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Pénale
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**International
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PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Single Judge

SITUATION IN UGANDA

THE PROSECUTOR v. JOSEPH KONY

Public

**Prosecution's Response to Defence Request for Reclassification
of two Registry Reports (ICC-02/04-01/05-509)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution concurs with the “Kony Defence Request for Reclassification of ICC-02/04-01/05-459-SECRET-Exp and ICC-02/04-01/05-2047-Secret-Exp”¹ (“Request”), insofar as information included in the two Registry reports, as well as corresponding Annexes should be made available to the Defence. The Prosecution recognises that a balance needs to be struck between the Defence’s right to access the information, pursuant to Rule 77 of the Rules and the necessity to protect sensitive sources, tracking of fugitive strategy, including cooperation with state partners, pursuant to articles 54 (3), 68, 72, 93 of the Statute and rule 81(2), 81(3) and 81(4) of the Rules. Thus, the Prosecution submits that the two reports and corresponding annexes should be made available by way of *confidential redacted versions*, with limited redactions applied as set out below and not be made available without any redactions by way of reclassification, as *confidential* to the Defence.

II. SUBMISSIONS

2. The Prosecution normally refrains from advising on the classification of information in Registry’s submissions to the Chamber. However, in this particular case, the Prosecution liaised with and provided its views to the Registry in relation to both Reports and corresponding annexes after the Request was submitted, as information regarding tracking of fugitives is a shared responsibility between Prosecution and Registry through the Suspects at Large Working Group (“SALWG”). SALWG collects and shares information on the movements and localization of persons subject to arrest warrants.

3. SALWG’s efforts to locate and arrest Mr Kony are ongoing to ensure his arrest and surrender to the Court. The Registry routinely provides updates to the Chamber and can continue to do so concerning the work and progress of SALWG in relation to

¹ ICC-02/04-01/05-509 (“Request”).

tracking Mr Kony. Accordingly, the Prosecution will confine its response to the Request by setting out in general terms what it considers the necessary and proportionate response to the Request at this stage of the proceedings.

4. The Prosecution accepts that the Defence of Mr Kony needs to be in a position to scrutinise the basis of the Chamber's decision to allow *in absentia* proceedings. Thus, parts of the content of the reports, including annexes may be deemed material to the preparation of Defence within the meaning of rule 77 of the Rules and the requirements of article 61(2)(b) of the Statute.

5. However, a balance has to be struck between the need to disclose information pertinent to the requirements of article 61(2)(a) of the Statute and the obligations of the Prosecution and Registry to protect the life and wellbeing of their confidential sources, as well as strategic partnerships and operations for the purposes of tracking fugitives. Exceptions to disclosure apply to such information under the Statute and the Rules where its necessity and proportionality can be individually justified on a case-by-case basis. While rule 81 applies to evidence first and foremost, its underlying principles have been applied to non-evidentiary materials as well.² Rules 81(3) and (4) of the Rules foresee exceptions to disclosure where steps have been taken to ensure confidentiality and where the protection of witnesses and victims is at stake, including by authorizing the non-disclosure of their identity prior to the commencement of a trial.³ Furthermore, rule 81(2) foresees the protection of ongoing investigations. The principles enshrined in these rules apply *in arguendo* to information collated in the Registry's reports related to sources and strategic steps taken of relevance to ongoing tracking efforts.

² For example, ICC-02/04-01/15-202-Red, paras. 4-6, 13.

³ The Court has in the past also recognised that anonymity of informants must be strictly preserved including for the purposes of their safety and has allowed redactions to that effect, Second Decision on the "Defence request for disclosure" submitted by the Defence for Jean-Pierre Bemba on 20 February 2014 and related filings ICC-01/05-01/13-298, 27 March 2014, pp. 5-6.

6. The “Registry’s Report on the measures to locate Joseph Kony”⁴ (“Report”), includes information held jointly by the Prosecution and the Registry. It summarises measures taken to locate Mr Kony, notify him of the allegations against him and secure his arrest or appearance since the issuance of the arrest warrant. In the body of the filing, information is included regarding his alleged location, and the cooperation efforts pursued by the Registry. Further, Annex I to this Report sets out details including sources, cooperation partners and strategy for tracking Mr Kony.

7. In some instances, the information in the Report is based on highly sensitive sources, whose identification and cooperation with the Court cannot be compromised, and frustrate future tracking opportunities. Information about his *alleged* location could also thwart tracking efforts and strategy. Disclosure of such information would harm the Registry’s and Prosecution’s ability to work with informants on tracking fugitives, and thus further diminish the Court’s ability to locate and arrest fugitives such as Mr Kony.

8. The Prosecution also considers that wholesale disclosure of this Report and Annex I via a reclassification as *confidential* would demonstrate to the wider international community that the Court is unable to protect sensitive information related to tracking and source handling. Thus, limited redactions, individually justified, applied to the identifying information of such sources would mitigate against this risk, which is objectively justifiable, even though the Defence is bound by confidentiality, due to the highly sensitive nature of these particular sources. Furthermore, limited redactions related only to protecting the identity of sources and cooperation partners would allow the Defence to scrutinise the measures, results and assessments without putting the sources themselves at risk of being identified and thus potentially compromised. Thus, limited redactions would also be overall proportionate in the circumstances at this stage of the proceedings.

⁴ ICC-02/04-01/05-459-SECRET-Exp.

9. The “Registry’s Report on the measures to locate Joseph Kony and notify him of the Warrant of Arrest”⁵ further includes parts which detail information provided by informants and intermediaries of the Registry and Prosecution. Where possible, such identifying information should be redacted to ensure the efficacy and viability of the tracking efforts as well as safeguard the sources themselves. However, any assessments, conclusions, and measures taken which would not risk identifying such sources, strategy or cooperation partners should be made available to the Defence.

10. The Prosecution notes that the Request extends to further Registry filings⁶ still classified as secret *ex parte* and submits that the principles as set out above should also extend to these. The Prosecution notes that it should be notified of any Registry response considering the current classification of the two reports.

III. CONCLUSION

11. For the reasons as set out above, the Prosecution respectfully submits that confidential redacted versions of both Registry reports be made available to the Defence as soon as possible, with appropriate redactions applied to safeguard the identity of confidential informants and intermediaries, as well as strategic operational partnerships relevant to ongoing tracking efforts, pursuant to rules 81(2), 81(3) and (4) of the Rules, and articles 54(3)(e), 68, 72, 93 of the Statute.



Karim A. A. Khan KC, Prosecutor

Dated this 16th day of July 2024
At The Hague, The Netherlands

⁵ ICC-02/04-01/05-463-SECRET-Exp.

⁶ Request, para. 27.