

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 April 2025

PRE-TRIAL CHAMBER III

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

SITUATION IN THE REPUBLIC OF UGANDA

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

Public

Public Redacted Version of ‘Kony Defence Response to “Prosecution’s submission of witness materials and related requests for protective measures, witness preparation, and testimony via video link” (ICC-02/04-01/05-579-Conf)’

Source: Defence for Mr Joseph Kony

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I. INTRODUCTION

1. On 12 December 2024, the Pre-Trial Chamber ordered the Prosecution to “submit a list of its proposed *viva voce* witnesses for the confirmation of charges hearing, together with a summary of the witnesses’ evidence and the aspects of the Prosecution’s case this evidence is said to support, on the date of the completion of the disclosure process.”¹
2. On 28 March 2025, the Prosecution proposed five *viva voce* witnesses, consisting of four crime-base witnesses, and one expert witness.² All four crime-base witnesses are described as “vulnerable”, for whom in-court protective and supportive measures are sought.³ In-court protective measures are also sought for the expert witness.
3. The Prosecution has proposed to present the live evidence of these five witnesses, but has not demonstrated that the proposed *viva voce* testimony “cannot be properly substituted by a written statement,” as required.⁴ Given the limited evidential scope of a confirmation hearing, particularly in the context of an *in absentia* proceeding and the danger of needless re-traumatisation of vulnerable witnesses and risk to their security, the threshold for receiving their evidence *viva voce* is not met.

A. Standard for Witness Testimony at Confirmation

4. Article 61(5) of the Statute governs the confirmation process and provides that “the Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial”. This stands in contrast with Article 69(2) of the Statute setting out the procedure for trial, which provides that “[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence”.

¹ [Decision Setting the Disclosure Regime](#), ICC-02/04-01/05-537, 12 December 2024, para. 27.

² [Prosecution’s submission of witness materials and related requests for protective measures, witness preparation, and testimony via video link](#), ICC-02/04-01/05-579-Conf, 28 March 2025 (“Prosecution’s submission”).

³ *Id.*, para. 3.

⁴ [Chambers Practice Manual](#), para. 44; *Prosecutor v. Kenyatta*, [Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing](#), ICC-01/09-02/11-181, 20 July 2011, para. 9 “[C]onsidering the nature and purpose of the confirmation of charges hearing as well as the limited evidentiary debate to take place therein, the Single Judge anticipates that when the parties intend to rely on witnesses for the purposes of the confirmation hearing, they would normally do so through the use of their statements or transcripts of their recorded interviews. Consequently, the Single Judge expects the parties to rely on live witnesses only as far as their oral testimony at the hearing cannot be properly substituted by documentary evidence or witnesses’ written statements.” See also *Prosecutor v. Kenyatta*, [Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses](#), ICC-01/09-02/11-226, 10 August 2011, para. 14 (“Kenyatta Order to Reduce Witnesses”).

5. Building on this clear statutory framework, the ICC Chambers Practice Manual provides that the use of live evidence at the confirmation hearing “should be exceptional and should be subject to specific authorisation by the Pre-Trial Chamber. The parties must satisfactorily demonstrate that the proposed oral testimony **cannot be properly substituted by a written statement or other documentary evidence.**”⁵ This reflects ICC practice, where the parties have been expected at the confirmation hearing “to rely on live witnesses **only as far as their oral testimony at the hearing cannot be properly substituted by documentary evidence or witnesses’ written statements.**”⁶ Historically, underlining the practical effect of this principle, during the course of the confirmation process against 31 suspects at the ICC, just four Prosecution witnesses have been heard *viva voce*.⁷

6. This approach aligns with the purpose and scope of the confirmation process where “the Pre-Trial Chamber, by the very design of the pre-trial proceedings, is not in a position to conclusively determine issues relating to the probative value of evidence, including with respect to the credibility of witnesses, whose declarations are, as a rule, brought before it only in written form”, given that “the credibility of witnesses can only be properly addressed at trial, where they will be called to testify and their evidence properly tested.”⁸ Moreover, repeated judicial pronouncements have warned against the confirmation hearing being allowed to turn into a “mini trial” or a “trial before a trial.”⁹

7. The Prosecution has not demonstrated – indeed it has not even attempted to demonstrate – that “the proposed testimony cannot be properly substituted by a written statement or other documentary evidence.”¹⁰ On the contrary, a written statement has been taken by the Prosecution from each of the crime-base witnesses¹¹ and the expert witness has produced a written report.¹²

⁵ [Chambers Practice Manual](#), para. 44 (emphasis added).

