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**International
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PRE-TRIAL CHAMBER III

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. JOSEPH KONY

Confidential

**Prosecution's Response to Defence's Request Concerning the Publicity of
Proceedings (ICC-02/04-01/05-607-Conf)**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Defence's Request Concerning the Publicity of Proceedings¹ should be dismissed *in limine*, in its entirety, on the basis that it is made out of time.²

2. In the alternative, the Request misconprehends the well-established regime in the Court's proceedings for designating material as confidential, directly applicable in the present case. The relief it seeks amounts to a request for reconsideration of Pre-Trial Chamber III's ("Chamber") Decision Setting the Disclosure Regime.³ While the Prosecution takes no issue with conducting a review of its current confidentiality classifications, it respectfully requests the Chamber to reject the remainder of the Request.

II. CONFIDENTIALITY

3. This response is submitted confidentially under regulation 23*bis*(1) and (2) of the Regulations of the Court since it relates to a request of the same designation. The Prosecution has no objection to it being reclassified as public, unredacted, upon the Chamber's order.

III. SUBMISSIONS

A. The Request is filed out of time and should be dismissed *in limine*

4. At the outset, the Prosecution notes the Chamber's order that the parties "shall bring any matter arising from the disclosure process to the attention of the Chamber by way of a formal filing by no later than 9 May 2025 [...]".⁴ The Defence's Request, under any interpretation, raises matters arising from the disclosure process, *i.e.* the confidentiality designations made by the Prosecution in the course of its pre-confirmation disclosure.⁵ Yet, the Defence has neither sought to establish that the

¹ ICC-02/04-01/05-607-Conf ("Request").

² See ICC-02/04-01/05-539, paras. 12-13 ("Time Limits Decision").

³ ICC-02/04-01/05-537 ("Disclosure Regime Decision").

⁴ Time Limits Decision, para. 12.

⁵ See, *e.g.*, Request, para. 2.

matter arose only after the expiry of the time limit,⁶ nor sought an extension of the time limit under regulation 35. In line with the Chamber's direction that, following the expiry of this time limit, it "shall not entertain any matter pertaining to the disclosure process...",⁷ the Request should be dismissed *in limine*.

5. Should the Chamber nevertheless decide to entertain the Request, the Prosecution submits that the Request should still be substantially dismissed on its merits for the following reasons.

B. Alternatively, the Request should be dismissed on its merits

The Prosecution has the power to designate material as confidential

6. As a starting point, the Prosecution is empowered by the Court's statutory framework to designate material as confidential, not to be disclosed to the public, in its investigation and prosecution of crimes. This derives from its obligation, both independent but also shared with the Court's other organs, to protect relevant persons and to preserve its evidence. Article 68(1) emphasises that the Prosecution "particularly" shall take measures to protect victims and witnesses during the investigation and prosecution of crimes. Article 54(3)(f) empowers the Prosecutor not only to "request that necessary measures be taken" but to independently "take necessary measures", "to ensure the confidentiality of information, the protection of any person or the preservation of evidence."

7. The Chamber's adoption⁸ of the Information and Contact Protocol⁹ in the present case confirms the Prosecution's power of designation within these specific proceedings, and builds upon it by codifying the meaning of confidentiality and the required conduct of the Parties and Participants in relation to confidential material. The Protocol defines a "confidential document" as material that is not classified as

⁶ See Time Limits Decision, para 13 ("... except if the party... establishes that the relevant matter arose only after the expiry of the aforementioned time limit and could not have been reasonably brought to the Chamber's attention prior thereto.").

⁷ ICC-02/04-01/05-539, para. 13.

⁸ See Disclosure Regime Decision, para. 45.

⁹ Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, annexed to the Chambers Practice Manual (Eighth edition) (herein referred to as "Information and Contact Protocol", or "Protocol").

public,¹⁰ and relatedly defines “confidential information” as information in a confidential document not affirmatively made or ordered to be public.¹¹ There is nothing in the Protocol or elsewhere to suggest that the determination is subject to the granting of protective measures under article 87 of the Statute, as the Defence contends.¹² To the contrary, the Chamber’s Practice Manual makes it abundantly clear that the very purpose of the Protocol is to “regulate the use of confidential documents or information”, i.e. “evidence [that] is *disclosed confidentially*”.¹³ Additionally, the Chamber’s Disclosure Regime Decision confirms that it is for the Prosecution, as the disclosing party, to assign confidentiality designations upon disclosure.¹⁴ The same would apply to any material disclosed by the Defence.

