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No. ICC-02/04-01/05

Date: 4 March 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

Second decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence

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

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Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court, following the receipt of the document containing the charges and the Registry’s report on its effort to inform Mr Kony of those charges, issues this further decision on the Prosecution’s request to hold a confirmation of charges hearing in the *Kony* case in the suspect’s absence.

I. PROCEDURAL HISTORY

1. On 23 November 2023, following a request by the Prosecution to hold a hearing on the confirmation of charges against Mr Kony in his absence,¹ the Chamber 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 finding that Mr Kony qualifies as a person who cannot be found within the meaning of article 61(2)(b) of the Rome Statute (the ‘Statute’), and that under the prevailing circumstances, there is cause to hold a confirmation hearing against him, in his absence. The Chamber ordered the Prosecution to submit a document containing the charges within eight weeks, should it wish to proceed with its request. It also instructed the Registry to submit a plan indicating the outreach activities and notification efforts it would pursue to inform Mr Kony of the charges against him, if the Prosecution files the document containing the charges. The Chamber deferred its final decision on whether to proceed with the confirmation hearing in the absence of Mr Kony until all the requirements outlined by the Chamber had been fulfilled, namely, to take all reasonable steps to inform Mr Kony of the charges as described in the DCC and subsequently that a hearing to confirm those charges will be held.

2. On 18 December 2023, the Chamber received the ‘Registry’s Proposed Plan on Outreach Activities and Notification Efforts’³ (the ‘Registry’s Plan’) and on 19 January 2024, the Prosecution submitted the ‘Document Containing the Charges’ (the ‘DCC’).⁴

¹ Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, 24 November 2022, ICC-02/04-01/05-446-Conf (the ‘Prosecution’s Request’) (public redacted version filed the same day, [ICC-02/04-01/05-446-Red](#)).

² [ICC-02/04-01/05-466](#).

³ ICC-02/04-01/05-473, with two annexes.

⁴ [ICC-02/04-01/05-474](#).

3. On 26 January 2024, the Chamber ordered the Registry to initiate notification efforts and related outreach activities, and provided it with a summary of the DCC.⁵ The Registry was instructed, *inter alia*, to take all reasonable steps to inform Mr Kony of the charges as described in the DCC and ensure that the latter and its Acholi translation are easily accessible on the Court's website. The Registry was also instructed to report back on the matter within four weeks from the notification of the order.

4. On 23 February 2024, the Chamber received the 'Registry's Report on the implementation of Pre-Trial Chamber II's "Order to initiate notification efforts related outreach activities"' (the '23 February 2024 Registry's Report').⁶

II. DETERMINATION

5. The Chamber recalls that, in the 23 November 2023 Decision, it found that Mr Kony qualifies as a person who cannot be found within the meaning of article 61(2)(b) of the Statute. Pursuant to the second requirement of article 61(2)(b) of the Statute, before deciding whether a confirmation hearing in the absence of Mr Kony ought to take place, the Chamber must be satisfied that all reasonable steps have been taken to inform him of the charges. In the present decision, the Chamber assesses whether this requirement has been satisfied.

6. The Chamber previously observed that it 'can only determine whether this requirement has been fulfilled after the Registry has had sufficient time to take the necessary and adequate "steps" to inform the person of the charges described in the DCC'.⁷ The Chamber notes the steps and activities undertaken by the Registry to try to inform Mr Kony of the charges against him as set out in the 23 February 2024 Registry's Report. These included large-scale media campaigns, both in Uganda and neighbouring countries, activities aiming at engaging with relevant stakeholders and communities,

⁵ Order to initiate notification efforts and related outreach activities, [ICC-02/04-01/05-475](#), and public annex ([ICC-02/04-01/05-475-Anx](#)).

⁶ ICC-02/04-01/05-479, and annexes.

and the use of social media platforms as well as information provided via the website of the Court. The Chamber notes in particular that the summary of DCC was broadcasted in Acholi and English on different radio stations in Northern Uganda, and that it is estimated that an audience of eight million people per day since 6 February 2024 has been reached through such mean of communication. Moreover, the summary of the charges was also read out by Registry staff in Acholi, during interactive radio programs conducted on two community radio stations most listened to by rural communities in Northern Uganda. It is estimated that eight million people across the Acholi, Lango West Nile sub-regions in Northern Ugandan, as well as some part of Southern Sudan and the Democratic Republic of Congo listened to the relevant programs. In addition, the Registry launched a radio campaign on two radio stations in the Central African Republic during which the existing charges against Mr Kony were explained in French and Sango. An expected audience of six million people was reached with the latter campaign.

7. Moreover, the Registry made efforts to engage with relevant stakeholders and communities. Such activities focused on communities in Northern Uganda close to Mr Kony and included meetings attended by clan members and other persons close to him. During the relevant meetings, the Registry provided updates on the case, the charges were read out, and copies of the summary of the DCC in Acholi shared. The Registry also held an interactive dialogue with, *inter alia*, religious and cultural leaders as well as civil society, victim groups and local government leaders, during which the summary of the DCC was read. Furthermore, the Chamber notes that the Registry used several platforms to raise awareness on the charges against Mr Kony, including by posting a short video in English and French as well as visuals with Frequently Asked Questions.⁸ The Chamber also notes that a specific sub-page on the Court's website was created including the DCC and its summary, in English, French, and Acholi.

