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

Date: **7 February 2024**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN UGANDA

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

Public

OPCD request related to the notification efforts and outreach activities

Source: Office of Public Counsel for the Defence

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

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I. INTRODUCTION

1. This is the first time the Court is providing notice of the charges for the purpose of a potential confirmation hearing in the absence of the suspect. It is important that this process strictly adheres to the statutory roles of parties and participants, and safeguards the rights of Mr Joseph Kony. As the Court charts this new path, the Office of Public Counsel for the Defence (“OPCD”) has a duty, under regulation 77(4)(d) of the Regulations of the Court, to raise issues on behalf of unrepresented suspects when given leave by the Chamber to do so. The OPCD has identified two issues arising from the *Order to initiate notification efforts and related outreach activities*¹ which require remedies from the Chamber to protect Mr Kony’s rights as well as ensure that a safe precedent is set for any future suspects who may be subject to similar proceedings.
2. First, the OPCD submits that the preparation of any summary of the Document Containing the Charges² (“DCC”) is the role of the Prosecution because it necessarily involves conscious litigation choices about what information to publicise. The summary of the DCC prepared by the Chamber³ should, therefore, be rescinded to avoid the unfavourable impression that the Chamber will be assessing the summary it itself created when later determining whether the notification requirements to hold the confirmation hearing under article 61(2)(b) of the Statute have been met.
3. Second, the notification efforts will involve airing highly prejudicial allegations against Mr Kony, and this process should be done with full respect for the safeguards of his Rome Statute rights. The presumption of innocence, in particular, “protects all persons from a formal declaration of guilt before a judicial determination”⁴ and requires the Court to avoid statements which could be misinterpreted by the public as attributing guilt.⁵ The OPCD therefore requests the adoption of additional measures to recite and reinforce this right.

¹ [Order to initiate notification efforts and related outreach activities](#), 26 January 2024, ICC-02/04-01/05-475 (“Order to initiate notification and outreach”), para. 4.

² [Document Containing the Charges](#), 19 January 2024, ICC-02/04-01/05-474.

³ [Summary of the ‘Document Containing the Charges’ \(ICC-02/04-01/05-474\) for outreach activities](#), 26 January 2024, ICC-02/04-01/05-475-Anx.

⁴ *Prosecutor v. Al Hassan*, [Decision on the Defence’s request for admission of evidence and fair trial remedy](#), 22 March 2023, ICC-01/12-01/18-2481-Red (“*Al Hassan* Decision”), para. 11.

⁵ *Prosecutor v. Callixte Mbarushimana*, [Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings](#), 31 January 2011, ICC-01/04-01/10-51 (“*Mbarushimana* Decision”), para. 10.

II. STANDING

4. Mr Kony continues to be unrepresented in these proceedings, and the Chamber indicated that he would be assigned counsel in the event that it proceeds with the confirmation hearing against him⁶ or, of course, if he is surrendered to the Court. Nevertheless, the Chamber has recognised that “the outcome of the article 61(2)(b) litigation would have a significant impact on Mr Kony’s rights as well as those of future defendants before the Court”.⁷ Thus, as Mr Kony is currently unrepresented, this Chamber has permitted the OPCD to submit observations in the litigation⁸ and recognised the OPCD’s standing to seek leave to appeal the decision of 23 November 2023.⁹ In this filing, the OPCD intervenes with two specific issues in the context of the notification and outreach efforts recently ordered by the Chamber¹⁰ which, if unaddressed, may adversely impact Mr Kony’s rights and those of future defendants. The OPCD submits that, in these circumstances, it continues to have the standing recognised by the Chamber in its previous orders so that it is ensured that the article 61(2)(b) litigation proceeds in a way which safeguards the rights of Mr Kony as well as future suspects subject to this process.

III. SUBMISSIONS

a. The summary of the DCC prepared by the Pre-Trial Chamber should be rescinded and, instead, prepared by the Prosecution

5. The OPCD is disquieted that the summary of the DCC for outreach activities has been written and prepared by the same Chamber which will later determine whether these activities adequately satisfy the requirements of article 61(2)(b) of the Statute. While it is understood that the summary was prepared with the best of intentions, the Statute assigns the Pre-Trial Chamber the responsibility to determine whether the conditions for charging in the suspect’s absence are fulfilled, and not contribute to the direct efforts to fulfil them.

⁶ [Decision rejecting the OPCD’s request to access the record of the *Kony* case](#), 19 December 2023, ICC-02/04-01/05-472, para. 4.

⁷ [Decision on the OPCD Request for Leave to Appeal the ‘Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence’](#), 11 December 2023, ICC-02/04-01/05-470, (‘Decision on OPCD Leave to Appeal’), para. 18.