8. Finally, the provisions of the Information and Contact Protocol dealing with the parties’ use of confidential material, specifically in the context of conducting investigations, is also instructive. It is inconceivable that material subject to such strict third party restrictions and related warnings against reproduction or further disclosure in the context of conducting investigations,¹⁵ could simply be broadcast in a public hearing or published in a public filing. In any case, the wording of paragraph 12 is dispositive as to the confidentiality of witness identities: “Notwithstanding [the foregoing], parties and participants shall not reveal to third parties that the witness is involved with the activities of the Court or the nature of such involvement.”

The Prosecution’s confidentiality designations are justified and proportionate

9. The Prosecution has exercised its power to make confidentiality designations in a way that is justified, proportionate and falls within the parameters implicitly set by the Chamber through its adoption of the Information and Contact Protocol.

¹⁰ Information and Contact Protocol, para. 4(d): “‘Confidential document’ shall mean any document, or any other type of material, not classified as ‘public’ in accordance with Regulation 14(b) of the Regulations of the Registry”.

¹¹ Information and Contact Protocol, para. 4(e): “‘Confidential information’ shall mean any information contained in a confidential document which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Chamber of the Court”.

¹² See Request, para. 24: “Absent a request for protective measures, the information must be public.”

¹³ Chamber’s Practice Manual, para. 101 (emphasis added).

¹⁴ See Disclosure Regime Decision, paras. 39-40.

¹⁵ See Information and Contact Protocol, paras. 8 and 9.

10. The Prosecution has designated all witness statements and associated documents as confidential, to ensure that the identities of Prosecution witnesses are not made public prior to their eventual testimony. This designation, along with its factual and legal basis in shorthand ("Protection of victims and witnesses – Article 68 and Rule 81(4)"), has been communicated through the relevant metadata fields in the disclosure process, consistent with the directions in the Chamber's Disclosure Regime Decision,¹⁶ and with the E-court Protocol.¹⁷ It is justified by the need to protect prospective trial witnesses from the risk of (threatened) harm and/or interference, and to preserve their evidence for a potential future trial, particularly in the context of the Prosecution's ongoing investigation in the *Kony* case.¹⁸ Unfortunately, the Court's relatively short history of proceedings has shown the risk of pre-testimony witness interference in particular to be real, and not speculative. These justifications have been implicitly accepted by the Chamber by virtue of its implementation – unadapted – of the model Information and Contact Protocol,¹⁹ pursuant to articles 57(3)(c) and 68(1),²⁰ affording a pre-trial chamber the power to provide for the "protection and privacy of victims and witnesses", as well as the "preservation of evidence".²¹

11. As concerns the status of overlapping witnesses from the *Ongwen* case, the Prosecution makes no distinction in its confidentiality designation, given that the justification relates to prospective testimony in the present case. This means that, even in the case of witnesses who testified publicly in *Ongwen*, the need to preserve the confidentiality of their identities in the present proceeding remains unchanged. The Prosecution notes that, as anticipated in its *inter partes* email of 23 May 2025,²² it has

¹⁶ See Disclosure Regime Decision, para. 40.

¹⁷ See ICC-02/04-01/05-547-Anx, pp. 10-11 (entry: "Confidentiality Level"), pp. 12-13 (entry: "Basis of Confidentiality") where the shorthand basis "Protection of victims and witnesses – Article 68 and Rule 81(4)" is listed as a possible example.

¹⁸ As the Appeals Chamber has recognised, the Prosecution's investigation may be continued beyond the confirmation hearing: ICC-01/04-01/06-568, paras. 52, 54. See also Chambers Practice Manual, para. 14.

¹⁹ See Disclosure Regime Decision, para. 45.

²⁰ According to para. 103 of the Chamber's Practice Manual, "(t)he Chamber, acting under Articles 57(3)(c) and 68(1) of the Statute, should order the parties and participants to comply with [the Information and Contact Protocol]...".

²¹ Article 57(3): "In addition to its other functions under this Statute, the Pre-Trial Chamber may: ... (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence ...".

²² See Annex B to the Request, Prosecution's email of 23 May 2025.

now provided the Defence with a list of overlapping witnesses subject to protective measures in the *Ongwen* case.

12. Additionally, as communicated to the Defence on the specific question of P-0455,²³ some witnesses may also have specific circumstances that further increase their risk profile. However, while this makes their anonymity vis-à-vis the public at this stage of proceedings all the more important, and may ultimately motivate an application for in-court protective measures under rule 87 in relation to their future testimony, such a specific showing is not necessary in order to preserve the confidentiality designation.

