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PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Iulia Motoc
Judge Haykel Ben-Mahfoudh

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

THE PROSECUTOR v. JOSEPH KONY

Public

Kony Defence Response to “Victims’ Concerns on the Document Containing the Charges” and the Prosecution Response thereto, and to the Application for recognition of the status of victims in the *Kony* case

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 Defence for Mr Joseph Kony (“Defence”), in accordance with Pre-Trial Chamber III’s (“PTCIII”) instruction, provides its response to the following filings:

(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 have been filed in the meantime.¹

II. PROCEDURAL HISTORY

2. On 10 August 2007, the Single Judge of Pre-Trial Chamber II (“PTCII”) granted seven applicants the status of victims in the *Kony* case and/or the *Situation in Uganda*.²

3. On 15 February 2008, the Single Judge of PTCII appointed Ms Paolina Massidda, Principal Counsel of the Office of Public Counsel for Victims (“OPCV”), as legal representative of a victim admitted both in the *Situation in Uganda* and the *Kony* case.³

4. On 14 March 2008, the Single Judge of PTCII granted 12 applicants the status of victims in the *Kony* case and/or the *Situation in Uganda*.⁴

5. On 21 November 2008, the Single Judge of PTCII granted 30 applicants the status of victims in the *Kony* case and/or the *Situation in Uganda*.⁵

¹ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024, para. 27.

² [Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06](#), ICC-02/04-01/05-252, 10 August 2007 (“First Decision on Victims’ Applications”).

³ [Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06](#), ICC-02/04-01/05-267, 15 February 2008.

⁴ [Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06](#), ICC-02/04-01/05-282, 14 March 2008 (“Second Decision on Victims’ Applications”).

⁵ [Decision on victims’ applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07](#), ICC-02/04-01/05-356, 21 November 2008 (“Third Decision on Victims’ Applications”).

6. On 9 February 2009, the Single Judge of PTCII appointed Ms Paolina Massidda as legal representative of 15 victims in the context of the *Situation in Uganda* and Ms Sarah Pellet as legal representative of 36 victims in the *Kony* case.⁶
7. On 9 March 2012, the Single Judge of PTCII appointed OPCV as “legal representative of all victims and victim applicants pending the appointment of a common legal representative.”⁷
8. On 24 November 2022, the Prosecution filed a request to hold an *in absentia* confirmation of charges hearing in the *Kony* case.⁸
9. On 30 March 2023, OPCV submitted the “Victims’ Views and Concerns on the Prosecution’s Request to hold an *in absentia* confirmation of charges hearing against Joseph Kony”,⁹ upon PTCII’s invitation.¹⁰
10. On 23 November 2023, PTCII issued the “Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence”.¹¹
11. On 19 January 2024, the Prosecution submitted a new Document Containing the Charges (“DCC”), charging Joseph Kony with 36 counts of war crimes and crimes against humanity, including three counts of enslavement as a crime against humanity (counts 10, 15 and 30) and two counts of sexual slavery as a war crime (counts 27 and 36).¹²
12. On 27 February 2024, OPCV filed the “Victims’ Concerns on the Document Containing the Charges” (“OPCV Request”), seeking an amendment to the legal characterisation of the facts.¹³ OPCV submitted that some facts should be charged as sexual slavery as a crime against

⁶ [Decision on legal representation of Victims a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0090/06 to a/0096/06, a/0098/06, a/0102/06, a/0103/06, a/0112/06, a/0115/06, a/0117/06, a/0118/06, a/0120/06 to a/0126/06, a/0076/07 to a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07 to a/0103/07, a/105/07 to a/0108/07, a/0112/07, a/0115/07, a/0117/07, a/0118/07 and a/0123/07](#), ICC-02/04-176, 9 February 2009.

⁷ [Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda](#), ICC-02/04-191, 9 March 2012. For this reason, throughout these submissions the Defence refers to the OPCV both as the Legal Representative of Victims and as the independent office of the Court.

⁸ [Public Redacted Version of the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”](#), ICC-02/04-01/05-446-Red, 24 November 2022.

⁹ [Victims’ Views and Concerns on the “Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence”](#), ICC-02/04-01/05-457, 30 March 2023.

¹⁰ [Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant](#), ICC-02/04-01/05-453, 7 February 2023.

¹¹ [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.

¹² [Document Containing the Charges](#), ICC-02/04-01/05-474, 19 January 2024.

