

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 March 2024

PRE-TRIAL CHAMBER II

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

SITUATION IN UGANDA

THE PROSECUTOR v. JOSEPH KONY

Public

**Prosecution Response to Victims' Concerns on the Document Containing the
Charges**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Karim A.A. Khan KC
Mame Mandiaye Niang
Leonie von Braun

Counsel for the Defence

Legal Representatives of the Victims

Paolina Massida
Sarah Pellet

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Paolina Massidda
Sarah Pellet
Anne Grabowski
Fiona Lau

**The Office of Public Counsel for the
Defence**

Marie O'Leary

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Oswaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Prosecution respectfully requests the Chamber to reject the request of the Office of the Public Counsel for Victims (OPCV) to amend the DCC.¹ Any determination on the proper legal characterisation of the facts is reserved for the Chamber's discretion after the Confirmation of Charges hearing as part of its deliberations. Thus, the Request is premature at this stage. Further, *arguendo* that the OPCV may exercise the procedural rights of a party to raise objections to the form of the DCC,² the issue it raises does not constitute a "defect" in the DCC as the Prosecution has properly exercised its charging discretion based on the facts of this case and the law.³ Given the entrenched and interconnected nature of the conduct amounting to enslavement in this case, additionally characterising only certain aspects of it as sexual slavery as a crime against humanity could lead to a fragmented and decontextualised understanding of the totality of the harm to victims. An additional characterization of sexual slavery as a crime against humanity is also unnecessary. Here, the relevant facts, the harm to survivors and victims and the protected legal interests associated with different crimes are covered in the overall charging strategy.

II. SUBMISSIONS

a. Procedural considerations

2. The OPCV Request should be dismissed on procedural grounds. *First*, it is premature. While the Prosecution filed its DCC on 18 January 2024, the confirmation of charges hearing is envisaged to take place on 15 October 2024.⁴ It is likely only at

¹ Referred to as DCC. ICC-02/04-01/05-480 ([OPCV Request](#)).

² *See e.g.*, rule 122 (3), Rules of Procedure and Evidence (Rules) allowing the Prosecutor and person charged to raise objections or to make observations on the proper conduct of proceedings before the confirmation hearing; similarly, rule 134 of the Rules (for trial); ICC-02/04-01/15-1562 ([Ongwen CD Defects AD](#)), para. 129 ("[R]ule 122(3) foresees challenges brought by the parties concerning an issue related to the proper conduct of the proceedings prior to the confirmation of charges hearing [...]"); ICC-02/17-137 ([Afghanistan Victims Standing AD](#)), para. 21 (finding that the victims cannot be considered a "party" for the purpose of article 82(1) appeals)

³ Article 61, Statute; *see e.g.*, ICC-01/09-02/11-382-Red ([Muthaura et al CD](#)), paras. 284-286; ICC-01/09-01/11-373 ([Ruto et al CD](#)), paras 275-278; ICC-01/05-01/13-2275-Red ([Bemba et al. AJ](#)), para. 196.

⁴ ICC-02/04-01/05-481 ([Second Confirmation Hearing Decision](#)), p. 11.

that stage that the Prosecution will be able to present submissions on its overall charging approach to the Chamber, and address any issues raised. Many, if not all, of the concerns that the OPCV now expresses can be addressed appropriately at that later stage. Also, the DCC itself is not the place for supporting submissions or explanations.⁵ Moreover, 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.⁶

3. *Second*, as the Statute makes clear, the Prosecutor is the “charging entity” under the Court’s legal framework.⁷ Accordingly, the principle of prosecutorial discretion over charging extends to the choice of charges in a case.⁸ The Prosecution has exercised its charging discretion properly in this case, as set out further below under *b* and *c*.

4. 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.⁹ The *Ongwen* DCC filed in 2015 was significant, in that it included several gender-based crimes for the first time, such as forced pregnancy and forced marriage (as other inhumane acts). However, the Prosecution is not necessarily obliged to replicate every aspect of its 2015 approach in 2024. The Prosecution exercises continuous diligence and vigil over its charging strategy in cases related to gender-based crimes (including crimes involving sexual, reproductive and other gender-based violence) and crimes against and affecting children.¹⁰ When improvements can be made, especially in light of learning

⁵ *Contra* [OPCV Request](#), para. 31.

⁶ [OPCV Request](#), paras. 4-5; *See* Chambers Practice Manual (2023), paras. 35-37.

⁷ [Bemba et al. AJ](#), para. 196.