⁸ [Order on procedural matters and decision on request for a lesser redacted version of the arrest warrant](#), 7 February 2023, ICC-02/04-01/05-453, paras 16–17.

⁹ [Decision on OPCD Leave to Appeal](#), para. 18.

¹⁰ [Order to initiate notification and outreach](#).

6. The Chamber itself made the division of responsibilities clear in the decision of 23 November 2023 setting out the legal framework for charging *in absentia*. It specified that the Prosecution is required to set out the charges, while the Chamber provided the legal framework and guidance on what information is required so that a suspect can be considered “to be properly informed of the charges”.¹¹ Referencing the respective roles in the process, the Chamber stressed that, “[a]fter the DCC is submitted, *the Registry and the Prosecution* must make their best efforts to put Mr Kony on notice of the charges for which confirmation is sought, and report to the Chamber on the measures taken”.¹²
7. By creating the summary of the Prosecution’s DCC “to be used for outreach activities”, it has assumed a more active role than merely receiving reports on the measures taken by the Prosecution and Registry. While crafting a summary may appear innocuous and even helpful, doing so involves making choices regarding what charging information in the DCC should be publicised on platforms with limited time and space to convey a message. Those platforms are also likely those with the greatest reach, meaning that the messaging choices here are especially important. In any event, what information is conveyed will form part of the Chamber’s assessment on whether all reasonable steps have been taken to inform Mr Kony of the charges and whether the information disseminated sufficiently specifies “for each charge the place, time, and approximate number of victims” and the “necessary particulars that comprise the elements of the crime”.¹³
8. The role of notifying ‘the charges’ is vested in the Prosecution, which in turn is facilitated by the Registry in implementation. It is the Prosecution’s role to persuade the Chamber as to whether their efforts fulfil the requirements of article 61(2)(b) of the Statute. In the original Decision, the Chamber instructed that a “very concise document would be easier to transmit” by local media outlets and through social media;¹⁴ nevertheless, the Prosecution opted to submit the DCC without preparing the concise document as prompted by the Chamber. This must be seen as a conscious litigation choice by the Prosecution. Thus, by preparing the concise document it earlier alluded to, the Pre-Trial Chamber risks giving the impression that it is making or

¹¹ [Decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence](#), 23 November 2023, ICC-02/04-01/05-466, paras 46–53 (“Decision on the Prosecution’s Original Request”).

¹² [Decision on the Prosecution’s Original Request](#), para. 54 (emphasis added).

¹³ [Decision on the Prosecution’s Original Request](#), para. 53.

¹⁴ [Decision on the Prosecution’s Original Request](#), paras 53, 57.

correcting litigation choices on behalf of the Prosecution. A reasonable observer might have the legitimate concern that the Chamber would be judging the sufficiency of the charging summary that it has itself prepared contrary to the maxim *nemo iudex in causa sua*.

9. The OPCD is not arguing that this Pre-Trial Chamber has actually predetermined the requirements of article 61(2)(b). It understands that the summary was prepared with the likely intention to facilitate and expedite the confirmation process and reflects information originating from the Prosecution in the DCC. However, strict adherence to statutory roles and responsibilities in these novel proceedings is important, particularly as the Court is at an advanced stage of considering, for the first time in its history, whether to hold a confirmation hearing in the suspect's absence. The OPCD feels obligated to raise this issue at this time, while it can still be corrected, to ensure that the Chamber sets a scrupulous first precedent for both Mr Kony and future defendants.
10. The OPCD therefore respectfully requests that the summary of the DCC annexed by the Chamber in the order of 26 January 2024 be rescinded, and that the Chamber instead order the Prosecution to prepare any summaries of the charges to be used in the notification and outreach activities. It is also respectfully requests that these summaries be preserved on the record, and that the Registry be ordered to prepare comprehensive and detailed reports so that the adequacy of the notification efforts can be properly litigated in the event that a counsel is later appointed for Mr Kony in any *in absentia* confirmation process.

b. Adoption of safeguards to protect Mr Kony's presumption of innocence

11. The anticipated notification efforts and outreach activities facilitated by the Registry will involve publicising highly prejudicial allegations against Mr Kony, who, as a suspect, remains entitled to be presumed innocent until proved guilty before the Court. The adoption of safeguards are, therefore, necessary when disseminating these allegations to ensure that this right is respected. As observed by the Chamber in *Mbarushimana*, the right to be presumed innocent as enshrined in article 66(1) of the Statute is "guaranteed [...] not only to accused persons, but also to those with respect to whom a warrant of arrest or summons to appear has been issued, before their surrender to the Court".¹⁵ At the ICC:

¹⁵ [Mbarushimana Decision](#), para. 8.