¹³ [Victims’ Concerns on the Document containing the charges](#), ICC-02/04-01/05-480, 27 February 2024 (“OPCV Request”).

humanity, in addition to enslavement as a crime against humanity and sexual slavery as a war crime, to reflect a “comprehensive approach to accountability”.¹⁴

13. On 4 March 2024, PTCII issued its “Second Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case”,¹⁵ setting the date for the commencement of the confirmation of charges hearing as 15 October 2024.¹⁶

14. On 11 March 2024, the Prosecution filed its Response to the OPCV Request (“Prosecution Response”), submitting that it should be dismissed.¹⁷ The same day, the Office of Public Counsel for Defence sought leave to file submissions on the OPCV Request (“OPCD Request”), asking PTCII to reserve consideration until Mr Kony’s Counsel had been given an opportunity to respond.¹⁸

15. On 11 March 2024, OPCV filed an application seeking recognition of 4,095 victims admitted to participate in the *Ongwen* case, as victims in the *Kony* case. OPCV also asked the Pre-Trial Chamber to adopt the *Ongwen* application form and the A-B-C procedure for admission of victims to participate in the present proceedings (“OPCV Application”).¹⁹

16. On 12 March 2024, the *Situation in Uganda* was reassigned to PTCIII.²⁰

17. On 2 May 2024, PTCIII rendered its Decision on the Procedure for Appointing Counsel,²¹ in which Defence Counsel was ordered to provide a response, if any, on the OPCV Request, the Prosecution Response, the OPCV Application, and any related submissions filed in the meantime.²²

¹⁴ [OPCV Request](#), para. 30.

¹⁵ [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 (“Second Decision on *in absentia* proceedings”).

¹⁶ [Second Decision on *in absentia* proceedings](#), para. 12.

¹⁷ [Prosecution Response to Victims’ Concerns on the Document Containing the Charges](#), ICC-02/04-01/05-482, 11 March 2024 (“Prosecution Response”).

¹⁸ [OPCD Request to Advance Submissions on the Victims’ Concerns](#), ICC-02/04-01/05-484, 11 March 2024.

¹⁹ [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, 11 March 2024 (“Application for recognition of the status of the *Ongwen* victims in the *Kony* case”).

²⁰ [Decision assigning judges to divisions and recomposing Chambers](#), ICC-02/04-01/05-485, 12 March 2024.

²¹ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024.

²² [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024, para. 27(c).

18. On 8 May 2024, the Registry filed submissions on matters related to the participation of victims, wherein it supported the OPCV Application in full.²³

19. On 21 June 2024, Peter Haynes, KC was appointed as Counsel to represent the rights and interests of Mr Kony during the confirmation proceedings.²⁴

III. DEFENCE RESPONSE

A. Defence Response to the OPCV Request and Prosecution Response

- i. *The OPCV Request should be dismissed in limine absent authorisation for the victims to present their views and concerns*

20. Pursuant to Article 68(3) of the Statute, participating victims may present their views and concerns where their personal interests are affected, subject to the Court's authorisation and at stages of the proceedings deemed appropriate.²⁵ Permission to present "views and concerns" has been granted to victims pursuant to Article 68(3) of the Statute "on a case-by-case basis, upon specific and motivated request submitted by the legal representative of victims".²⁶ Victims "may be authorised by the Chamber to make written submissions on specific issues of law and/or fact" if the legal representative demonstrates "by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake".²⁷ This "constitutes an additional criterion to be met by victims over and above the victim status accorded to them."²⁸

21. Historically, the submission of victims' views and concerns regarding charges and the charging instrument have been preceded by a request to do so.²⁹ This general practice was also

²³ [Registry submissions on matters related to the participation of victims](#), ICC-02/04-01/05-500 + Anx, 8 May 2024 ("Registry submissions on victims' participation").

²⁴ [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, 21 June 2024.

²⁵ ICC, [Rome Statute](#), 2021, Article 68(3).

²⁶ *Prosecutor v. Ruto and Sang*, [Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings](#), ICC-01/09-01/11-249, 5 August 2011, para. 84.

²⁷ *Prosecutor v. Ruto and Sang*, [Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings](#), ICC-01/09-01/11-249, 5 August 2011, para. 100.

²⁸ *Situation in the Democratic Republic of the Congo*, [Decision on the application for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6](#), ICC-01/04-101-tEN-Corr, 17 January 2006, para. 62. See also *Situation in the Republic of Kenya*, [Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58\(7\)"](#), ICC-01/09-42, 11 February 2011, para. 12; *Prosecutor v. Lubanga*, [Decision on victims' participation](#), ICC-01/04-01/06-1119, 18 January 2008, para. 101; *Prosecutor v. Banda*, [Decision on the participation of victims in the trial proceedings](#), ICC-02/05-03/09-545, 20 March 2014, para. 17.

