



Original: English

**No. ICC-02/04-01/05
Date: 12 December 2024**

PRE-TRIAL CHAMBER III

Before:

**Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Iulia Antoanella Motoc
Judge Haykel Ben Mahfoudh**

**SITUATION IN THE REPUBLIC OF UGANDA
IN THE CASE OF
*THE PROSECUTOR v. JOSEPH KONY***

Public

Decision on the Document Containing the Charges and
the ‘Victims’ Concerns on the Document Containing the Charges’

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

Mr Peter Haynes

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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER III of the International Criminal Court (the ‘Court’) issues this ‘Decision on the Document Containing the Charges and the “Victims’ Concerns on the Document Containing the Charges”’, pursuant to article 61(3)(a) of the Rome Statute (the ‘Statute’), rule 121(3) of the Rules of Procedure and Evidence (the ‘Rules’), and regulations 38(3)(g) and 52 of the Regulations of the Court (the ‘Regulations’).

I. PROCEDURAL HISTORY

1. On 8 July 2005, Pre-Trial Chamber II issued a warrant of arrest against Joseph Kony (‘Mr Kony’), which was amended on 27 September 2005.¹
2. On 23 November 2023, Pre-Trial Chamber II issued the ‘Decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence’ (the ‘23 November 2023 Decision’).²
3. On 19 January 2024, the Prosecution submitted the ‘Document Containing the Charges’ (the ‘DCC’),³ pursuant to the 23 November 2023 Decision.
4. On 27 February 2024, the Office of Public Counsel for Victims (the ‘OPCV’) submitted the ‘Victims’ Concerns on the Document Containing the Charges’ (the ‘OPCV Concerns’).⁴
5. On 4 March 2024, Pre-Trial Chamber II issued the ‘Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence’.⁵
6. On 11 March 2024, the Prosecution submitted the ‘Prosecution Response to Victims’ Concerns on the Document Containing the Charges’ (the ‘Prosecution Response’).⁶

¹ Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, ICC-02/04-01/05-28-US-Exp, under seal and *ex parte*, only available to the Prosecution (a public redacted version was issued on 13 October 2005, [ICC-02/04-01/05-53](#)).

² [ICC-02/04-01/05-466](#), public.

³ [ICC-02/04-01/05-474](#), public.

⁴ [ICC-02/04-01/05-480](#), public.

⁵ [ICC-02/04-01/05-481](#), public.

⁶ [ICC-02/04-01/05-482](#), public.

7. On 25 September 2024, the Defence submitted the ‘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’ (the ‘Defence Response’).⁷

8. On 29 October 2024, the Chamber issued the ‘Decision on the criteria for holding confirmation of charges proceedings in absentia’.⁸

9. On 12 December 2024, the Chamber issued the ‘Decision Setting the Disclosure Regime’.

II. SUBMISSIONS

A. OPCV Concerns

10. The OPCV conveys the victims’ concerns on the Prosecution’s choice to charge the crime of sexual slavery only as a war crime and not as a crime against humanity, since it prevents fully recognising the extent of the harm suffered by the victims, and creates a misleading perception that certain forms of victimisation are less severe.⁹

11. In the view of the OPCV, the conduct described in counts 27 and 36 of the DCC encompasses acts that under the Statute may constitute sexual slavery both as a war crime and a crime against humanity, and it is in the inherent powers of the Chamber to recharacterize the charges accordingly, since no additional investigations or significant changes to the DCC are required and no delays would be caused.¹⁰ The OPCV adds that the distinctiveness of the crimes of sexual slavery under article 7(1)(g) and article 8(2)(e)(vi) of the Statute arises from their unique contextual elements, which, in turn, result in the protection of different interests through the prosecution of each type of crime, namely ensuring the protection of civilians during peacetime and upholding the principles of international humanitarian law prohibiting acts of sexual violence against persons taking no active part in hostilities during armed conflict.¹¹

⁷ [ICC-02/04-01/05-527](#), public.

⁸ [ICC-02/04-01/05-532](#), public.

⁹ [OPCV Concerns](#), paras 16-18.

