

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **09/07/2024**

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 with confidential Annex A

**Kony Defence Request for Reclassification of ICC-02/04-01/05-459-SECRET-Exp and
ICC-02/04-01/05-2047-SECRET-Exp**

Source: Defence for Mr Joseph Kony

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

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I. INTRODUCTION

1. The first task designated to the Defence in this case is to provide observations, if any, on the Decisions which held that a confirmation hearing can be conducted in Mr Kony's absence.¹ Central to this question, is the extent and efficacy of the measures that have been taken to locate Mr Kony, to inform him of the charges, and to inform him that a hearing will be held on the question of whether or not to confirm them.

2. One of these Decisions is the publicly available 'Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence' of 23 November 2023. In this Decision, the Pre-Trial Chamber, in its previous composition ("Chamber"), relies on a 'Registry Report on the measures to locate Joseph Kony', which is dated 30 March 2023 ("Registry Report").² It also cites to "an amended report on the measures taken to locate Mr Kony and inform him of the existence of the Arrest Warrant", which is dated 8 May 2023 ("Amended Registry Report").³ Both documents are classified as 'SECRET-Exp'.

3. On Friday 5 July 2024, the Single Judge varied the time limits for the Defence observations. Relevantly, the Single Judge directed the Defence to file any reclassification requests as soon as possible to avoid any additional delay.⁴ On Monday morning, 8 July 2024, the Defence asked the Registry to confirm whether the Registry Report could be reclassified to facilitate Defence access, hoping that the Registry's agreement would expedite this process. The Registry responded that reclassification was a matter for the Chamber and that it had provided the Chamber with justification for the classification of the documents it has filed.⁵

¹ Decision on the Procedure for Appointing Counsel, ICC-02/04-01/05-499, 2 May 2024, public, para. 27: "...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) ('Decisions'); and (iii) 'Registry's Report on the 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)."

² 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, 23 November 2023, public, para. 8, citing Registry's Report on the measures to locate Joseph Kony, 30 March 2023, ICC-02/04-01/05-459- SECRET-Exp.

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, 23 November 2023, public, para. 10, citing: Registry's Report on the measures to locate Joseph Kony and notify him of the Warrant of Arrest, 8 May 2023, ICC-02/04-01/05-2047-SECRET-Exp.

⁴ Decision on the 'Defence Request for Variation of Deadlines and for a Status Conference', ICC-02/04-01/05-508, 5 July 2024, public, para. 14.

⁵ Annex A.

4. For the reasons set out below, without access to the Registry Report and the Amended Registry Report, any Defence observations on the sufficiency of the measures they describe will be partial and limited. Perhaps more importantly, the novelty of this procedure and the public interest it has generated, makes it critical for the Court to avoid the appearance that the process is being conducted behind closed doors and away from any meaningful scrutiny. As such, the Defence files the present motion for reclassification of the Registry Report and Amended Registry Report.

II. PROCEDURAL HISTORY

5. On 23 November 2023, 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”,⁶ in which it instructed “the Registry to submit a plan indicating the outreach activities and notification efforts it would pursue to inform Mr Kony of the charges against him, if the Prosecution files a DCC [Document Containing the Charges] before the Chamber, within four weeks of the present decision.”⁷

6. On 19 December 2023, the Registry proposed a plan on proposed outreach activities and a course of action to notify the suspect of the DCC (“Registry’s Proposed Plan”).⁸

7. On 19 January 2024, the Prosecution submitted the document containing the charges (“DCC”).⁹

8. On 26 January 2024, the Chamber issued the ‘Order to initiate notification efforts and related outreach activities’, in which it instructed the Registry to use the DCC and a summary of the DCC provided by the Chamber to initiate its proposed plan on notification efforts and outreach activities, and to take all reasonable steps to inform Mr Kony of the charges against him as described in the DCC.¹⁰

⁶ 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, 23 November 2023.

⁷ *Id.*, para. 57, p. 20.