²⁹ See, e.g., *Prosecutor v. Ruto and Sang*, [Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings](#), ICC-01/09-01/11-249, 5 August 2011, paras 83-85; *Prosecutor v. Ruto*

adopted in the *Kony* case, wherein PTCII invited OPCV to “convey the views and concerns of the victims” concerning holding an *in absentia* confirmation hearing.³⁰ Importantly, PTCII clarified that it only wished “to receive the views and concerns of the victims and does not wish to receive any submissions or observations on the legal aspects of the Prosecution’s Request.”³¹

22. Despite prior practice and this specific instruction, the OPCV Request purports to offer legal submissions without any prior leave having been sought or granted. On this basis alone, the OPCV Request should be dismissed *in limine*.

ii. The OPCV Request interferes with the statutory charging procedure

23. The Defence agrees with the Prosecution position regarding the principle of prosecutorial discretion. Pursuant to Article 54 of the Statute and Rule 121(4) of the Rules of Procedure and Evidence (“Rules”), it is the Prosecutor that exercises authority over trial strategy, including the formulation and presentation of the DCC.³² This provision further entrusts the Prosecutor with the responsibility for conducting investigations and determining the appropriate charges based on the facts and the applicable legal framework. This is reinforced by Article 61(7)(c)(ii) of the Statute, which confers exclusive authority on the Prosecutor to decide whether to amend the charges.³³ As stated in the Chambers Practice Manual:

[T]he decision on what to charge, as well as on how the charges shall be formulated, is fully within the responsibility of the Prosecutor. The Pre-Trial Chamber’s interference with the charges by ordering the Prosecutor to remedy any identified deficiency should be strictly limited to what is necessary to make sure

and Sang, [Request by the Victims’ Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or facts](#), ICC-01/09-01/11-263, 15 August 2011, para. 3; *Prosecutor v. Ruto and Sang*, [Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims](#), ICC-01/09-01/11-367, 9 November 2011, paras 3-7. See further *Prosecutor v. Bemba*, [Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber](#), ICC-01/05-01/08-1990-tENG, 6 December 2011, para. 1; *Prosecutor v. Ntaganda*, [Public Redacted Version of the “Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns”](#), ICC-01/04-02/06-1739-Conf-Red, 23 January 2017, ICC-01/04-02/06-1739-Red2, 17 February 2017, para. 6.

³⁰ [Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant](#), ICC-02/04-01/05-453, 7 February 2023, paras 12-13.

³¹ [Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant](#), ICC-02/04-01/05-453, 7 February 2023, paras 12-13.

³² [Prosecution Response](#), paras 1, 3.

³³ *Prosecutor v. Bemba*, [Decision Adjourning the Hearing pursuant to Article 61\(7\)\(c\)\(ii\) of the Rome Statute](#), ICC-01/05-01/08-388, 3 March 2009, para. 38; *Prosecutor v. Lubanga*, [Prosecution’s Application for Leave to Appeal the “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55\(2\) of the Regulations of the Court”](#), ICC-01/04-01/06-2074, 12 August 2009, para. 24.

that the suspect is informed in detail of the nature, cause and content of the charge.³⁴

iii. The OPCV Request is erroneously framed as a request to correct a “defect” in the charges

24. OPCV characterises its request as being necessary to correct a “defect” in the formulation of the charges.³⁵ Citing to the Chambers Practice Manual, OPCV submits that “a defect in the formulation of the charges may be cured prior to the opening of the confirmation hearing”.³⁶ A “defect” in the formulation of the charges has previously been found to refer to “the clarity with which the prosecution case is stated or [...] the sufficiency of the information given in relation to that case”,³⁷ rather than a difference of opinion concerning the pleading of particular crimes.

25. Nonetheless, the Chambers Practice Manual also states that “[t]he Pre-Trial Chamber may remedy defects in the formulation of the charges either *proprio motu* or upon request by the Defence, by instructing the Prosecutor to make the necessary adjustments.”³⁸ Thus, OPCV does not have standing to request the Chamber to remedy an alleged defect in the charges. The Pre-Trial Chamber only has a discretion to remedy a defect upon a request by the Defence or *proprio motu*.³⁹

iv. The OPCV Request confuses amendment of the charges with legal recharacterisation of the charges

26. OPCV seeks to add three additional charges of sexual slavery as a crime against humanity. An amendment of this type can only be made by the Prosecution, following the procedure set out in Article 61(9) of the Statute. OPCV attempts to circumvent this procedure by framing its request as seeking “additional legal recharacterisation” of the charges.

³⁴ ICC, [Chambers Practice Manual](#), 2023, para. 38.

³⁵ [OPCV Request](#), paras 5, 25, p. 22.

