¹³

B. Prosecution Observations

9. The Prosecution requests the Chamber to reject the Registry’s proposed process and to instruct the Registry to select counsel without further delay.¹⁴ In its view, this

⁸ [OPCD submissions on Registry’s proposed process for selection of counsel representing Mr Kony’s rights and interests](#), ICC-02/04-01/05-497, public; [ICCBA observations on the process of selecting counsel to represent the rights and interests of Joseph Kony during *in absentia* confirmation proceedings](#), ICC-02/04-01/05-496, public.

⁹ [Prosecution’s response to the OPCD’s and ICCBA’s observations on the process of selecting counsel to represent the rights and interests of Joseph Kony during *in absentia* confirmation proceedings](#), ICC-02/04-01/05-498, public.

¹⁰ [Registry Report](#), para. 16.

¹¹ [Registry Report](#), para. 17.

¹² [Registry Report](#), paras 18-19.

¹³ [Registry Report](#), para. 20.

¹⁴ [Prosecution Observations](#), paras 1, 9.

process risks delaying the proceedings.¹⁵ The Prosecution adds that the proposed process is legally not required.¹⁶ According to the Prosecution, regulation 76(1) of the Regulations does not require the Chamber to consider the wishes of the person concerned, and regulation 73(1) of the Regulations requires the Registry to select a counsel from the ICC List of Counsel.¹⁷ In the submission of the Prosecution, the Registry has sufficient legal basis to choose counsel from that list.¹⁸ It further argues that an example from the Special Tribunal for Lebanon (the ‘STL’) demonstrates that counsel were assigned to represent an absent suspect or accused without any further distinction in requirements as envisioned by the Registry in this case.¹⁹

C. OPCD Observations

10. The OPCD is of the view that the process proposed by the Registry seeks to address the need to respect Mr Kony’s right to be represented while he is not in a position to exercise the right of free choice of counsel.²⁰ According to the OPCD, the process proposed by the Registry appears to provide a template suitable to identify counsel who would have many of the necessary attributes to defend Mr Kony in these proceedings.²¹ The OPCD also suggests that the selection process could be shortened by following a model similar to recruitment for short-term appointment staff.²²

11. The OPCD further contends that Mr Kony is entitled to have adequate time and facilities to prepare his defence and, given the fact that counsel will not be in a position to receive instructions as well as the breadth of charges and evidence indicated, the remaining time before the scheduled confirmation hearing will unlikely be enough.²³

12. Lastly, the OPCD avers that a methodical process to assign an effective counsel is not a measure of ‘undue’ delay given the significance of these proceedings.²⁴ It adds that, if the date for the confirmation hearing were to be maintained, the selection process

¹⁵ [Prosecution Observations](#), para. 2.

¹⁶ [Prosecution Observations](#), para. 3.

¹⁷ [Prosecution Observations](#), para. 3.

¹⁸ [Prosecution Observations](#), paras 4-7.

¹⁹ [Prosecution Observations](#), para. 8.

²⁰ [OPCD Observations](#), paras 5-7.

²¹ [OPCD Observations](#), paras 7-8.

²² [OPCD Observations](#), para. 9.

²³ [OPCD Observations](#), paras 10-12.

²⁴ [OPCD Observations](#), para. 14.

should be shortened to the extent possible, but that the best option would be to temporarily vacate the start date of the confirmation hearing.²⁵

D. ICCBA Observations

13. The ICCBA supports the approach proposed by the Registry.²⁶ The ICCBA is of the view that the information collected by the Registry for the ICC List of Counsel is general in nature and will not touch upon all specific experience which may be relevant to represent Mr Kony in *in absentia* confirmation proceedings.²⁷ It adds that applicants to the STL List of Counsel were asked questions on their experience and appreciation of the practical and ethical challenges involved in representing clients in their absence.²⁸ The ICCBA also recommends that the Registry involve the ICCBA's President in its selection panel and the development of the criteria to be used in the selection process.²⁹

14. According to the ICCBA, the principle of expedition cannot be allowed to override other essential defence rights, including the right to effective representation.³⁰ The ICCBA adds that this is not a case where the suspect is in custody awaiting trial, and that the Prosecution could have made its application for an *in absentia* confirmation hearing many years before.³¹

15. Lastly, the ICCBA contends that the Registry's proposal maximises the chances of ensuring diversity and opportunity among private lawyers seeking access to work at the Court, including those with no previous experience of the Court.³²

E. Prosecution Response

16. The Prosecution responds that, should the Single Judge be minded to adopt the Registry's proposed process, the process should be completable within three weeks.³³

²⁵ [OPCD Observations](#), paras 15-16.

²⁶ [ICCBA Observations](#), paras 3-4.

²⁷ [ICCBA Observations](#), paras 7-8.

²⁸ [ICCBA Observations](#), para. 9.

²⁹ [ICCBA Observations](#), para. 10.

³⁰ [ICCBA Observations](#), paras 11-12.

³¹ [ICCBA Observations](#), paras 13-14.

³² [ICCBA Observations](#), paras 15-18.

³³ [Prosecution Response](#), paras 2-3.