⁸ Chambers Practice Manual (2023), para. 38 (“[The] 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 that the suspect is informed in detail of the nature, cause and content of the charge (cf. Article 67(1)(a) of the Statute). This will necessarily depend on the particular circumstances of each case.”); [Muthaura et al CD](#), para. 286.

⁹ *Contra* [OPCV Request](#), para. 31.

¹⁰ *See* OTP Policy on Gender-Based Crimes, December 2023; OTP Policy on Children, December 2023.

from earlier cases and deepening understanding of these issues, it is both the Prosecution's intention and responsibility to make them.¹¹

5. The Prosecution carefully considers how the harm caused to victims can be conveyed in more accurate and comprehensive terms. Thus, the DCC in this case includes several charging modifications to apply the text of the Statute fully to reflect *inter alia* the systemic nature of the persecution and enslavement that women and children (girls and boys) faced within the LRA. It includes specific charges for more gender-based crimes, such as persecution based on grounds of gender and age and the crime of enslavement. For the latter, the Prosecution takes a gender-competent inclusive approach to the myriad indicia of the exercise of powers of ownership, *including* those acts by which victims were caused to engage in acts of a sexual nature. These charges were absent in *Ongwen*.

6. *In addition*, while the OPCV may present the views and concerns of victims when their personal interests are affected,¹² it does not enjoy the same procedural standing and rights as the parties.¹³ As such, its attempt to either seek amendment of the DCC (a right reserved for the Prosecutor under the Statute)¹⁴ or to make objections on the conduct of the proceedings (a right left to the parties under the Rules)¹⁵ should be rejected. Further, Chambers have previously rejected requests from the Legal Representatives for Victims (LRV), when the Prosecutor had characterised facts or chosen to charge differently.¹⁶ They have also found that a Pre-Trial Chamber may,

¹¹ See article 54(1)(b), Statute.

¹² Article 68(3), Statute.

¹³ Rule 122 (3), Rules; [Ongwen CD Defects AD](#), para. 129; [Afghanistan Victims Standing AD](#), para. 21.

¹⁴ Article 61(7), Statute.

¹⁵ Article 61(6)(a) and (b), Statute; Rules 122(3)-(7), Rules; See Chambers Practice Manual (2023), paras. 35-39.

¹⁶ See e.g., [Ruto et al CD](#), paras. 275-278 (rejecting the LRV request to include acts of destruction of property, looting, and the infliction of physical injuries, since the Amended DCC already included them); [Muthaura et al CD](#), paras 284-286 (rejecting the LRV request to include acts of destruction and looting as underlying acts of persecution, when the Prosecutor had chosen to charge only the alleged destruction of property amounting to other inhumane acts).

under article 61(7)(c)(ii) of the Statute, request the Prosecutor to consider amending a charge, but not to add a new charge.¹⁷

b. Enslavement as a crime against humanity is the appropriate charge on these facts

7. On the facts of this case, the Prosecution considers that enslavement as a crime against humanity (and not sexual slavery as a crime against humanity) is the appropriate charge. The case against Mr Kony is one of systemic enslavement in all its forms. The facts pleaded support this charge.

8. The crime of enslavement is often a gender-based crime, which in turn, includes acts and omissions relating to sexual, reproductive and other gender-based violence.¹⁸ Moreover, the right not to be held in slavery is a jus cogens norm that extends to all forms of it—not only aspects of slavery related to acts of a sexual nature.¹⁹ As has been recognised, diverse gendered, sexualised norms have permeated the practices of slavery and slave trade historically and in its contemporary forms.²⁰ Enslavement under customary international law encompasses the exercise of powers attaching to rights of ownership over a broad span of acts and omissions, including those that

¹⁷ *Ruto et al CD*, para. 278 (“[A]rticle 61(7)(c)(ii) of the Statute only allows the Chamber to request the Prosecutor to consider amending a charge. Accordingly, the Chamber, cannot on the basis of this provision, request the Prosecutor to consider adding a new charge as the [LRV] requests.”); *Muthaura et al CD*, para. 285.

¹⁸ See e.g., OTP Policy on Gender-Based Crimes, December 2023.