8. The Chamber had instructed the Registry 'to convey the charges against Mr Kony as they are contained in the DCC [...] [w]here possible'.⁹ As reflected above, for part of the Registry's efforts the summary of the charges was used. Although notifying a

⁸ The posts published on the Court's social media platforms generated a total of 127,000 impressions, and 6,600 engagements; and the video generated 30,000 views.

⁹ [ICC-02/04-01/05-475, para. 4.](#)

person of a summarised version of the charges against him or her does not mean that this person was informed of the actual charges, it would mean that the charged person was made aware that such charges against him or her exist. In the present case, the summary of the DCC included an explanation that the Acholi version of the DCC is available on the Court's website. In such a circumstance, it would be incumbent on the suspect to retrieve the charges. This is so because the 'all reasonable steps' standard for the second requirement of article 61(2)(b) of the Statute must also be considered as having been fulfilled as long as all efforts have been made to inform the person that charges against him or her exist and that these charges were available for consultation. In such instance, whether the person made an effort to consult the specific charges or chooses not to learn about them does not impact the Chamber's finding on whether all reasonable steps to inform him or her of the charges have been taken.

9. As the abovementioned measures and activities were varied, extensive and reached a large population, including clan members and other persons close to Mr Kony, the Chamber is satisfied that the Registry made its best efforts to put Mr Kony on notice of the charges for which confirmation is sought, or at least of the fact that such charges exist and that the document containing them was available for consultation in a language the suspect speaks and understands. These steps were reasonable, adequate and took into consideration the communication preferences of the local audiences. For the same reasons, and in light of the specific circumstances of the case where the suspect has been at large for a significant period of time, the Chamber considers that sufficient time has been provided to the Registry to take all reasonable steps to inform Mr Kony of the charges. Therefore, the Chamber considers that the second requirement of article 61(2)(b) has been met.

10. In light of this finding, the only remaining requirement of article 61(2)(b) of the Statute that must be satisfied is whether all reasonable steps have been taken to inform Mr Kony that a confirmation of the charges hearing *in absentia* will take place. As the Chamber considered before, this requirement only needs to be assessed after the Chamber has decided to hold such a hearing.¹⁰

¹⁰ [23 November 2023 Decision](#), para. 45.

11. For this reason, the Chamber decides to proceed and sets a date for the hearing on the confirmation of the charges brought against Mr Kony.

12. As to the date, the Chamber is first and foremost guided by the need to ensure the suspect's right to have adequate time and facilities for the preparation of his defence under article 67(1)(b) of the Statute and rule 121(1) of the Rules of Procedure and Evidence (the 'Rules'). This is especially so in light of the fact that, should the Chamber definitively decide that there is cause to authorise a confirmation of charges in the absence of Mr Kony, a counsel will have to be appointed to represent the rights and interests of Mr Kony in the proceedings. Such counsel will require sufficient time for his or her preparation in the absence of Mr Kony. In this regard, the Chamber has taken note of the scope of the Prosecution's allegations as reflected in the DCC, and the potential voluminous amount of material that the Prosecution is likely to disclose in the present case. In light of the foregoing and given that this would be the first time the Court would hold a confirmation of charges hearing *in absentia*, the Chamber considers commencing the confirmation of charges hearing on 15 October 2024 appropriate.

13. The Registry is instructed to make its best efforts to inform Mr Kony that a confirmation of charges hearing *in absentia* will take place on the above mentioned date. The Registry is to proceed in the same manner as it recently has for the notification of the charges. Although the Chamber can only formally determine that the third legal requirement of article 61(2)(b) of the Statute (namely, to inform Mr Kony of the fact that the hearing on the confirmation of charges against him will commence on the above mentioned date) at a later stage,¹¹ the Chamber recalls that it found above that the procedure that will be followed qualifies as all reasonable steps to inform the suspect of the relevant information. The Chamber therefore trusts that the forthcoming efforts by the Registry will result in the fulfilment of the third requirement. Unless the Chamber decides and gives instructions otherwise, the parties and participants must proceed on the basis that the confirmation hearing will start on 15 October 2024.

