



Original: English

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

Date: 28 March 2024

PRE-TRIAL CHAMBER II

Before: Judge Althea Violet Alexis-Windsor, Single Judge

SITUATION IN UGANDA

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

Public
With Annex A and
Confidential, *EX PARTE*, only available to the Prosecution, Annex B

Prosecution's Observations on the conduct of the confirmation proceedings
***in absentia* and**
Requests for the adoption of certain protocols and an *in situ* hearing in Uganda

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 Defence**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants for
Participation/Reparation****The Office of Public Counsel for
Victims**

Paolina Massidda
 Sarah Pellet

**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. Pursuant to the order of the Pre-Trial Chamber¹, the Prosecution provides its observations regarding the conduct of the confirmation of charges hearing *in absentia*.

2. In addition, the Prosecution respectfully requests the Chamber to adopt certain protocols in the case, which are necessary for the Prosecution to perform its duties in these proceedings: the Redaction Protocol² and the Protocol on the handling of confidential information and contacts with witnesses³ (“Proposed Protocols”). Further, the Prosecution requests the adoption of the new e-Court Protocol, as soon as the Registry submits it to the Chamber.

3. Finally, pursuant to articles 3 and 4 of the Statute, rule 100 of the Rules of Procedure and Evidence (“Rules”) and regulation 48 of the Regulations of the Registry, the Prosecution respectfully requests that the confirmation of charges hearing be held in Uganda.

4. Granting these requests will promote efficiency and fairness of the proceedings and further the interests of justice.

II. CLASSIFICATION

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, Annex B, to this public filing is classified as confidential, *ex parte*, only available to the Prosecution, because it contains sensitive information relating to the Prosecution’s ongoing investigation.

¹ ICC-02/04-01/05-481, para. 14.

² Chambers Practice Manual, pp. 26-30, paras. 98-100.

³ Ibid, Annex, pp. 1-11.

III. SUBMISSIONS

A. Prosecution's observations on the conduct of the confirmation proceedings *in absentia*

6. The Prosecution provides the following information in response to the Chamber's questions:

(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?

7. The Prosecution intends to rely on approximately 6,178 items of documentary evidence at the confirmation hearing. This includes evidence related to intercepts, police reports, forensic files from the Ugandan authorities as well as witness statements and transcripts. The overall number of pages is approximately 64,954. The original language of the evidence is mainly English. Where the original document is in a language other than English or French, it will be translated into English for disclosure to the Defence.

(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?

8. The Prosecution intends to rely on approximately 18 videos, 340 audio recordings, and 1,356 photographs. The videos amount to a total of about 21 hours. The videos are mainly in English and where appropriate will be transcribed for disclosure. Where a video is recorded in a language other than English or French, it will be translated into English for disclosure. The audio recordings amount to about 176 hours. The audio recordings are mainly intercept recordings, for which the Prosecution will also disclose the written content records, such as logbooks, as was previously done in the *Ongwen* case and provide specific guidance to the Defence on these items of evidence.

(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?

9. As set out in Annex A,⁴ the Prosecution plans a thematic disclosure, which is designed to aid the Defence. This will include redacted and unredacted items of evidence. The applied standard redactions are limited.⁵

10. The Prosecution will disclose approximately 17,837 unredacted items. The unredacted items amount to 106,858 pages.

11. The Prosecution will also disclose approximately 100 unredacted videos, that amount to about 28 hours and approximately 391 unredacted radio recordings, that amount to about 192 hours.

(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?

12. The Prosecution is in the process of reviewing its collection for potentially exonerating evidence ("PEXO"). Priority has been given to identifying PEXO information *within* the evidence that is to be disclosed as incriminatory ("INCRIM"). So far, the Prosecution has identified 178 items, and this information will be indicated in the external disclosure notes to the Defence.

13. The Prosecution has identified 67 items to be disclosed as PEXO, that amounts to 728 pages, with only five items requiring redactions. The Prosecution has so far not identified any PEXO information in videos or radio recordings.

⁴ Annex A, contains an overview of the number of items to be disclosed thematically, which are subject to further review before final disclosure via JWP on the proposed dates.

⁵ Prosecution applied standard redactions as set out in the Chamber's Practice Manual.