13. The practical implementation of confidentiality designations at the confirmation hearing needs not, as the Defence suggests, unduly impinge on the fundamental principle of publicity of proceedings under article 67(1).²⁴ Indeed, it is the stated purpose of the Information and Contact Protocol to protect individuals at risk and the integrity of proceedings in a manner consistent with the rights of suspects and accused.²⁵ As the Prosecution has advised the Defence in continued *inter partes* communications,²⁶ it takes no issue with the Defence referring to or citing portions of the evidence as long as this in no way reveals the identity of Prosecution witnesses whose identities have not been made public. Indeed, this has long been the common practice between parties at confirmation stage (not to mention at trial),²⁷ as demonstrated most recently by the meticulous approach taken by defence counsel in the *Mokom* confirmation hearing.²⁸ Far from leading to a “largely anonymous and

²³ See Annex A to the Request, Prosecution’s emails of 8 and 13 May 2025.

²⁴ Request, paras. 1, 29-30.

²⁵ See Information and Contact Protocol, para. 1.

²⁶ The last message in the chain with subject “Witness Protective Measures Inquiry” was sent by the Defence on 27 May 2025, the day before it filed its Request: see Annex B to Request, Defence’s email of 27 May 2025.

²⁷ See, e.g. the almost identical preliminary remarks made by the pre-trial chamber judge presiding over recent confirmation hearings that the parties and participants shall refrain from mentioning the names of victims and witnesses and refer to their codes or pseudonyms: ICC-01/14-01/22-T-006-Red, p. 5, lns. 21-24 (22 August 2023); ICC-01/14-01/21-T-004-Red2, p. 9, lns. 7-9 (12 October 2021); ICC-02/05-01/20-T-007-Red, p. 4, lns. 23-25 (24 May 2021).

²⁸ See ICC-01/14-01/22-T-007-Red, p. 39, lns. 10-20, *in particular* lns. 16-17 (“...everything was done with the assistance of a lady which I will not give her name to – for safety reasons. Let’s call her Madame Pistache.”), p. 54, lns. 11-25, *in particular* lns. 21-22 (“... he mentions who his chief was, I will not mention it here for fear of identifying...”). See further, e.g., defence’s counsel’s references to and citations of portions of witness statements, used in conjunction with the witness code or pseudonym: ICC-01/14-01/22-T-007-Red, p. 52, lns. 16-19, p. 53, lns. 1-17; ICC-01/14-01/22-T-008-Red, p. 5, ln. 24 – p. 6, ln. 1, p. 10, lns. 3-5, p. 11, lns. 17-25, p. 12, lns. 1-14.

closed session confirmation hearing” where a public airing of the evidence is all but impossible,²⁹ this approach strikes an appropriate balance between the protection of witnesses and the integrity of proceedings and ongoing investigations, on the one hand, and the principle of publicity, on the other.

14. Lastly, beyond witness statements and associated documents, the Prosecution has also exercised its power to designate other disclosed documents as confidential, on such bases as that the item pertains to cooperation (under articles 87(3) and 93 and Rule 81(4)). While the Prosecution maintains that its general approach remains justified, it is happy to conduct a review of its designations with a view to correcting any clerical errors made in its disclosure metadata.³⁰

The Request amounts to a request for reconsideration

15. Given this internally coherent and well-established framework for the designation of confidential information, directly applicable in the present case through the Chamber’s implementation of the Information and Contact Protocol, the Defence’s argument amounts to a request for reconsideration of the Disclosure Regime Decision. It also amounts to a request for reconsideration of the portions of that decision governing the designation of confidentiality (paragraphs 39 and 40). Yet the Defence in its Request has not sought reconsideration of the Disclosure Regime Decision, nor has it sought the Chamber’s authorisation to deviate from the Information and Contact Protocol, as provided for under that Protocol.³¹ For its failure to articulate and motivate its request for reconsideration, alone, the Defence’s Request should fail.

Rule 87 has no application to non-testifying witnesses

16. In any event, the Defence’s insistence that protective measures under rule 87 are required to protect the confidentiality of witness identities *vis-à-vis* the public³² is misconceived and must be rejected. *First*, and dispositively, recourse to rule 87 is not

²⁹ See Request, paras. 1, 29.

³⁰ For e.g., UGA-OTP-0236-0022, as identified by the Defence in its Response, para. 2, fn. 2, was erroneously designated as Confidential.