14. Furthermore, the Chamber is of the view that it is important that steps are taken to ensure that the confirmation of charges hearing *in absentia* can in fact commence on that date. Therefore, with a view to ensure that the disclosure process begins as soon as

¹¹ [23 November 2023 Decision](#), para. 45.

possible, the Chamber considers it necessary to receive detailed observations from the Prosecution on the questions set forth below with regard to disclosure and related matters, including the time needed to effectuate the disclosure and/or submit related requests to the Chamber. The Prosecution is therefore instructed to provide the Chamber with the following information, within four weeks of the notification of the present decision:

- (i) Within the category of documentary evidence, what is the overall number of written pieces of evidence the Prosecution intends to rely upon at the confirmation hearing? How many pages does this amount to? What is the original language of such evidence and/or in what language will it be made available?
- (ii) Does the Prosecution intend to rely upon other non-written pieces of documentary evidence, such as photographs, video, or audio recordings? If so, what is the total length/time span and original language of such pieces of evidence and will transcripts and/or translations be made available?
- (iii) How many and which pieces of evidence can be immediately disclosed without redactions? How many pages, or in case of video and radio recordings, what time span does this evidence amount to?
- (iv) What is the estimated overall amount of exculpatory evidence that the Prosecution intends to disclose as soon as practicable pursuant to article 67(2) of the Statute? How many pages, or in case of video and radio recordings, what time span does this evidence amount to? Does the exculpatory evidence require redactions?
- (v) How many persons, if any, does the Prosecution intend to call as witnesses to testify *viva voce* at the confirmation hearing?
- (vi) How many witness statements does the Prosecution intend to provide for the purposes of the confirmation hearing, pursuant to rule 76 of the Rules? Does the Prosecution intend to provide such statements in their entirety or in the form of summaries, pursuant to articles 61(5) and 68(5) of the Statute?

(vii) What is the language of the materials the Prosecution intends to rely upon at the confirmation hearing?

(viii) Does the Prosecution intend to submit requests to withhold the identity of any potential witnesses and, if so, of how many persons?

Have security assessments been prepared for such witnesses, and, if not yet, when are they estimated to be finalised?

(ix) Does the Prosecution intend to request protective measures for witnesses, victims or other persons at risk prior to disclosure of the names of the witnesses and/or of certain documents, pursuant to rules 87 and 88 of the Rules? Has the Prosecution held consultation with the Victims and Witnesses Unit (the 'VWU') regarding protective measures for witnesses, victims or other persons at risk? How many witnesses have been referred to the VWU for protection purposes, including relocation? Does the Prosecution intend to refer other witnesses to the VWU for protection purposes before the confirmation hearing? What is the Prosecution's estimate regarding the time needed for such measures to be put in place?

(x) Does the Prosecution possess or control any books, documents, photographs or other tangible objects that shall be permitted to be inspected as material to the preparation of the Defence under rule 77 of the Rules? If so, what is the estimated overall amount of such material ?

(xi) Are any of the Prosecution's pieces of evidence, in particular exculpatory evidence or evidence considered as material for the preparation of the defence, affected by confidentiality agreements in accordance with articles 54(3)(e), 72 and 93 of the Statute? In the affirmative, has the Prosecution undertaken, or will the Prosecution undertake, steps to obtain the consent of the information provider(s) regarding the disclosure of such material?

(xii) Does the Prosecution intend to submit requests in relation to unique investigative opportunities under article 56 of the Statute? What could be the impact of such requests on the disclosure process and the commencement of the confirmation hearing?

- (xiii) Is the Prosecution continuing the investigation regarding Mr Kony, and if so, how would this impact on the disclosure process?
- (xiv) Bearing in mind the scheduled date for the confirmation hearing, what does the Prosecution anticipate to be the earliest date it will be able to complete disclosure?

15. Finally, the Chamber instructs the Registry to commence the process of selection of counsel to represent the rights and interests of Mr Kony during the confirmation process and the confirmation hearing, should this take place in Mr Kony's absence. The Registry is instructed to report back on the progress of this process within three weeks of the notification of the present decision, with a view of a counsel being appointed by the time the Prosecution files the information on disclosure.

FOR THE ABOVE REASONS, THE CHAMBER HEREBY

FINDS that all reasonable steps to inform Mr Kony of the charges against him as set out in the Document Containing the Charges have been taken, within the meaning of article 61(2)(b) of the Statute;

DECIDES that the confirmation of charges hearing, to be held in Mr Kony's absence should he not appear, will commence on 15 October 2024;

INSTRUCTS the Registry to initiate notification efforts and outreach activities in respect of the date for the commencement of the confirmation of charges hearing in accordance with this order;


INSTRUCTS the Registry to report on the matter within four weeks of the notification of the present decision;

ORDERS the Prosecution to provide the Chamber with the information specified at paragraph 14 of this decision, within four weeks of the notification of the present decision;

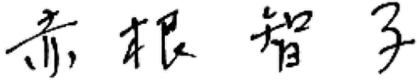
INSTRUCTS the Registry to commence the process of selection of counsel to represent the rights and interests of Mr Kony, and report to the Chamber within three weeks of the notification of the present decision; and

INSTRUCTS the Registry to file a public redacted version of ICC-02/04-01/05-479-Conf-AnxI within five days of notification of the present decision.

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



Judge Rosario Salvatore Aitala
Presiding



Judge Tomoko Akane



Judge Sergio Gerardo Ugalde Godínez

Dated this Monday, 4 March 2024

At The Hague, The Netherlands