14. The Prosecution will continue to progress its PEXO review as a matter of priority and aims to complete its PEXO-specific review of the case collection at the earliest by 6 June 2024.

(v) How many persons, if any, does the Prosecution intend to call as witnesses to testify viva voce at the confirmation hearing?

15. In accordance with article 61(5) of the Statute, the Prosecution seeks to call between five and 12 witnesses, *viva voce* at the confirmation hearing. A list of witnesses is being prepared and can be submitted to the Chamber, Parties and Participants as soon as practicable. The identified witnesses can testify to the crimes against girls and women abducted into the LRA, to crimes against children in the LRA, as well as the four attacks charged, which were not adjudicated in the *Ongwen* case.

16. The Prosecution seeks to call witnesses due to the exceptional nature of the proceedings in *absentia*. Although the case against Mr Ongwen was successfully prosecuted in the Uganda situation, a large victim community remains, who allegedly suffered due to the conduct by the Lord's Resistance Army, under Mr Kony's control, and who were not represented in proceedings at the Court. Giving a voice to those victims will provide a record of the atrocities that they allegedly endured and reinforces the urgency of Mr Kony being arrested and tried at the Court, should the charges be confirmed.

(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?

17. The Prosecution intends to rely on the written statements of approximately 170 witnesses; all statements will be provided in their entirety to the Defence, with limited standard redactions applied.

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

18. The Prosecution intends to rely upon material that is in English, including the English translation of documents originally in Acholi.

(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?

19. The Prosecution does not intend to submit any requests to withhold the identity of any witness. The Prosecution has not requested any security assessment for any of the witnesses, except the witnesses to be called *viva voce* at the confirmation hearing. These requested security assessments are in the process of being completed at the latest by 31 May 2024.

(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?

20. The Prosecution will only request measures pursuant to rules 87 and 88 for the witnesses to be called *viva voce* at the confirmation hearing. The Prosecution will, in the course of the proceedings, engage VWU on any issues relevant to these witnesses and will update the Chamber on the amount of time needed to put measures 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?

21. The Prosecution has identified approximately 13,000 items pursuant to Rule 77 and will disclose these items via the Judicial Working Platform ("JWP").

(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?

22. The Prosecution has not identified any potentially exculpatory evidence or evidence material to the preparation of the Defence that is affected by articles 54(3)(e), 72, or 93 of the Statute.

(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?

23. The Prosecution currently does not intend to submit such requests.

(xiii) Is the Prosecution continuing the investigation regarding Mr Kony, and if so, how would this impact on the disclosure process?

24. The Prosecution refers to confidential *ex parte* Annex B, where it details the further investigative steps regarding Mr Kony. These additional investigative activities will not materially impact the disclosure process, the protection of witnesses, or the commencement of the confirmation hearing.

(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?

25. The Prosecution estimates that it can complete its disclosure of the evidence by 6 June 2024 at the earliest, in accordance with the disclosure plan in Annex A. The plan foresees a thematic disclosure on a rolling basis which could begin as early as mid-April 2024.

B. Request for the Adoption of Protocols

26. The Prosecution requests the Chamber to adopt certain protocols in the case. Adopting these protocols will promote an efficient disclosure process, ensure that the Parties and Participants are aware of and understand their obligations from an early

stage of the proceedings, and create consistency and coherence between the phases of the proceedings. The proposed Protocols are also consistent with the Chambers Practice Manual.⁶

27. First, the Prosecution requests the adoption of the Redaction Protocol,⁷ which allows the Prosecution to apply redactions to specific standard categories of information without seeking prior authorisation from the Chamber. Adopting the Redaction Protocol will promote judicial economy and efficiency in disclosure.

28. Second, the Prosecution requests the adoption of the Protocol on the handling of confidential information and contacts with witnesses,⁸ which defines procedural obligations of the Parties and Participants when dealing with certain non-public evidence and information. Adoption of this protocol will achieve an appropriate balance between the rights and interests of the person charged, the interests of the Parties and the safety of witness and others affected by the activities of the Court.⁹

29. Third, ordinarily the Prosecution would request the adoption of the e-Court protocol.¹⁰ However, as this is subject to further updates to align the handling of electronic evidence with JWP, through which the Prosecution will also effect its disclosure, the Prosecution requests the Chamber to adopt the new version of the protocol, once the Registry submits it to the Chamber. The Registry and the Prosecution have agreed that JWP will be used for disclosure and evidence management in this case.¹¹

C. Prosecution's request for an *in situ* hearing

30. Pursuant to rule 100(1) and (2) of the Rules, and subject to the fulfilment of the notification process with respect to the date of the hearing pursuant to article 61(2)(b)

⁶ Chambers Practice Manual, p. 5, para. 20, pp. 26-30, paras. 98-100, p. 30, paras. 101-103. *See also*, Annex to Chambers Manual, pp. 1-11.