17. The Prosecution also contends that the OPCD request to vacate the date of the confirmation hearing should be dismissed.³⁴ According to the Prosecution, the notification of the hearing date is an element of article 61(2)(b) of the Statute and the necessary outreach activities for this specific date have only just been concluded by the Registry.³⁵ It adds that counsel would still have sufficient time to prepare as the Prosecution will rely on approximately 6,178 items of evidence amounting to around 64,954 pages, disclosure notes will be used to identify any potentially exonerating information within material classified as incriminating, and the Prosecution's material will be packaged under specific disclosure themes.³⁶

III. DETERMINATION

18. The Single Judge notes that, pursuant to rule 21(2) of the Rules, a person defending himself or herself through counsel has the right to freely choose his or her counsel from the ICC List of Counsel meeting the relevant criteria, or other counsel who meets the required criteria and is willing to be included in the ICC List of Counsel. Persons entitled to legal assistance are frequently represented by counsel appointed from the ICC List of Counsel in proceedings before the Court. In principle, this process is entirely suitable to implement the right to conduct a defence through counsel of a person's choosing pursuant to article 67(1)(d) of the Statute.

19. However, the present proceedings are distinguishable from a regular confirmation procedure in that the suspect is absent. *In absentia* proceedings involve distinct considerations in connection with the legal representation of the person concerned. Such considerations, include, in particular, the lack of instructions by the suspect to counsel and the associated effects on defining a legal strategy by counsel. Considering that the qualifications to be met by counsel pursuant to rule 22 of the Rules and regulation 67 of the Regulations do not specifically reference experience in *in absentia* proceedings, coupled with the fact that *in absentia* proceedings are exceptional within the legal framework of the Court, such expertise cannot be presumed by virtue of inclusion in the ICC List of Counsel. In addition, the present procedure will assess

³⁴ [Prosecution Response](#), para. 4.

³⁵ [Prosecution Response](#), para. 4.

³⁶ [Prosecution Response](#), para. 5.

whether there are substantial grounds to believe that Mr Kony bears individual criminal responsibility for the crimes set forth in the Document Containing the Charges so as to possibly warrant a full-fledged trial. This means that it is imperative to ensure that counsel has the required qualifications to effectively represent Mr Kony in these particular circumstances. Accordingly, the Single Judge finds that these two considerations, namely the exceptional nature of *in absentia* confirmation proceedings and the need to ensure effective assistance, warrant the procedure proposed by the Registry.

20. The Single Judge is not persuaded by the Prosecution's argument that the process proposed by the Registry is not legally permissible. First, whether or not Mr Kony needs to be consulted under regulation 76(1) of the Regulations is not determinative.³⁷ This provision stipulates that '[a] Chamber [...] may appoint counsel in the circumstances specified in the Statute, Rules and these Regulations or where the interests of justice so require'. Its broad wording allows for the exceptional nature of *in absentia* proceedings to be considered in determining the procedure to be followed for the appointment of counsel. Second, the fact that regulation 73(1) of the Regulations mandates the Registrar to identify counsel willing to act as duty counsel does not establish that the Registrar must necessarily appoint counsel from the ICC List of Counsel.³⁸ This aspect of regulation 73(1) of the Regulations merely serves to ensure that those willing to act as duty counsel are identified. It cannot be read as prescribing the manner in which counsel is to be appointed. Lastly, whereas the suitability of the regular procedure of appointing counsel from the ICC List of Counsel is not in question,³⁹ it does not, as mentioned, specifically take into account expertise in *in absentia* proceedings.

21. Thus, the Single Judge is of the view that neither the provisions invoked by the Prosecution nor any other provision dealing with the appointment of counsel mandate that counsel must only be appointed from the ICC List of Counsel. Rather, the regulatory framework bestows discretion on the Registrar and the Chamber in defining the most appropriate procedure. As set out above, in view of the importance of the legal

³⁷ [Prosecution Observations](#), para. 3.

³⁸ [Prosecution Observations](#), para. 3.

³⁹ [Prosecution Observations](#), paras 4-7.

representation of a suspect in *in absentia* proceedings, it is critical to ensure that the procedure to be followed takes this aspect into account.

22. The Single Judge does not consider that the STL decision invoked by the Prosecution supports the proposition that, in the present matter, counsel must be appointed from the ICC List of Counsel.⁴⁰ The STL Head of Defence Office considered that ‘no provision of the Statute, the Rules or the Directive provides that the lead counsel must fulfil requirements in addition to those mentioned in Rule 59 (B) of the [STL] Rules in order to be able to be assigned to represent accused tried *in absentia*’, but that ‘the [STL] Head of Defence Office has nevertheless deemed it appropriate to consider [specific] criteria when exercising this power in order to be satisfied that the accused tried *in absentia* receive effective legal representation of the highest standard’, including the ‘[a]greement by counsel to represent an accused in a trial *in absentia*’.⁴¹ Accordingly, this decision demonstrates that, even when trials *in absentia* are specifically contemplated by a particular legal framework,⁴² careful consideration is required in relation to the appointment of counsel. In any event, the appointment of counsel in the present proceedings must, first and foremost, be assessed on the basis of the regulatory framework of the Court. Therefore, in the context of the legal framework of ICC proceedings, the Single Judge finds that the procedure proposed by the Registry is appropriate because a confirmation procedure *in absentia* constitutes an exception and such expertise is not specifically assessed in respect of the ICC List of Counsel.