¹⁰ [OPCV Concerns](#), paras 19-25.

¹¹ [OPCV Concerns](#), paras 26-34.

12. The OPCV further submits that, while the Prosecution charges the crime against humanity of enslavement in relation to the same facts relied upon to charge the war crime of sexual slavery, this approach does not cure the erroneous legal characterisation, since the crime of sexual slavery includes the additional element that the victim is also forced to engage in at least one act of a sexual nature.¹² According to the OPCV, the material facts pleaded in the DCC already support the cumulative charge of sexual slavery as a war crime and as a crime against humanity.¹³

13. The OPCV accordingly requests the Chamber to instruct the Prosecution to make the necessary adjustments pleading sexual slavery as a war crime and a crime against humanity, or alternatively to consider the matter in its determination on the proper legal characterisation of facts at the confirmation of charges hearing (the ‘OPCV Request’).¹⁴

B. Prosecution Response

14. The Prosecution requests the Chamber to reject the OPCV Request.¹⁵

15. According to the Prosecution, the OPCV’s request is premature, as it is likely only at the confirmation of charges hearing that the Prosecution will be able to present submissions on its overall charging approach, and address any issues raised.¹⁶ It adds that the issues raised do not relate to any purported deficiencies in pleading the material facts described in any of the charges, but rather relate to the potential legal qualification of a single crime.¹⁷ The Prosecution further submits that it has exercised its charging discretion properly and, even with the overlap of factual allegations against Mr Ongwen and Mr Kony, it is not necessary that the charges in the two cases must be identical.¹⁸ The Prosecution is additionally of the view that the OPCV does not enjoy the same procedural standing and rights as the parties and, as such, it cannot seek amendment of the DCC or make objections on the conduct of the proceedings.¹⁹

¹² [OPCV Concerns](#), paras 35-47.

¹³ [OPCV Concerns](#), paras 48-50.

¹⁴ [OPCV Concerns](#), para. 5.

¹⁵ [Prosecution Response](#), paras 1, 20.

¹⁶ [Prosecution Response](#), para. 2.

¹⁷ [Prosecution Response](#), para. 2.

¹⁸ [Prosecution Response](#), paras 3-5.

¹⁹ [Prosecution Response](#), para. 6.

16. The Prosecution also avers that enslavement as a crime against humanity (and not sexual slavery as a crime against humanity) is the appropriate charge, since the case against Mr Kony is one of systemic enslavement in all its forms, and acts of sexual violence are among the many indicia of enslavement.²⁰ The Prosecution adds that it has chosen not to include the charge of sexual slavery as a crime against humanity, as: (i) the pool of victims charged under sexual slavery as a crime against humanity (as opposed to enslavement) is more limited; (ii) applying the test for cumulative convictions necessarily leads to the parsing of the conduct and an artificial separation of the overall indicia of the exercise of powers of ownership across the two crimes; and (iii) using the two legal qualifications in a case of systemic enslavement could lead to an incomplete, decontextualised and fragmented portrayal of the harm, in view of certain findings made by the Trial Chamber in the Ongwen Case.²¹

17. The Prosecution additionally contends that giving full effect to the charge of enslavement in this case accords with the *jus cogens* status of prohibitions of slavery, the objectives in the preamble to the Statute, and article 21 of the Statute.²² According to the Prosecution, it is incorrect to assert that the protected interests associated with sexual slavery as a crime against humanity are not reflected in the DCC, as the charge of enslavement as a crime against humanity highlights those same protected interests and is even broader.²³ The Prosecution lastly avers that it has charged sexual slavery as a war crime, given that the Statute does not include slavery as a war crime.²⁴

C. Defence Response

18. The Defence submits that the OPCV Request should be dismissed *in limine* as it purports to offer legal submissions without prior leave having been sought or granted.²⁵

19. Furthermore, the Defence agrees with the Prosecution that the latter exercises authority over trial strategy, including the formulation and presentation of the DCC.²⁶ The Defence adds that the OPCV does not have standing to request the Chamber to

²⁰ [Prosecution Response](#), paras 7-12.

²¹ [Prosecution Response](#), paras 13-16.