³⁶ [OPCV Request](#), para. 5.

³⁷ ICTY, *Prosecutor v. Galić*, [Decision on application by Defence for leave to appeal](#), IT-98-29-AR72, 30 November 2001, para. 11. See further, *Prosecutor v. Ongwen*, [Decision on Defence Motions Alleging Defects in the Confirmation Decision](#), ICC-02/04-01/15-1476, 7 March 2019, paras 11, 17 stating that defect is also raised on the ground that “certain charges fail to provide sufficient notice or are overbroad in scope”.

³⁸ ICC, [Chambers Practice Manual](#), 2023, paras 37-38.

³⁹ [OPCV Request](#), p. 22.

27. OPCV argues that the facts underlying counts 10, 15, 27, 30, and 36 warrant “additional legal characterisation”.⁴⁰ The same facts, already charged as enslavement under count 10, are now presented by OPCV as supporting the charge of sexual slavery as a crime against humanity under Article 7(1)(g) of the Statute.⁴¹ OPCV then relies on the underlying facts of the combined counts 15 (enslavement as a crime against humanity) and 27 (sexual slavery as a war crime) to justify the addition of a charge of sexual slavery as a crime against humanity,⁴² which it then repeats with counts 30 and 36 to support a third additional charge of sexual slavery as a crime against humanity.⁴³

28. An amendment to the charges is a separate and distinct exercise from a legal recharacterisation of the charges. Notably, these are procedures which occur at different stages of the proceedings and give rise to different outcomes. Recharacterisation under Regulation 55 of the Regulations of the Court (“Regulations”) refers to a Trial Chamber’s legal interpretation and categorisation of the facts of a case “at any time during the trial”.⁴⁴ Regulation 55 allows the Trial Chamber *proprio motu* to modify the legal characterisation of facts, for example, by altering the nature of a crime (international or non-international)⁴⁵ or adjusting modes of liability,⁴⁶ during the trial stage.

29. By contrast, at the pre-trial stage, only the Prosecution has the discretion to amend the charges in the DCC, having followed the procedure set out in Article 61(9) of the Statute, which gives the Prosecutor the ability to amend the DCC at any point prior to the confirmation of charges hearing.⁴⁷ OPCV’s attempt to frame its request for additional charges under the guise of “recharacterisation” must accordingly fail. Rather than seeking to reinterpret the existing

⁴⁰ [OPCV Requet](#), para. 23.

⁴¹ [OPCV Request](#), para. 49.

⁴² [OPCV Request](#), para. 50.

⁴³ [OPCV Request](#), p. 22.

⁴⁴ ICC, [Regulations of the Court](#), 2018, Regulation 55; *Prosecutor v. Lubanga*, [Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009](#), ICC-01/04-01/06-2205, 8 December 2009, para. 93; *See e.g.*, *Prosecutor v. Al Hassan*, [Decision on the Applicable Procedure following the Prosecutor’s Filing of Her Request for Corrections and Amendments of the Decision to Confirm the Charges](#), ICC-01/12-01/18-608-Red, 21 February 2020, para. 47; *Prosecutor v. Gbagbo*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court”](#), ICC-02/11-01/15-369, 18 December 2015, paras 51-52.

⁴⁵ *Prosecutor v. Lubanga*, [Judgment pursuant to Article 74 of the Statute](#), ICC-01/04-01/06-2842, 14 March 2012, paras 566-567.

⁴⁶ *Prosecutor v. Katanga*, [Decision on the implementation of Regulation 55 of the Regulations of the Court and evering the charges against the accused persons](#), ICC-01/04-01/07-3319-tENG/FRA, 21 November 2012.

⁴⁷ ICC, [Rome Statute](#), 2021, Article 61; ICC, [Rules of Procedure and Evidence](#), 2023, Rule 121(4).

charges, OPCV is seeking the introduction of additional ones. The responsibility for formulating the charges rests with the Prosecution.

v. The OPCV Request is premature

30. The OPCV Request was submitted on 27 February 2024, prior to the Second Decision on the *in absentia* proceedings,⁴⁸ the Decision on the Procedure for Appointing Counsel,⁴⁹ and the appointment of Counsel.⁵⁰ The Defence concurs with the Prosecution that the OPCV Request is premature.⁵¹

31. As argued by the Prosecution, any submissions “on the overall charging approach” will be made during the confirmation of charges hearing itself, or in related written submissions.⁵² OPCV’s criticism of the DCC and its request for modification impermissibly shift the initiative and responsibility for formulating the charges away from the Prosecution. This impacts the procedure for notification of the charges to the Defence,⁵³ and the Defence’s ability to comment and respond to them. The OPCV Request accordingly disturbs the statutory procedure and assignment of responsibility concerning the presentation of the charges, which foresees the possibility – on the basis of the confirmation hearings themselves – to request the Prosecutor to consider amending the charges.⁵⁴

32. The Pre-Trial Chamber in *Ruto and Sang* reached the same conclusion when victims requested authorisation to make written submissions on several issues including “the possible legal characterisation of acts of destruction of property and/or burning property, infliction of

⁴⁸ [Second Decision on *in absentia* proceedings](#).