*The Pre-Trial Chamber therefore has a specific responsibility to protect the rights of a suspect. In order to fulfil its duties relating to this responsibility and to its role of the guarantor of the suspect's rights, the Chamber has the necessary powers to take appropriate measures to protect these rights.*¹⁶

12. The presumption of innocence requires that any public statements about the suspect are made with all due discretion and circumspection to preserve this right.¹⁷ As cited with approval by the Pre-Trial Chamber in *Mbarushimana*, public authorities, in particular those involved in criminal investigations and proceedings:

*should be careful when making statements in public, if at all, about matters under investigation and on the persons concerned thereby, in order to avoid as much as possible that these statements could be misinterpreted by the public and possibly lead to the [persons]'s innocence being called into question even before being tried.*¹⁸

13. This principle is perhaps heightened by the stage of the proceedings where Mr Kony remains a *suspect* and is being called on to respond only to a process that will examine if charges go forward. Although it is understood why the Chamber ordered the Prosecution to produce the DCC for notification purposes,¹⁹ the conduct described in the DCC is liable to be misinterpreted by the public unless publicised with appropriate safeguards. With the exception of sparse references to “charges”, the entire DCC phrases the allegations against Mr Kony in a way which asserts the alleged conduct as facts. This can be contrasted with the arrest warrant against Mr Kony which caveats nearly every factual proposition and paragraph with an indication that they are “allegations”, “submissions”, “charges”, based on “evidence submitted”, or variations thereof.²⁰

14. The OPCD observes that the Court takes great care to avoid prejudice against suspects and accused in its proceedings; for example, the Trial Chamber in *Al Hassan* has emphasised that outreach activities “may not be conducted at the expense of the rights of accused persons”.²¹ Public messaging from the Court in media advisories and press releases has included explanatory statements to stress that the “accused before the ICC

¹⁶ [Mbarushimana Decision](#), para. 6.

¹⁷ European Court of Human Rights, [Fatullayev v Azerbaijan](#), no. 40984/07, 22 April 2010, para. 159; [Allenet de Ribemont v France](#), no. 15175/89, 10 February 1995, para. 38; [Garycki v Poland](#), no. 14348/02, 6 February 2007, para. 69.

¹⁸ [Mbarushimana Decision](#), para. 10, citing European Commission on Human Rights, *X v Netherlands*, application no. 8361/78, 17 December 1981, p. 43.

¹⁹ [Decision on the Prosecution's Original Request](#), paras 46–53.

²⁰ [Lesser Redacted Version of “Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005”](#), 13 March 2023, ICC-02/04-01/05-456-Anx, paras 5, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28.

²¹ [Al Hassan Decision](#), para. 8.

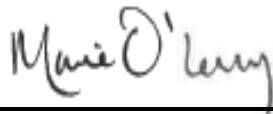
is presumed innocent” and language is used to clarify the evidential and legal process leading to any factual findings.²²

15. The OPCD therefore respectfully requests that the Chamber order the Prosecution and Registry, as well as any implementing partner, to ensure that any public statement, broadcast, or transmission of the DCC or of any allegations against Mr Kony to the public be accompanied by appropriate language to reference his article 66 presumption of innocence and fair trial rights granted by the Rome Statute.

RELIEF REQUESTED

16. For the foregoing, the OPCD respectfully requests that the Chamber:

- i. recognise the OPCD’s standing to make this request;
- ii. rescind the summary of the DCC annexed to the Order to initiate notification efforts and related outreach activities of 26 January 2024 and, instead, order the Prosecution to produce summaries, as the Chamber determines necessary, for the Registry to carry out the notification efforts and outreach activities;
- iii. order the Registry to keep comprehensive and detailed reports on these efforts and activities; and,
- iv. order that the Prosecution and Registry issue a caveat emphasising Mr Kony’s right to be presumed innocent in any public statement, broadcast, or transmission of the DCC or any allegation against him, and order any implementing partner to do the same.



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Acting Principal Counsel of the OPCD

dated this 7th day of February 2024
at The Hague, The Netherlands

²² ICC Media Advisory, “Trial Judgment in Al Hassan case on 18 January 2024 – Practical information”, 10 January 2024, available online at <<https://www.icc-cpi.int/news/trial-judgment-al-hassan-case-18-january-2024-practical-information>> (last accessed 7 February 2024); ICC Media Advisory, “Al Hassan case: Trial Chamber X postpones delivery of judgment”, 15 January 2024, available online at <<https://www.icc-cpi.int/news/al-hassan-case-trial-chamber-x-postpones-delivery-judgment>> (last accessed 7 February 2024); ICC Press Release, “Al Hassan case: ICC Trial Chamber X to deliver Trial Judgment on 18 January 2024”, available online at <<https://www.icc-cpi.int/news/al-hassan-case-icc-trial-chamber-x-deliver-trial-judgment-18-january-2024>> (last accessed 7 February 2024).