⁷ Chambers Practice Manual, pp. 26-30, paras. 98-100.

⁸ Chambers Practice Manual, Annex, pp. 1-11.

⁹ Chambers Practice Manual, p. 30, paras. 101-103.

¹⁰ ICC-01/14-01/21-610-AnxI.

¹¹ E-Mail from Registry dated 25 March 2024, 10:16h.

of the Statute, the Prosecution respectfully requests that the Chamber instruct the Registry to prepare an assessment on the feasibility of holding the confirmation hearing *in absentia* entirely in Uganda. Further, should this assessment be favourable, the Prosecution requests that the Chamber recommend to the Presidency to hold the confirmation hearing in Uganda. While the Prosecution favours holding the hearing in Uganda in its entirety, alternative mixed options between headquarters and Uganda, such as holding only the opening statements *in situ*, should be explored in the Registry's assessment.

31. It is in the interest of justice to hold the hearing in Uganda. The alleged crimes were committed in northern Uganda. The victims as well as Mr Kony are from Uganda. Holding the confirmation hearing *in situ* would bring the Court close to the victims and the affected communities. Additionally, such a hearing would reinforce the importance of justice and the Court's work to the population of Uganda. Furthermore, holding the hearing in Uganda, will raise the profile of the case in Uganda and surrounding countries, which could lead to the identification of Mr Kony's current location and improve interests and opportunities to arrest and surrender him for trial.

32. Holding the hearing with the full Court present in Uganda would not face any unsurmountable obstacles.¹² Uganda is sufficiently stable and secure according to the Prosecution's recent security assessment. The potential additional Court resources and time needed to realise this hearing would be well spent, as the hearing would bring the Court close to the affected communities and multiply the impact of the proceedings. Witnesses would not face unmanageable security concerns, nor would they have to fear Mr Kony's presence.¹³

33. The Prosecution's recent inquiries with the Ugandan authorities on *in situ* proceedings have been positive. Three locations have been identified as potentially

¹² Unlike in ICC-02/04-01/15-330, para. 3, there are no similar events, such as a general election, which would heighten security risk and could divert resources away from the *in absentia* proceedings.

¹³ ICC-02/04-01/15-499, para. 3. *See also*, ICC-02/04-01/15-437, para. 33.

suitable, which provide adequate facilities and the necessary technological capacities. These are court facilities in the towns of Lira, Gulu and Kampala.

34. The Ugandan authorities have expressed strong support for an *in situ* hearing, provided they receive adequate advance notice of about three months. Consequently, the Prosecution does not anticipate that the Court and the Government of Uganda would face challenges in entering and concluding appropriate legal agreements to secure privileges and immunities if required, to ensure that the Court and its staff are able to implement their functions without interference and in full independence.

D. Additional observations

35. Lastly, the Prosecution would like to inform the Chamber that it will submit a first request to Trial Chamber IX to provide the Defence to be appointed to represent Mr Kony, access to certain confidential transcripts and items of evidence, as well as decisions from the *Ongwen* trial that the Prosecution intends to rely on or are otherwise identified as material to the preparation of the Defence. Furthermore, the Prosecution is liaising with the Defence of Mr Ongwen in relation to confidential items of evidence disclosed by that Defence team, as well as Defence witnesses, which are subject to disclosure.

IV. RELIEF SOUGHT

36. For the reasons set out above, the Prosecution respectfully requests the Chamber to adopt the Proposed Protocols and to initiate the process pursuant to article 100(1) and (2) of the Rules to hold the confirmation of charges hearing in Uganda.



Karim A.A. Khan KC, Prosecutor

Dated this 28th March 2024
At The Hague, The Netherlands