⁸ Registry’s Proposed Plan on Outreach Activities and Notification Efforts, ICC-02/04-01/05-473 + Anxs, 19 December 2023.

⁹ Document Containing the Charges, ICC-02/04-01/05-474, 19 January 2024.

¹⁰ Order to initiate notification efforts and related outreach activities, ICC-02/04-01/05-475, 26 January 2024, p. 11.

9. On 23 February 2024, the Registry filed its ‘Report on the implementation of Pre-Trial Chamber II’s “Order to initiate notification efforts and related outreach activities”’,¹¹ in which it detailed the outreach activities and notification efforts undertaken to inform the suspect of the DCC, and joined the notification of the request for assistance sent to the Republic of Uganda and the response from the authorities of Uganda.¹²

10. On 4 March 2024, the Chamber issued the Second Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case, in which it instructed the Registry to “initiate notification efforts and outreach activities in respect of the date for the commencement of the confirmation of charges hearing” and to report on the matter within four weeks of the decision’s notification.¹³

11. On 12 March 2024, the Presidency reassigned the situation in Uganda, from Pre-Trial Chamber II to Pre-Trial Chamber III.¹⁴

12. On 28 March 2024, the Registry submitted its Report on the implementation of the Second Decision,¹⁵ detailing its outreach activities and notification efforts in respect of the date for the commencement of the confirmation of charges hearing.¹⁶

13. On 2 May 2024, the Single Judge of Pre-Trial Chamber III set deadlines for the newly appointed counsel for Mr Kony.¹⁷

14. On 21 June 2024, Peter Haynes KC was appointed as Counsel to represent the rights and interests of Joseph Kony during the confirmation proceedings.¹⁸ Mr Haynes’ appointment became public on 24 June 2024.¹⁹

¹¹ Corrected version of “Registry’s Report on the implementation of Pre-Trial Chamber II’s “Order to initiate notification efforts and related outreach activities” dated 26 January 2024 (ICC-02/04-01/05-475)” 23 February 2024, ICC-02/04-01/05-479, ICC-02/04-01/05-479-Corr + Anxs, 26 February 2024.

¹² *Id.*, Annexes I, II, III and IV.

¹³ 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.

¹⁴ Decision assigning judges to divisions and recomposing Chambers, ICC-02/04-01/05-485, 12 March 2024, p. 7.

¹⁵ Registry’s Report on the 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 + Anxs, 28 March 2024.

¹⁶ *Id.* Annexes I and II.

¹⁷ Decision on the Procedure for Appointing Counsel, ICC-02/04-01/05-499, 2 May 2024, public, para. 27.

¹⁸ Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony, ICC-02/04-01/05-503, 24 June 2024, public, with confidential annex II and public annexes I, III and IV.

¹⁹ *Id.*

15. On 28 June 2024, the Defence submitted the “Defence Request for Variation of Deadlines and for a Status Conference”, in which it, *inter alia*, informed the Single Judge that access to some of the underlying material would require the filing and adjudication of requests for reclassification.²⁰

16. On 5 July 2024, the Single Judge rendered its “Decision on the submitted the ‘Defence Request for Variation of Deadlines and for a Status Conference’”, directing the Defence to file the necessary reclassification requests as soon as possible to avoid any additional delay.²¹

III. APPLICABLE LAW

17. Article 64(7) of the Rome Statute stipulates that: “the trial shall be held in public”. This statutory requirement has been interpreted as setting publicity of hearings and proceedings as the rule. Relatedly, the starting point is that all parties and participants have access to the filings and documents which comprise a case file. Resort to closed sessions or confidential filings is the exception to the right to a public hearing, requiring special circumstances before being implemented.