⁴⁹ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024.

⁵⁰ [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, 21 June 2024.

⁵¹ [Prosecution Response](#), para. 2.

⁵² [Prosecution Response](#), para. 2.

⁵³ [Kony Defence Response to Prosecution’s Observations and Victims’ response 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-02/04-01/05-525, 11 September 2024, para. 6.

⁵⁴ ICC, [Rome Statute](#), 2021, Article 61(7)(c)(ii): “The Pre-Trial Chamber shall, **on the basis of the hearing**, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: (c) **Adjourn the hearing and request the Prosecutor to consider:** (ii) **Amending a charge** because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.” (Emphasis added).

injuries and looting”,⁵⁵ that were purportedly not reflected in the charges in the DCC.⁵⁶ After recalling its power to adjourn the hearing and request the Prosecutor to consider amending the charges under Article 61(7)(c)(ii) of the Statute, the Pre-Trial Chamber rejected the request on the basis that it was premature given that the confirmation of charges hearing had yet to take place.⁵⁷

B. Defence Observations on the Application for recognition of the status of victims in the *Kony* case to the victims participating in the *Ongwen* case and the Registry submissions on matters related to the participation of victims

33. OPCV has asked that all victims who previously participated in the *Ongwen* case be granted the status of victims in the present case.⁵⁸ In addition, OPCV and the Registry request the Chamber to “adopt the so-called ‘A-B-C’ admission process for the admission of victims’ applications in the present proceedings”.⁵⁹

34. The Defence submits that: (i) the A-B-C approach should be applied to the applications of all victims interested in participating in the present proceedings; and (ii) pursuant to the A-B-C approach, the applications of all victims who have already participated in the *Ongwen* case should be screened by the Registry to confirm their eligibility to participate in the *Kony* case, as well as their willingness to participate.

⁵⁵ *Prosecutor v. Ruto and Sang*, [Decision on the “Request by the Victims’ Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact”](#), ICC-01/09-01/11-274, 19 August 2011, para. 6.

⁵⁶ *Prosecutor v. Ruto and Sang*, [Document Containing the Charges](#), ICC-01/09-01/11-261-AnxA, 15 August 2011, pp 35-38.

⁵⁷ *Prosecutor v. Ruto and Sang*, [Decision on the “Request by the Victims’ Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact”](#), ICC-01/09-01/11-274, 19 August 2011, para. 9: “Therefore, an amendment of the charges could only be brought by the Prosecutor pursuant to a decision that the Chamber can issue within the framework of article 67(7)(c)(ii) of the Statute, namely on the basis of the confirmation of charges hearing and in light of the evidence submitted. Considering that the confirmation hearing in the present case is yet to take place, the Single Judge is of the view that the Request advanced by the legal representative of victims is premature at this moment of time and shall, accordingly, be rejected.”

⁵⁸ [Application for recognition of the status of the *Ongwen* victims in the *Kony* case](#). See also [Registry submissions on victims’ participation](#), paras 12-13.

⁵⁹ [Application for recognition of the status of the *Ongwen* victims in the *Kony* case](#), para. 24; [Registry submissions on victims’ participation](#), paras 1(ii), 16-19.

- i. *The A-B-C approach should be applied to the applications of all victims interested in participating in the present proceedings*

35. The process for the evaluation of victim participation applications has evolved dramatically since the first victims in this case were authorised to participate in proceedings.⁶⁰ The First, Second and Third Decisions on Victims' Applications were decided under a process that aligned most closely to Rule 89 of the Rules. Victim applications, after an initial eligibility assessment, were transmitted to the parties for observations, following which the Chamber made a judicial determination on each of the applications.⁶¹ This process was described by the Independent Expert Review ("IER") as "an intensely bureaucratic approach to verification and adjudication which involved close individual scrutiny by the Judges."⁶²

36. In *Ongwen*, PTCII implemented a version of the A-B-C approach that has not been followed in any other case,⁶³ and one that is no longer reflected in the most recent version of the Chambers Practice Manual.⁶⁴ Under that approach, all complete applications with a nexus to the charges were transmitted to the parties, who were given 14 days to submit observations.⁶⁵ Likely owing to time and resource constraints,⁶⁶ the parties filed observations on only a very small number of applications (52 out of an initial 2,048 applications).⁶⁷

