

# **ANNEX I**

## **PUBLIC**

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **4 April 2024**

**PRE-TRIAL CHAMBER III**

**Before: Judge Althea Violet Alexis-Windsor, Single Judge**

**SITUATION IN UGANDA**

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

**Public**

**Request for leave to file submissions under Rule 103 of the Rules of Procedure and Evidence**

**Source: ICC Bar Association**

**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**

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Paolina Massidda  
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***Amicus Curiae* Representatives**

**REGISTRY**

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**Registrar**

Osvaldo Zavala Giler

**Counsel Support Section**

Juan Escudero

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## I. INTRODUCTION

1. This request for leave is submitted pursuant to Rule 103 of the Rules of Procedure and Evidence (“RPE”) by the International Criminal Court Bar Association (“ICCBA”). It requests leave for the ICCBA to file submissions concerning the matters raised by the Registry Report filed on 25 March 2024,<sup>1</sup> (“Registry Report”) and the Prosecution’s observations thereon which were filed on 28 March 2024 (“Prosecution Observations”).<sup>2</sup>

## II. THE ICCBA

2. The ICCBA was established in 2016 and is registered as a non-profit foundation in the Netherlands. It is independent of the Court and States Parties. It is primarily funded by member subscriptions. In 2019, the ICCBA was officially recognised by the Assembly of States Parties as an independent representative body in accordance with Rule 20(3) of the RPE.<sup>3</sup>
3. The ICCBA serves as a collective voice for the independent lawyers who represent defendants, victims and others before the ICC. Its membership is drawn from the ICC’s List of Counsel, as well as the more junior jurists who serve as support staff on counsel teams. The ICCBA is the only organisation which brings together the expertise and experience of private lawyers who are qualified to practice before the ICC. In this role it engages with the organs of the Court, the Assembly of States Parties and others to represent external counsel and their teams.
4. In addition to its role addressing questions of legal representation, the ICCBA has an important role to play on substantive questions of defence and victims’ rights before the Court. In this respect it is the ICC equivalent of the Association of Defence Counsel practising before the International Courts and Tribunals (“ADC-ICT”). That body was initially established at the instigation of ICTY judges in recognition of the need for a body which could make collective representations for defence counsel involved in all cases at the ICTY.<sup>4</sup> This reflects the fact that, while the Prosecution is carried out by one unified

<sup>1</sup> [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, 25 March 2024.

<sup>2</sup> [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, 28 March 2024.

<sup>3</sup> [ASP Resolution ICC-ASP/18/Res.6](#), 6 December 2019, paras. 78-81.

<sup>4</sup> See ICTY Press Release, ‘Judges’ Plenary Session adopt reforms concerning Defense Counsel Teams’, 19 July 2002, available at: <https://www.icty.org/en/press/judges-plenary-session-adopt-reforms-concerning-defense-counsel-teams>.

entity and therefore able to speak to matters in a Court-wide way, that is not the case for the defence (or, at the ICC, for victims).

5. This role of the ICCBA means that it is uniquely placed to assist the Court on certain matters. These include both (a) questions concerning legal representation and (b) questions concerning core defence and victims' rights.
6. In this regard the ICCBA is similar to the ADC-ICT. The provision of *amicus curiae* submissions has been an important function of the ADC-ICT since its founding, with such submissions frequently welcomed by the judges of the *ad hoc* tribunals.
7. The ICCBA emphasizes that any submissions made by it are produced entirely independently of counsel and support staff acting in the case in question.

### III. SUMMARY OF PROPOSED SUBMISSIONS

8. The Registry Report sets out a proposed approach for selecting counsel to represent the interests of Mr Kony during the *in absentia* confirmation of charges hearing. It proposes to adopt an open and competitive selection process, which is "transparent, objective and fair", building on successful past Registry practice in the selection of common legal representatives of victims.<sup>5</sup>
9. The Prosecution Observations opposes this approach, arguing that the Registry may simply choose a counsel, without process, from the list of some 900 persons qualified to appear before the Court, in order to avoid delays.
10. The matter in dispute between the Registry and the Prosecution is one which goes fundamentally to the ICCBA's mandate. It concerns the right to effective legal representation, and the question of how that can be assured where an accused person is not in a position to select his own legal representative. It also concerns how that question interacts with arguments about delay, a matter on which it is the defence and victims (rather than the Prosecution) whose interests are principally affected. And finally, it concerns questions which affect the effective functioning of the Court's private legal professionals: their ability to fairly and equitably access opportunities to appear before the Court.
11. In the event that leave is granted, the ICCBA would make submissions concerning the following matters.

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<sup>5</sup> Registry Report, para. 18.

### ***III.1 Effective representation is best served by an open and competitive process***

12. The ICCBA believes that ensuring effective legal representation for an accused person is not only in the interests of that accused, but also advances the credibility and legitimacy of the Court as a whole. The Prosecution Observations overlook the reasons why the open and competitive process proposed by the Registry Report is essential to ensuring effective representation.
13. If granted leave, the ICCBA will 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. These submissions will include submissions based on the ICCBA's experience, including:
  - (a) Explanations of how the ICC's List of Counsel operates, and why this renders the Prosecution's proposed approach less legitimate and less effective; and
  - (b) Best practice before other institutions (international and national) where a person is unable to select their own legal representation.

### ***III.2 Victim and defence rights not to be subject to undue delay in proceedings exist but should not override the need to ensure quality representation***

14. The ICCBA recognises and strongly supports the imperative for legal proceedings to occur without undue delay. Indeed, the right to be tried without undue delay is a *defence* right, and also a fundamental interest of *victims*. Defence and victims' counsel within the ICCBA are acutely aware of the need to avoid unnecessary delay.
15. If granted leave, the ICCBA will make submissions on why this principle of expedition cannot be allowed to override other essential defence and victims' rights, including the right to effective representation, especially given the Registry's estimate that the envisaged selection process would only take about six weeks.

### ***III.3 An open and competitive process is necessary to ensure a diverse and representative legal profession at the Court and avoid negative perceptions***

16. Private lawyers play an essential part in the functioning of the Court, by representing defendants, victims, witnesses, States and *amici* in the Court's proceedings. Just as the Court seeks to ensure diversity in its other key office-holders, the ICCBA believes that it should also strive to ensure diversity and inclusion among those private lawyers able to access work at the Court, which likewise strengthens the efficacy and legitimacy of the Rome Statute system.

17. If granted leave, the ICCBA will make submissions on why an open and transparent process, such as that proposed by the Registry Report is the path most likely to enable as wide a range of qualified lawyers as possible to be considered for the role of defence counsel, regardless of their gender, nationality, or existing connections with the Court. Just as importantly, the ICCBA will make submissions on how an open and transparent process is the only means by which to avoid harmful *perceptions* that the Court exercises favouritism or preferential treatment among a small circle of existing practitioners. These submissions will make reference to experience to date in the selection of counsel at this Court and others.

#### IV. REQUEST FOR LEAVE

18. In light of the foregoing, the ICCBA respectfully requests that the Single Judge to:

**GRANT LEAVE** to the ICCBA to file submissions on the above identified matters pursuant to Rule 103 of the RPE.

Respectfully submitted,



Marie-Hélène Proulx  
President of the ICCBA

Dated this 4<sup>th</sup> day of April 2024  
at The Hague

Word count: 1310