18. Trial Chamber II in the *Katanga* case has addressed the importance of the publicity of proceedings, and was explicit that: “the public nature of proceedings is a fundamental principle which, furthermore, is enshrined by Article 64(7) of the Statute. This principle constitutes, for the Defence, a safeguard, an essential safeguard. It contributes to preserving the trust that all those subject to the law have to have in justice, and it is one of the best means of controlling the way in which such justice is rendered.”²²

19. Given that access of all parties and participants is the general rule, a party must demonstrate that restricted classification is necessary and proportional, not vice versa.²³ Single Judges have previously reviewed *ex parte* decisions and orders of the Pre-Trial Chamber and

²⁰ Defence Request for Variation of Deadlines and for a Status Conference, ICC-02/04-01/05-504, 28 June 2024, para. 16.

²¹ Decision on the submitted the ‘Defence Request for Variation of Deadlines and for a Status Conference’ ICC-02/04-01/05-508, 5 July 2024, para. 14.

²² *Prosecutor v. Katanga & Ngudjolo*, Transcript, ICC-01/04-01/07-T-189-ENG ET WT, 20 September 2010, p. 10.

²³ *Prosecutor v. Gbagbo*, Second decision on objections concerning access to confidential material on the case record, ICC-02/11-01/15-150, 21 July 2015, para. 11.

issued *inter partes* confidential versions.²⁴ Only where *ex parte* classification is strictly required and justified should it remain on the case record.²⁵

IV. SUBMISSIONS

20. Prior to the Defence being involved in these proceedings, the Chamber determined that the conditions of Article 61(2)(b) of the Statute were satisfied, and that a confirmation hearing could be held in Mr Kony's absence.²⁶ Namely, that Mr Kony was a person who could not be found, and that all reasonable steps had been taken to secure his appearance before the Court and to inform him of the charges and that a hearing to confirm those charges would be held.

21. In reaching this conclusion, the Chamber relied on the Registry Report, which it describes as setting out "the efforts taken to locate Mr Kony and secure his arrest".²⁷ The Chamber then cites to the Amended Registry Report, which is described as a report "on the measures taken to locate Mr Kony and inform him of the existence of the Arrest Warrant".²⁸ Both the Registry Report and the Amended Registry Report are classified as 'SECRET-Exp'.

22. Despite this classification, the Chamber describes the content of this Amended Registry Report in some detail in its public decision, demonstrating that there are sections of the Amended Registry Report which are suitable for the public domain. The Chamber states, for example:²⁹

The [Amended Registry Report] details the measures taken since 2005 to execute the Arrest Warrant and inform Mr Kony of its existence and the allegations contained therein, as well as to locate and to secure his appearance before the Court. These include cooperation and diplomatic efforts with relevant States, public information campaigns, outreach activities and communication attempts through intermediaries.

Outreach activities, such as the dissemination and publication of the Arrest Warrant in Acholi and in English and press releases concerning the current case, issued by the Registry and distributed to journalist in different countries since October 2005, appear suitable to enhance the likelihood of getting information on Mr Kony's whereabouts. In addition, measures aimed at informing Mr Kony of the existence and content of the Arrest

²⁴ *Prosecutor v. Al Hassan*, First order on the classification of decisions initially issued *ex parte* by Pre-Trial Chamber I, ICC-01/12-01/18-701, 31 March 2020, para. 3.

²⁵ *Prosecutor v. Al Hassan*, Second order on the classification of decisions initially issued *ex parte* by Pre-Trial Chamber I, ICC-01/12-01/18-738, 14 April 2020, para. 6; *See also Prosecutor v Ntaganda*, Decision on Defence request in relation to *ex parte* filings, ICC-01/04-02/06-2451, 11 December 2019, para. 9.

²⁶ 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, 23 November 2023, public.

²⁷ *Id.*, para. 8.

²⁸ *Id.*, para. 10, citing: Registry's Report on the measures to locate Joseph Kony and notify him of the Warrant of Arrest, 8 May 2023, ICC-02/04-01/05-2047-SECRET-Exp.

²⁹ 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, 23 November 2023, public, paras 42, 43, citing repeatedly to the Amended Registry Report.