37. More recent cases have adopted the A-B-C approach now included in the Chambers Practice Manual, whereby the Registry classifies the applications of those applicants who clearly qualify as victims (Group A); those who clearly do not (Group B) and those for whom the Registry could not make a clear determination (Group C). Only Group C applications are transmitted to the parties for observations within ten days, pursuant to Rule 89(1) of the Rules.⁶⁸

⁶⁰ K.L. Ring, "[The Evolution of the Procedure for Reviewing Victim Applications at the International Criminal Court](#)" 23 *Journal of International Criminal Justice* (2023), pp 29-54.

⁶¹ [First Decision on Victims' Applications](#), paras 2-4; [Second Decision on Victims' Applications](#); [Third Decision on Victims' Applications](#), paras 6-9.

⁶² Independent Expert Review of the International Criminal Court and the Rome Statute System, [Final Report](#), 30 September 2020, para. 844.

⁶³ K.L. Ring, "[The Evolution of the Procedure for Reviewing Victim Applications at the International Criminal Court](#)" 23 *Journal of International Criminal Justice* (2023), pp 43-45.

⁶⁴ Compare ICC, [Chambers Practice Manual](#), 2023, p. 25; ICC, [Chamber Practice Manual](#), 2016, pp 20-21.

⁶⁵ *Prosecutor v. Ongwen*, [Decision concerning the procedure for admission of victims to participate in the proceedings in the present case](#), ICC-02/04-01/15-299, 3 September 2015, para. 7.

⁶⁶ K.L. Ring, "[The Evolution of the Procedure for Reviewing Victim Applications at the International Criminal Court](#)" 23 *Journal of International Criminal Justice* (2023), p. 43.

⁶⁷ K.L. Ring, "[The Evolution of the Procedure for Reviewing Victim Applications at the International Criminal Court](#)" 23 *Journal of International Criminal Justice* (2023), p. 43.

⁶⁸ ICC, [Chambers Practice Manual](#), 2023, paras 96-97.

OPCV proposes that this approach be adopted for applicants in the present case, over 1,000 of whom submitted applications to participate in the *Situation in Uganda* between 2006 and 2014.⁶⁹

38. In other words, granting OPCV's request to extend victim participation status to all those who participated in *Ongwen* risks a situation where three groups of participating victims will have had their applications processed under three very different procedures. For this reason, the Defence proposes that the A-B-C approach should apply to all victim participation applications, including those of victims who have already participated in *Ongwen* and who have expressed a willingness to participate in the *Kony* confirmation proceedings. Applying the A-B-C approach to all victims will also ensure that those applications submitted between 2006 and 2014 remain valid, and that the individuals concerned still wish to participate and are able to do so.

ii. *Pursuant to the A-B-C approach, the applications of victims who have participated in the Ongwen case should be screened by the Registry to confirm their eligibility, as well as their willingness, to participate in the Kony case*

39. OPCV asserts that "the victims who had already been admitted to participate in the *Ongwen* case continue to satisfy the criteria of Rule 85 of the Rules of Procedure and Evidence and meet all the requirements to be directly admitted to participate in the present case".⁷⁰ However, the eligibility and desire of victims from the *Ongwen* case to participate in the present case cannot be presumed.

40. The *Ongwen* case started almost ten years ago,⁷¹ and the passage of time may have affected the validity of the applications with the criteria of Rule 85. Notably, as pointed out by the Registry, 103 of the participating victims in the *Ongwen* case are known to be deceased.⁷² The information contained in the Registry report, moreover, appears to date from 2017 and the Registry does not indicate if all the applications have been screened more recently to account for the number of deceased persons. If that has not been done, OPCV and/or the Registry will

⁶⁹ [Application for recognition of the status of the Ongwen victims in the Kony case](#), paras 22-25.

⁷⁰ [Application for recognition of the status of the Ongwen victims in the Kony case](#), para. 17.

⁷¹ *Prosecutor v. Ongwen*, [Decision on Setting the Date for the Initial Appearance of Dominic Ongwen and the Date for a Status Conference](#), ICC-02/04-01/05-418, 21 January 2015.

⁷² [Registry submissions on victims' participation](#), para. 14.

need to reassess the applications to determine whether and, if so, how many other victims have since died.