¹⁹ See e.g., M.C. Bassiouni, ‘Enslavement as an International Crime’, 23 N.Y.U. J. Int’l L & Pol. 445 1990-1991 (*Bassiouni*); P.V. Sellers and J. Kestenbaum, “The International Crimes of Slavery and Slave Trade” in I. Rosenthal *et al.* (Eds.), *Gender and International Criminal Law* (Oxford: OUP, 2022) (“Sellers and Kestenbaum 2022”), p. 173 (referring to the 1926 Slavery Convention to Suppress the Slave Trade and Slavery and 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery), p. 169 (“The Temporary Slavery Commission Reports of 1925 and 1926, which prepared for the drafting of the 1926 Slavery Convention, defined ‘slavery in all its forms’ as the exercise of any and all powers attaching to the rights of ownership over an individual, even in cases that did not require legal title or chattel ownership.”); see also *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al. A*”), paras. 117 (accepting that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery”, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right to ownership, and recognising that “at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity in customary international law.”), 124; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 (*Kunarac et al. TJ*), paras. 520, 539; *Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010 (*Case 001 TJ*), para. 342.

²⁰ See e.g., Sellers and Kestenbaum 2022, pp. 161-173.

violate the sexual and reproductive autonomy of different categories of victims.²¹ Since it is not possible to enumerate all contemporary forms of slavery relevant to the crime of enslavement, the list of indicia showing the exercise of any or all of the powers attaching to the right of ownership is an open-ended, non-exhaustive one.²² Acts of sexual violence are among the many indicia of enslavement.²³ Sexual slavery is itself only one *form* of enslavement.²⁴ There is no hierarchy among the different forms of enslavement.²⁵

9. Furthermore, Chambers at this Court have also consistently approved a similar open-ended list of indicia to demonstrate the exercise of powers of ownership.²⁶ This list of indicia applies equally to enslavement and sexual slavery, since the single element of enslavement and the first element of sexual slavery under the Statute are worded identically. Following the ordinary rules of treaty interpretation therefore, they must be interpreted identically,²⁷ and they have.²⁸

²¹ See e.g., [Kunarać et al. AJ](#), para. 119 (“[T]he question of whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement... [They] include the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force, or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”).

²² [Kunarać et al. AJ](#), para. 119; [Kunarać et al. TJ](#), paras. 541-543.

²³ [Kunarać et al. TJ](#), paras. 542 (“Further indications of enslavement include exploitation: the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.”), 543 (referring to *inter alia* assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality); P.V. Sellers and J. Kestenbaum, ‘Sexualised Slavery’ and Customary International Law in S. Weill *et al.* (Eds), *The President on Trial: Prosecuting Hissène Habré* (Oxford: OUP, 2020) (Sellers and Kestenbaum 2020), pp. 366-380 (sexualised violence comprises an *actus reus* or indicia of *de jure* or *de facto* slavery; when present, sexual violence and sexual integrity harms cannot be decoupled from manifestations of slavery).

²⁴ [Kunarać et al. TJ](#), fn. 1333 (“The setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not a form of enslavement.”).

²⁵ Sellers and Kestenbaum 2022, p. 180 (“[...] article 7(1)(c) enslavement encompasses all ‘exercises of ownership’ conduct, including any sexualized indicia of enslavement.”).

²⁶ ICC-02/04-01/15-1762-Red ([Ongwen TJ](#)), paras. 2711-2712, 2715-2716; ICC-01/04-02/06-2359 ([Ntaganda TJ](#)), para. 952; ICC-01/04-01/07-3436-tENG ([Katanga TJ](#)), para. 976 ; ICC-01/04-01/07-717 ([Katanga CD](#)), para. 431; ICC-01/12-01/18-461-Corr-Red ([Al Hassan CD](#)), paras. 546-547; see [Kunarać et al. TJ](#), paras. 542-543; [Kunarać et al. AJ](#), paras. 119-124; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgement, 2 March 2009 ([Sesay et al. TJ](#)), paras. 160-161; *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement, 18 May 2012 ([Taylor TJ](#)), para. 420; ICC-02/04-01/15-1952 ([Ongwen Prosecution Response to Amici](#)), paras. 37-38.

²⁷ [Ongwen Prosecution Response to Amici](#), paras. 37-38; article 31, Vienna Convention on the Law of Treaties (1969) ([VCLT](#)).

²⁸ See e.g., [Ongwen TJ](#), para. 2712 (for enslavement); [Ntaganda TJ](#), para. 952 (for sexual slavery); [Katanga TJ](#), para. 976 (for sexual slavery).