²² [Prosecution Response](#), para. 17.

²³ [Prosecution Response](#), para. 18.

²⁴ [Prosecution Response](#), para. 19.

²⁵ [Defence Response](#), paras 20-22.

²⁶ [Defence Response](#), para. 23.

remedy an alleged defect in the charges since, as stated in the Chambers Practice Manual, the Pre-Trial Chamber only has a discretion to remedy a defect upon a request by the Defence or *proprio motu*.²⁷ Moreover, according to the Defence, the OPCV seeks to add three additional charges of sexual slavery as a crime against humanity, whereas an amendment of this type can only be made by the Prosecution, following the procedure set out in article 61(9) of the Statute.²⁸

20. Lastly, the Defence contends that the OPCV Request is premature since, as argued by the Prosecution, any submissions ‘on the overall charging approach’ will be made during the confirmation of charges hearing, or in related written submissions.²⁹

III. DETERMINATION

A. DCC

21. The Chamber recalls that Pre-Trial Chamber II specified that the DCC submitted for the purposes of informing Mr Kony of the charges against him ‘should not contain references to the evidentiary items supporting the material facts underpinning the charges’, whilst indicating that, ‘[i]n the event a confirmation hearing *in absentia* is ultimately authorised, the Prosecution will be instructed to present a list of evidence and a document that includes the abovementioned information and material’.³⁰ In addition, the Judges of the Court amended, *inter alia*, regulation 52 of the Regulations on 21 October 2024.³¹ Accordingly, having authorised a confirmation of charges hearing *in absentia*, and noting the aforementioned amendment, the Chamber issues the following instructions regarding the DCC.

22. First, regulation 52(1) of the Regulations, as amended, provides that:

The document containing the charges referred to in article 61 shall contain only:

- (a) The full name of the person and any other relevant identifying information;
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;

²⁷ [Defence Response](#), paras 24-25.

²⁸ [Defence Response](#), paras 26-29.

²⁹ [Defence Response](#), paras 30-32.

³⁰ [23 November 2023 Decision](#), para. 53.

³¹ ICC Press Release, [ICC Judges amend the Regulations of the Court concerning the charges](#), 21 October 2024.

(c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7, 8 or 8 *bis* and the precise form of participation under articles 25 and 28.

23. The Chamber notes that, as a result of the addition of the words ‘contain only’ in the *chapeau* of regulation 52(1) of the Regulations and the insertion of sub-regulation 2 in the same provision, a document containing the charges must be limited to the essential factual and legal elements of the charges that the Prosecution is requesting the Chamber to confirm as the basis for a potential trial against a suspect.

24. This means that, in the present proceedings, the Prosecution shall revise the DCC by setting out, to the extent applicable, only the following legal and factual elements in relation to the alleged contextual elements, each alleged instance of an underlying crime, and each alleged mode of liability: (i) the alleged perpetrators and/or other relevant actors; (ii) the alleged conduct and/or consequences; (iii) the alleged location of the alleged crime or related conduct; (iv) the alleged time-frame(s) of the alleged crime and/or related conduct; (v) the alleged (approximate) number and identity of victims, dependent on the nature of the alleged crime; (vi) the alleged mental state of Mr Kony and/or other relevant actors; (vii) any other essential factual aspect pertaining to the legal elements of the proposed charge; and (viii) a legal characterisation. The DCC shall employ a narrative style, with the relevant factual assertions made by the Prosecution presented in a logical and chronological sequence.

25. Therefore, unlike the current DCC, the revised document containing the charges shall not contain factual or legal assertions that either exceed the legal and factual elements enumerated in the preceding paragraph, or do not support the legal elements of the crimes the Prosecution is proposing for confirmation. Furthermore, the revised DCC shall not combine assertions pertaining to different alleged crimes and alleged modes of liability. Such matters may be included, where necessary, in the pre-confirmation brief, as further set out hereafter.

26. Second, the amended version of regulation 52(2) of the Regulations stipulates that ‘[t]he document containing the charges shall not contain any submissions or references to, or analysis of, evidence. All such material in support of the charges shall be presented in a separate pre-confirmation brief to be submitted simultaneously’.