41. OPCV further suggests “the adoption of a flexible approach where the consent to participate in the current proceedings of the victims previously admitted in the *Ongwen* case is presumed”.⁷³ It states that “a significant number of victims” have expressed their interest in participating in the *in absentia* proceedings against Mr Kony.⁷⁴ The Registry has been informed that “2038 participating victims in the *Ongwen* case” have expressed such an interest, representing approximately half of the victims that OPCV seeks to have admitted in the present case.⁷⁵

42. The Defence agrees with the Registry that it is important for victims who participated in the *Ongwen* case to confirm, directly or through their legal representatives, their wish to participate in the *Kony* case.⁷⁶ Indeed, it is central to the purpose of victim participation that actions taken in the name of victims respect their voice and autonomy. As has been explained:

[A]mong the most important interests of victims in the context of their interaction with a criminal justice system, well beyond even the right to reparations, **is the right to receive information regarding their case.** Victims also value information and clarity concerning their particular role in the criminal proceedings, and need to feel that the system **gives them the appropriate amount of respect.** Finally, and perhaps most fundamentally, victims are more likely to be satisfied with the criminal justice system **if they feel their voices are being heard.**⁷⁷

To proceed in the absence of instructions from the victims, on the basis of a presumption of their desire to participate in the present proceedings, would ride roughshod over their agency as participants in this process.

43. It is not unreasonable to expect that some victims who participated in *Ongwen* may be less enthusiastic about taking part in the present proceedings, should PTCIII decide to proceed with a confirmation hearing *in absentia*. As the Defence has previously argued,⁷⁸ and indeed as

⁷³ [Application for recognition of the status of the Ongwen victims in the Kony case](#), para. 21.

⁷⁴ [Application for recognition of the status of the Ongwen victims in the Kony case](#), para. 20.

⁷⁵ [Registry submissions on victims’ participation](#), para. 13.

⁷⁶ [Registry submissions on victims’ participation](#), para. 12.

⁷⁷ P. Massidda, “Foreword”, in T.M. Funk. *Victims’ Rights and Advocacy at the International Criminal Court*, Oxford University Press, 2010, p. xvi (emphasis added).

⁷⁸ [Kony Defence Response to Prosecution’s Observations and Victims’ response 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-02/04-01/05-525, 11 September 2024, para. 24.

asserted by OPCV itself “[f]or the victims, the presence of the suspect during the confirmation hearing is an essential point in the procedures”.⁷⁹ The absence of the suspect, the impossibility of issuing a final judgment and the complete lack of prospect for reparations may well discourage interest from some of the *Ongwen* victims in participating in the *Kony* proceedings. Further, uncertainties in the implementation of the *Ongwen* reparations award could affect the victims’ willingness to participate in a new case while their existing reparations entitlement remains unsatisfied. Lastly, the time-consuming and largely uncompensated nature of victim participation in *Ongwen* has been documented by researchers who have interviewed victims and their representatives.⁸⁰ To assume victims’ continued willingness freely to give their labour in this manner, without checking with them first, may appear disrespectful. This further chimes with the Registry’s stance of recognising victim participants from *Ongwen* in the present proceedings “provided this is their explicit desire”.⁸¹

44. The Defence notes that the Registry refers to the limited time before the confirmation of charges hearing, to support the adoption of a flexible approach towards *Ongwen* victims’ consent.⁸² Although this is not a valid reason to circumvent the rules and requirements mentioned above, now that the confirmation of charges hearing has been postponed until further notice,⁸³ OPCV has ample time to consult with the *Ongwen* victims and ascertain their intentions concerning participation in the *Kony* case.⁸⁴ Only once explicit consent is obtained, based on full information having been provided as to the limitations of the proposed proceedings in this case, should the applications be submitted for the Chamber’s authorisation to participate in the proceedings.

45. The Defence further submits that an initial sifting of applications is necessary because the charges against Mr Kony do not encompass all of the same crimes for which Mr Ongwen was prosecuted. Contrary to the assertions in the OPCV Application, the crimes and events charged

⁷⁹ *Prosecutor v. Katanga and Ngudjolo*, [Transcript of Confirmation of Charges Hearing](#), ICC-01/04-01/07-T-46-ENG, 11 July 2008, p. 17, lines 9-22.

⁸⁰ L. Ullrich, “[#Workingforjustice: Victim Participation at the International Criminal Court \(ICC\)](#)”, *EJIL:Talk!*, 11 September 2024.

⁸¹ [Registry submissions on victims’ participation](#), para. 1(i).

⁸² [Registry submissions on victims’ participation](#), para. 13.

⁸³ [Decision Postponing the Confirmation of Charges Hearing](#), ICC-02/04-01/05-526, 12 September 2024.