Warrant would presumably have allowed him to make an informed decision as to whether surrender himself and appear before the Court to participate in the proceedings.

Based on the information before it, the Chamber is satisfied that all reasonable steps were taken to secure Mr Kony's appearance. Given Mr Kony's evident unavailability, the first requirement of article 61(2)(b) of the Statute is met.

23. These passages demonstrate that the Registry Report and the Amended Registry Report were central to the Decisions on which the Defence is now being asked to provide observations. As a starting point, therefore, any Defence observations on the Decisions would be limited and partial without access to the underlying material which informed them. It would be difficult for the Defence to provide any meaningful observations on the sufficiency of the measures taken to locate Mr Kony or to inform him of the charges, without having access to information about what those efforts were.

24. In addition, the Registry Report and the Amended Registry Report were designated as 'SECRET-Exp' in different circumstances. Namely, these designations were made before a Defence Counsel was appointed, who is subject to the applicable Code of Conduct and ethical duties regarding confidentiality. They were made before the Chamber itself summarised aspects of the Amended Registry Report in the public domain. And before the Defence was ordered to provide observations which logically require their review. A question therefore arises whether the SECRET-Exp classification remains strictly required and proportional in the present circumstances.³⁰

25. When asked whether it agreed to reclassification, the Registry responded that it "has provided justifications for the documents it has filed".³¹ This response demonstrates that the Registry is continuing to rely on the justification provided in March and May 2023, and has not performed the exercise of re-assessing whether this extraordinary classification continues to be justified in July 2024, when considered against the changed circumstances.

26. Given these changed circumstances, and given the obligation now being placed on the Defence to provide observations, fairness and transparency mitigate in favour of Defence access to the Registry Report and Amended Registry Report. This reclassification will put the Defence in a position to provide meaningful and full observations on this critical question of whether an

³⁰ *Prosecutor v. Gbagbo*, Second decision on objections concerning access to confidential material on the case record, ICC-02/11-01/15-150, 21 July 2015, para. 11.

³¹ Annex A.

in absentia confirmation process can be justified. The novelty of this procedure at the ICC, the public interest in potential *in absentia* proceedings at the ICC, and the very recent inclusion of the Defence in this process, all weigh in favour of reclassification, which will also have the benefit of avoiding any appearance that the process is being conducted out the public eye, and away from any meaningful scrutiny.

27. In addition, the Defence was only made aware of the Registry Report and the Amended Registry Report through their reference in publicly available decisions. If there are previous or subsequent Registry Reports or other material relevant to the measures taken to locate Mr Kony and inform him of the charges and the proposed confirmation hearing, which are also currently designated as ‘SECRET-Exp’, the Defence also asks for their reclassification on the same basis.

28. The reclassification of the Registry Report and Amended Registry Report as public, would facilitate the Defence filing public observations, to the extent possible. If a confidential filing is justified, the Defence asks that a public redacted version is also prepared and filed. If the Registry Report and Amended Registry Report contain specific pieces of information for which an *ex parte* classification is justified and proportional, redactions could be applied to a confidential version to the extent that is strictly necessary.

29. Given the fact that the Defence is required to submit its observations by 15 August 2024, the Single Judge is invited, moreover, to impose abbreviated time limits upon the parties and participants to respond to the requests herein.

V. RELIEF REQUESTED

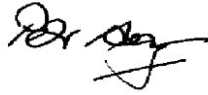
30. For the reasons set out above, the Defence respectfully requests that the Single Judge:

ORDER the reclassification of the Registry Report and Amended Registry Report;

ORDER the reclassification of any other previous or subsequent reports or material which address the question of measures taken to locate Mr Kony and inform him of the charges and the proposed confirmation hearing; and

IMPOSE abbreviated time limits upon the parties and participants to respond to the requests herein.

The whole respectfully submitted.



Peter Haynes KC
Counsel for Joseph Kony

The Hague, The Netherlands,
Tuesday, July 09, 2024