23. At the same time, the Single Judge is mindful of the need to ensure that the present proceedings are conducted expeditiously in light of the fact that a certain delay could result from the procedure outlined by the Registry.⁴³ However, given the significance of ensuring the fairness of the present procedure, the issue of a possible delay is not determinative for the specific purposes of the matter under consideration.

24. In view of the foregoing, the Single Judge is of the view that, on balance, the advantages in terms of fairness in following the procedure outlined by the Registry

⁴⁰ [Prosecution Observations](#), para. 2.

⁴¹ Special Tribunal for Lebanon, Head of Defence Office, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, [Assignment Of Counsel For The Proceedings Held In Absentia Pursuant To Rule 106 Of The Rules](#), STL-11-01/PT/PTJ, 2 December 2012, paras 12, 14.

⁴² S/RES/1757 (2007), [Statute of the Special Tribunal for Lebanon](#), article 22.

⁴³ [Prosecution Observations](#), para. 2.

merit the adoption of the procedure. Thus, without prejudice to the procedure employed in relation to the appointment of counsel in proceedings conducted in the presence of the suspect, this procedure strikes an appropriate balance between fairness and expeditiousness in the specific circumstances of the present proceedings. It will allow the Registry to consider the applicant's general competences for the purposes of the present proceedings, including those set forth in rule 22 of the Rules and regulations 67 and 73 of the Regulations, namely experience, expertise, geographical proximity, and languages, as well as their specific expertise in relation to *in absentia* proceedings.

25. The Single Judge has further noted the suggestions made by the Prosecution, OPCD and ICCBA as to different aspects of the procedure to be followed by the Registry.⁴⁴ However, the manner in which the procedure is to be implemented falls within the Registry's discretion. The Single Judge does not find it necessary to provide any specific directions to the Registry in this regard. Moreover, the OPCD's proposal to vacate the date of the confirmation hearing exceeds the scope of the authorised submissions,⁴⁵ and this matter shall not be addressed any further.

26. Accordingly, for the foregoing reasons, the Single Judge authorises the Registry to implement the procedure as described in the Registry Report within, at the most, six weeks from the date of the present decision. The Single Judge further directs the Registry to finalise all formalities related to the appointment of counsel, including providing counsel with access to the relevant materials, within the shortest possible time following the completion of the aforementioned procedure. In addition, the Registry shall immediately provide the present decision and the specific materials set out hereunder to counsel upon his or her appointment.

27. Furthermore, noting the matters pending before the Chamber, counsel for Mr Kony, once appointed, shall:

- a. provide observations, if any, on the: (i) '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); (ii) '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); and (iii) 'Registry's Report on the

⁴⁴ [OPCD Observations](#), paras 7-9; [ICCBA Observations](#), paras 5, 10; [Prosecution Response](#), paras 2-3.

⁴⁵ [OPCD Observations](#), paras 12, 16.

implementation of the “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-02/04-01/05-491), by no later than ten working days following his or her official appointment;

b. provide a response, if any, to the: (i) ‘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); and (ii) ‘Victims’ response to Prosecution’s requests for the adoption of certain protocols and an *in situ* hearing in Uganda (No. ICC-02/04-01/05-490)’ (ICC-02/04-01/05-494), by no later than twenty working days following his or her official appointment; and

c. provide a response, if any, to the: (i) ‘Victims’ Concerns on the Document Containing the Charges’ (ICC-02/04-01/05-480); (ii) ‘Prosecution Response to Victims’ Concerns on the Document Containing the Charges’ (ICC-02/04-01/05-482); (iii) ‘Application for recognition of the status of victims in the case of *The Prosecutor v. Joseph Kony* to the victims participating in the case of *The Prosecutor v. Dominic Ongwen* and matters related to the participation of victims in the proceedings’ (ICC-02/04-01/05-483); and (iv) any related submissions that may be filed in the meantime, by no later than thirty working days following his or her official appointment.

28. Further submissions by the Prosecution and/or the Office of Public Counsel for Victims on the aforementioned matters shall not be entertained.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

AUTHORISES the Registry to implement the procedure as described in the Registry Report within, at the most, six weeks from the date of the present decision;

ORDERS the Registry to finalise all formalities related to the appointment of counsel within the shortest possible time following the completion of the procedure as described in the Registry Report;

ORDERS the Registry to immediately provide the present decision and the specific materials enumerated in paragraph 27 of the present decision to counsel upon his or her appointment; and

ORDERS counsel for Mr Kony, once appointed, to provide the observations and responses, if any, enumerated in paragraph 27 of the present decision.

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



Judge Althea Violet Alexis-Windsor

Single Judge

Dated this Thursday, 2 May 2024.

At The Hague, The Netherlands.