³¹ See Information and Contact Protocol, para. 3: “Any deviation from this Protocol requires the prior authorization of the Chamber”.

³² See Request, para. 24.

necessary given the clear framework for the designation of confidential information, as outlined at paragraphs 6-8.

17. *Second*, rule 87 is a permissive provision applying to persons at risk “on account of testimony given by a witness”, as set out in the empowering paragraph (1), and repeated in paragraph (3). For witnesses who are not testifying, but whose statements are being presented as evidence to “support each charge” under article 61(5), this provision has limited application. Where it is not clear which witnesses will testify at a future trial, and when – if at all – this would take place, it would be entirely premature for the Prosecution to make applications for protective measures under rule 87.

18. *Third*, based on a clear reading of the Chamber’s instructions and subsequent rulings on rule 87 applications, the Chamber does not intend for the Prosecution to submit such applications in order to avoid disclosure of its witnesses’ identities to the public. While the Chamber’s instructions in its Disclosure Regime Decision is not expressly limiting, the time limit for rule 87 applications is given as part of an instruction on proposed *viva voce* witnesses.³³ If the Chamber had intended the Prosecution to file rule 87 applications for all witnesses relied on for the purpose of confirmation and not only for those proposed to testify, it would have made this clear. Here, the section of the Information and Contact Protocol on “witnesses whose identity has not been made public” is also instructive. That the section applies to “witnesses whose identity or relationship with the Court has not been made public OR who are subject to other protection measures”,³⁴ makes it clear that the absence of protective measures is not synonymous with publicity. In any case, the Chamber’s subsequent ruling on the five rule 87 applications submitted by the Prosecution in relation to proposed *viva voce* testimony makes its view abundantly clear. In dismissing these applications as “moot” following its rejection of the proposed *viva voce* testimony,³⁵ the

³³ See Disclosure Regime Decision, para. 27: “In addition, the Prosecution shall submit a list of its proposed *viva voce* witnesses for the confirmation of charges hearing... on the date of the completion of the disclosure process as set out below. The Prosecution shall also submit any requests pursuant to rules 87 and/or 88 of the Rules, accompanied by the completed security assessments for the witnesses in question, by the same time limit.”

³⁴ Information and Contact Protocol, para. 10 (emphasis added).

³⁵ See ICC-02/04-01/05-609, para. 21.

Chamber has already effectively ruled that rule 87 has no application to non-testifying witnesses.

19. *Fourth*, on the basis of one equivocal word (“including”) in a recent decision of Pre-Trial Chamber I in *Duterte*,³⁶ the Defence seeks to invoke a generalised custom whereby rule 87 applications are filed at confirmation stage. Yet the Request fails to point to one case in the history of the Court where rule 87 protective measures were required to ensure the non-disclosure of witness identities vis-à-vis the public at confirmation stage. As expanded upon above, the common practice is quite the opposite.³⁷ While the Prosecution cannot speculate as to the precise scenario contemplated by Pre-Trial Chamber I in *Duterte*, it is worth noting that mention has been made on the record of that case about the potential for article 56 testimony.³⁸

20. *Last*, introducing the requirement that rule 87 applications be made at the confirmation stage in relation to all witnesses would be unduly burdensome for the parties, participants and pre-trial chambers alike. This would have required the Prosecution to submit applications in relation to the witnesses whose statements it relies upon for the confirmation of charges *prior* to their disclosure. The Defence and the Office of Public Counsel for Victims would then have had to meaningfully consider and respond to these, and the Chamber to decide on these, all prior to the disclosure of the statements and related documents. The impractical consequences of the Request in itself underscore the incongruity of the Defence’s approach with the clear disclosure regime established by the Chamber.

IV. RELIEF REQUESTED

21. The Prosecution respectfully requests the Chamber to reject the Defence’s Request *in limine*.

22. Alternatively, while the Prosecution takes no issue with conducting a review to identify any inadvertent errors in the current confidentiality classifications of the items

³⁶ ICC-01/21-01/25-114, para. 22, cited at Request, para. 5, fn. 17.

³⁷ See above, para. 13, fns. 27-28.

³⁸ ICC-01/21-01/25-104-Red, para. 25.

on its List of Evidence, it otherwise respectfully requests the Chamber to reject the Defence's Request on the merits.

A handwritten signature in black ink, appearing to read 'Mandiaye Niang', with a horizontal line drawn underneath it.

Mame Mandiaye Niang, Deputy Prosecutor

Dated this 4th day of June, 2025
At The Hague, the Netherlands