10. Unlike the crime of sexual slavery under the Statute, the crime of enslavement is not limited in the type of acts that can fall in its purview. Based on the Statute's plain text, all acts relevant to sexualised enslavement and the control of sexual and reproductive autonomy can fall under the rubric of enslavement as relevant indicia; they are not restricted by any further requirement to show that the perpetrator must *cause* the victim to *engage* in one or more *acts of a sexual nature*.²⁹ Moreover, precisely because the crime of enslavement is not so limited, it allows a comprehensive and accurate portrayal of harm, where the acts of sexual nature can be properly situated in their larger context, alongside other acts of gender-based violence including reproductive violence and other associated non-gender-based violations as well.

11. In addition to the value of bringing separate charges relating to other inhumane acts (forced marriage) and forced pregnancy, enslavement also permits those acts to be properly contextualised, as different indicia of exercise of powers of ownership, within the broader systemic enslavement within the LRA. Charging enslavement in this manner also allows for a greater number of victims to be considered under this charge, since it is not limited to only those who are held out for acts of a sexual nature.

12. Accordingly, Count 15 of the DCC includes any and all indicia of the exercise of powers of ownership over different victims systematically enslaved within the LRA, including at least hundreds of women and at least hundreds of children (girls and boys) including those born to the enslaved women and girls. Likewise, Count 30 includes any and all indicia of the exercise of powers of ownership over a young woman in Kony's own household. Further, Count 10 includes any and all indicia of

²⁹ Compare elements of article 7(1)(c) enslavement and article 7(1)(g) sexual slavery, Elements of Crimes. See Sellers and Kestenbaum 2022, pp. 179-182 (sexual slavery is enslavement; "The '*ting tings*' enslavement was sexualised. Like the grooming of fancy girls, Ongwen deliberately waited for '*ting tings*' to mature sexually by monitoring their menstruation. He controlled all sexual access to them prior to their distribution to LRA fighters. His holding of the '*ting ting*'s in abeyance for future sexual abuse is demonstrative of the exercise of powers attaching to the rights of ownership, thus committing sexualised enslavement."); R. Grey, "Reproductive Crimes in International Criminal Law" in I. Rosenthal *et al.* (Eds.), Gender and International Criminal Law (Oxford: OUP, 2022) (Grey 2022), pp. 255-256 (forced reproduction is a part of enslavement).

the exercise of powers of ownership over abducted civilians, including those taken from Lwala Girls School and other locations.

c. Effects of additional characterisation as sexual slavery as a crime against humanity

13. On the facts of this case, and consistent with its overall charging strategy to properly contextualise and convey the systemic nature of the LRA crimes and resulting harm, the Prosecution has chosen not to include the charge of sexual slavery as a crime against humanity. This acknowledges not only the evidence in this case, but also the complex inter-relationship between enslavement and sexual slavery as crimes against humanity under the Statute, and the experience in *Ongwen*.

14. By definition, the pool of victims charged under sexual slavery as a crime against humanity (as opposed to enslavement) is more limited. This is because its second element requires all such victims to have been “engaged” in an act of sexual nature. While its first element can be interpreted broadly, the second element necessarily restricts. For instance, in *Ongwen*, only four out of the seven direct victims were found to be victims of sexual slavery, when, in fact, all seven could have equally been victims of enslavement.³⁰ Likewise, for the indirect victims, only those abducted women and girls who were “distributed” to the Sinia brigade members for sex (*i.e.*, subjected to acts of rape) were found to be victims of sexual slavery.³¹ Yet, all the abducted women and girls could have been properly legally characterised as enslaved persons within the context of the LRA.

15. The *Ongwen* charges included both enslavement and sexual slavery as crimes against humanity for the same conduct. The *Ongwen* Trial Chamber did not enter convictions for enslavement for the conduct that was encompassed in the count of sexual slavery.³² When the crime of sexual slavery is charged along with the crime of

³⁰ [Ongwen TJ](#), para. 3047-3049, 3051-3055.

³¹ [Ongwen TJ](#), paras. 3084.

³² [Ongwen TJ](#), paras. 3051-3055, 3086-3087.

enslavement — as crimes against humanity for the same underlying acts — 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.³³ In *Ongwen*, it led to different indicia of sexualised enslavement and control of sexual and reproductive autonomy being captured differently. Some were folded into the conviction for sexual slavery, others were under the convictions for enslavement.³⁴ This can lead to arbitrary determinations of which acts fall under the respective convictions for enslavement and sexual slavery. Victims and survivors may also have diverse experiences of whether an act is an act of sexual nature on this continuum of entrenched enslavement.