⁸⁴ *Contra*, [Application for recognition of the status of the Ongwen victims in the Kony case](#), para. 22; [Registry submissions on victims’ participation](#), para. 13.

are not identical in both cases,⁸⁵ an argument that OPCV also raised in its request for amendment of the charges.⁸⁶

46. Specifically, Mr Ongwen was charged with crimes that Mr Kony has not been charged with as follows:

- a. Count 22: Outrages upon Personal Dignity as a War Crime (Article 8(2)(c)(ii));⁸⁷
- b. Count 55: Sexual Slavery as a Crime Against Humanity (Article 7(1)(g));⁸⁸
- c. Count 60: Outrages upon Personal Dignity as a War Crime (Article 8(2)(c)(ii));⁸⁹ and
- d. Count 66: Sexual Slavery as a Crime Against Humanity (Article 7(1)(g)).⁹⁰

Victim applications must accordingly be reassessed to exclude those who were affected by crimes solely attributed to Mr Ongwen from the proceedings against Mr Kony.

47. OPCV also attempts to draw parallels between this situation and the cases of *Gbagbo and Blé Goudé*, and *Banda and Jerbo*.⁹¹ Unlike those cases, the *Kony* case is taking place nearly a decade after the *Ongwen* case started,⁹² with different charges, and what seems to be a distinct prosecutorial strategy.⁹³ In both the *Gbagbo* and *Banda* cases, the core issues concerned the same incidents, the same events, and the same charges in the DCC.⁹⁴ That is not the case here.

48. OPCV also refers to the IER recommendation that “[v]ictims admitted to participate in proceedings should be automatically admitted to participate in any other case opened within the same situation for the same events”.⁹⁵ The case law cited by the IER as authority for that proposition was a decision in *Ntaganda* where the Single Judge ordered the Registry to assess

⁸⁵ [Application for recognition of the status of the Ongwen victims in the Kony case](#), para. 2.

⁸⁶ [OPCV Request](#).

⁸⁷ *Prosecutor v. Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, count 22, p. 1070.

⁸⁸ *Prosecutor v. Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, count 55, p. 1074.

⁸⁹ *Prosecutor v. Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, count 60, p. 1075.

⁹⁰ *Prosecutor v. Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, count 66, p. 1076.

⁹¹ [Application for recognition of the status of the Ongwen victims in the Kony case](#), para. 14.

⁹² *Prosecutor v. Ongwen*, [Decision on Setting the Date for the Initial Appearance of Dominic Ongwen and the Date for a Status Conference](#), ICC-02/04-01/05-418, 21 January 2015.

⁹³ [OTP Response to Victims’ Concerns on the DCC](#), para. 13.

⁹⁴ See *Prosecutor v. Blé Goudé*, [Decision on victims’ participation in the pre-trial proceedings and related issues](#), ICC-02/11-02/11-83, 11 June 2014, paras 15-16; *Prosecutor v. Banda and Jerbo*, [Decision on Victim’s Participation at the Hearing on the Confirmation of the charges](#), ICC-02/05-03/09-89, 29 October 2010, paras 8-9.

⁹⁵ Independent Expert Review of the International Criminal Court and the Rome Statute System, [Final Report](#), 30 September 2020, Recommendation 338.

how many of the victims eligible for reparations in the *Lubanga* case were also eligible for reparations in *Ntaganda*.⁹⁶ As such, it is clear that an assessment of eligibility by the Registry is a prerequisite for permitting the same victims to participate in related cases.

IV. CONCLUSION AND RELIEF REQUESTED

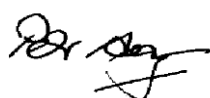
49. The OPCV Request should be dismissed *in limine* as unauthorised; or summarily dismissed as premature and lacking a legal basis. The Defence further advocates for the adoption of a careful, individualised assessment before victims previously admitted in the *Ongwen* case are automatically admitted in the *Kony* case. Given the passage of time, the differences in the charges, and the specific nature of the *in absentia* proceedings, it is inappropriate to proceed on the basis of a presumption of consent for participation. Clear, express consent from the victims is necessary to ensure their meaningful participation in the current proceedings.

50. For the reasons set out above, the Defence respectfully requests the Chamber to:

DISMISS the OPCV Request on the DCC in its entirety; and

DIRECT the Registry to reassess the status of each victim who participated in the *Ongwen* case, ensuring that each applicant is still alive, their circumstances remain consistent with victimhood in the *Kony* case, they have consented to participate in the present case, and they continue to satisfy the criteria of Rule 85.

The whole respectfully submitted.



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The Hague, The Netherlands,
Wednesday, 25 September 2024

⁹⁶ *Prosecutor v. Ntaganda*, [Order setting deadlines in relation to reparations](#), ICC-01/04-02/06-2447, 5 December 2019, para. 9.