27. Consequently, the Prosecution shall, together with the revised DCC, submit a pre-confirmation brief with a view to setting out its legal and factual argumentation in support of the charges proposed for confirmation, as well as the evidence it relies upon.

The purpose of the pre-confirmation brief is limited to substantiating the specific factual and legal elements of the proposed charges in the DCC in compliance with the Chamber's aforementioned directions.

28. More specifically, the Prosecution shall comply with the following instructions. The pre-confirmation brief shall mirror the structure of the revised DCC in accordance with the preceding directions. Thus, in respect of the different alleged contextual elements, each alleged instance of an underlying crime, and each alleged mode of liability, the Prosecution shall set out to the extent applicable: (i) a detailed explanation of the evidence that, in its view, supports each separate assertion (with the relevant items hyperlinked in the corresponding footnote); (ii) any factual or legal assertions that either exceed the elements to be set out in the DCC as specified above, or do not support the legal elements of the crimes the Prosecution is proposing for confirmation, but that are, in the Prosecution's view, nonetheless necessary to be included for it to properly set out its case; and (iii) any legal submissions in connection with the legal characterisation of each alleged instance of an underlying crime, including the relevant contextual elements, and each alleged mode of liability.

29. Lastly, the Chamber observes that, pursuant to rule 121(3) of the Rules, a document containing the charges and a list of evidence shall be provided by 'no later than 30 days before the date of the confirmation hearing'. As this time limit is indicative,³² the Prosecution shall submit the DCC in English and Acholi, together with the list of evidence and the pre-confirmation brief, at the latest on 17 April 2025. The DCC shall not exceed 30 pages in accordance with regulation 38(3)(g) of the Regulations, while the pre-confirmation brief shall not exceed 60 pages. Furthermore, the Chamber orders the Prosecution to ensure that the list of evidence to be submitted pursuant to rule 121(3) of the Rules only contains the evidentiary items referenced in the Pre-Confirmation Brief.

B. OPCV Request

30. The Chamber considers that the exact legal qualification of any alleged criminal conduct can only be assessed following the disclosure of the Prosecution's evidence

³² See for instance Pre-Trial Chamber II, *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Order on the conduct of the confirmation of charges proceedings](#), 27 June 2022, ICC-01/14-01/22-62, para. 34.

and the subsequent presentation of the evidence, both by the Prosecution and potentially the Defence, for the purposes of the confirmation of charges hearing.

31. Accordingly, the Chamber rejects the OPCV Request insofar as it requests the Chamber to instruct the Prosecution to amend the DCC, without prejudice to any further assessment of the matter at an appropriate juncture.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Prosecution to submit a revised document containing the charges and a list of evidence in keeping with the directions contained in the present decision by no later than 17 April 2025;

ORDERS the Prosecution to submit a pre-confirmation brief in keeping with the directions contained in the present decision by the same time limit; and

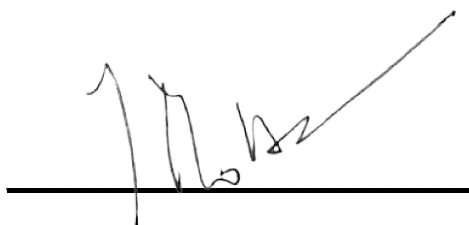
REJECTS the OPCV Request insofar as the OPCV requests the Chamber to instruct the Prosecution to amend the DCC.

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

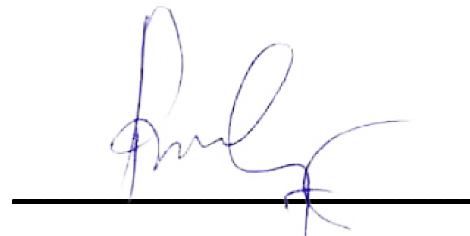


Judge Althea Violet Alexis-Windsor

Presiding Judge



Judge Iulia Antoanella Motoc



Judge Haykel Ben Mahfoudh

Dated this Thursday, 12 December 2024.

At The Hague, The Netherlands.