16. Significantly, based on the approach taken in that case, the *Ongwen* Trial Chamber found that “not all abducted women and girls were immediately subjected to institutionalised sexual abuse”.³⁵ It also found that “there existed, systemically, a sub-category of abducted girls in the LRA who were not sexually enslaved, but enslaved.”³⁶ However, *all* enslaved women and girls in the LRA were subject to sexual and reproductive control in varied ways, and sexualised enslavement. In a case of systemic enslavement, such as the one against Mr Kony, following the *Ongwen* charging *verbatim* could thus lead to an incomplete, decontextualised and fragmented portrayal of the harm. In this case, the entrenched enslavement regulated all aspects of the victims’ lives.

³³ [Ongwen TJ](#), paras. 3051-3055 (For direct SGBC, the Trial Chamber did not enter convictions for enslavement vis-à-vis P-0101, P-0214, P-0226 and P-0227. It only entered convictions for enslavement vis-à-vis P-0099, P-0235 and P-0236); paras. 3086-3087 (For indirect SGBC, the Trial Chamber did not enter convictions for enslavement for facts that were covered by sexual slavery). See ICC-02/04-01/15-2022-Red ([Ongwen AJ](#)), para. 1631 (“[C]onvictions may be entered cumulatively if the conduct in question violates two distinct provisions of the Statute, each having a ‘materially distinct’ element not contained in the other, *i.e.*, an element which requires proof of a fact not required by the other”.)

³⁴ [Ongwen TJ](#), paras. 3084 (including acts of rape under sexual slavery), 3086 (including the control of younger abducted girls or *ting tings* as enslavement).

³⁵ [Ongwen TJ](#), para. 3086.

³⁶ [Ongwen TJ](#), para. 3086.

17. While the Prosecution recognises the discussions when the Statute was being drafted in 1998,³⁷ it also notes that applying ordinary rules of treaty interpretation, the content of the Statute's preparatory work is only a supplementary means of interpretation.³⁸ Further, interpretations of this preparatory work cannot override the proper exercise of prosecutorial discretion in selecting appropriate charges on the facts and evidence of a given case. Significantly, the Statute must primarily be interpreted in good faith, according to its ordinary meaning, and in light of its object and purpose.³⁹ 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.

18. It is incorrect to assert that the protected interests associated with sexual slavery as a crime against humanity are not reflected in the DCC.⁴⁰ The charge of enslavement as a crime against humanity *in lieu* of sexual slavery as a crime against humanity highlights those same protected interests. In fact, it is even broader. The essence of enslavement is the reduction of a person to servile status and depriving them of *all* aspects of liberty and autonomy—this includes sexual and reproductive autonomy.⁴¹ Therefore, since the crime of enslavement can also include the protected interest of reproductive autonomy among others, it offers potentially greater protection than sexual slavery alone. Likewise, the contextual elements of enslavement as a crime against humanity—similar to its sexual slavery counterpart—appropriately recognise the protection of civilians in peacetime and where slavery practices are used to control civilian populations.⁴² The practice of cumulative charging was not essential to achieve this outcome.⁴³

³⁷ [OPCV Request](#), paras. 38-47.

³⁸ Article 32, [VCLT](#).

³⁹ Article 31(1), [VCLT](#).

⁴⁰ *Contra* [OPCV Request](#), paras. 26-33, 37.

⁴¹ *See* [OPCV Request](#), para. 37.

⁴² *See* [OPCV Request](#), para. 28.

⁴³ *Contra* [OPCV Request](#), paras 26-34.

19. Moreover, given the statutory gap for war crimes (which does not include slavery as a war crime), the Prosecution has charged sexual slavery as a war crime, to include situations where sexual autonomy is deprived in war time. Additionally, the charges of persecution, forced marriage (other inhumane act), forced pregnancy, and rape have distinct protected values. In particular, the charging of rape as a crime against humanity and war crime additionally underscores the protection of sexual autonomy. Thus, the Prosecution's overall charging approach seeks to convey the harm suffered by victims and survivors of the LRA crimes in as comprehensive and authentic terms as possible, which will ultimately *expand* the basis of victims' participation, not reduce it, in these proceedings.

III. RELIEF SOUGHT

20. For these reasons, the Prosecution respectfully requests the Chamber to dismiss the OPCV Request.



Karim A. A. Khan KC, Prosecutor

Dated this 11th day of March 2024
At The Hague, The Netherlands