⁶ *Prosecutor v. Kenyatta*, [Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing](#), ICC-01/09-02/11-181, 20 July 2011, para. 9 (emphasis added). See also *Kenyatta Order to Reduce Witnesses*, para. 14.

⁷ One witness in *Lubanga* and three in *Abu Garda*: *Prosecutor v. Lubanga*, [Decision on the confirmation of charges](#), ICC-01/04-01/06-803-tEN, 29 January 2007, para. 26; *Prosecutor v. Abu Garda*, [Decision on the Confirmation of Charges](#), ICC-02/05-02/09-243-Red, 8 February 2010, para. 13.

⁸ *Prosecutor v. Said*, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), ICC-01/14-01/21-218-Red, 9 December 2021, para. 39 (“*Said* Confirmation Decision”). See also, *Prosecutor v. Yekatom & Ngaïssona*, [Corrected version of Public Redacted Version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’](#), ICC-01/14-01/18-403-Corr-Red2, 14 May 2020, para. 18.

⁹ [Said Confirmation Decision](#), para. 42. See also, *Prosecutor v. Katanga & Ngudjolo*, [Decision on the confirmation of charges](#), ICC-01/04- 01/07-717, dated 30 September 2008 and registered on 1 October 2008, para. 64; *Prosecutor v. Abu Garda*, [Decision on the Confirmation of Charges](#), ICC-02/05-02/09-243-Red, 8 February 2010, para. 39.

¹⁰ [Chambers Practice Manual](#), para. 44.

¹¹ [REDACTED].

¹² [REDACTED].

No explanation has been given as to why these statements are unsuitable for the purposes of the confirmation hearing so as to require oral testimony. As particularised below, these statements are suitable for admission and *viva voce* testimony is unwarranted and unjustified.

B. Crime-Base Witnesses

8. Given the nature of the testimony proffered, the limited purpose of a confirmation hearing, the standards for live testimony set out in the Chambers Practice Manual and the absence of instructions from the suspect, the Defence does not consider cross-examination of the proposed crime-base witnesses to be necessary for the purposes of the confirmation hearing.

9. The Defence does not believe that it would be in the interests of justice to compel these witnesses to recount highly traumatic events, with all the potential risks of re-traumatisation that would be necessarily occasioned, when their evidence could be presented in written form. The Prosecution's own submissions highlight that each of the crime-base witnesses "are exposed to the residual trauma and stigma of having survived crimes,"¹³ are [REDACTED],¹⁴ or [REDACTED].¹⁵ Considering that they have already recounted their experiences by giving a statement that can be received for the purposes of the confirmation hearing and that they would have to be re-called at trial for their testimony to be given substantial weight, having them testify *viva voce* for a confirmation hearing is inappropriate and does not accord with the principle of "do no harm."¹⁶ This is a consideration that has frequently been relied upon by the Prosecution in the past to justify tendering testimonial evidence in written form even during trial proceedings, let alone during a confirmation hearing.¹⁷

¹³ [Prosecution's submissions](#), para. 3.

¹⁴ [Annex C to Prosecution's submissions](#), [REDACTED].

¹⁵ *Id.*, [REDACTED].

¹⁶ *Prosecutor v. Ntaganda*, [Reparations Order](#), ICC-01/04-02/06-2659, 8 March 2021, para. 50 "Do no harm" is an internationally recognised principle that "complements the humanitarian principles of humanity, impartiality, neutrality and independence".

¹⁷ *Prosecutor v. Yekatom & Ngaïssona*, [Public redacted version of "Prosecution's Request for a Variation of Time Limit pursuant to Regulation 35 to seek the Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864, and P-1871 pursuant to Rule 68\(2\)\(c\)"](#), 22 December 2023, ICC-01/14-01/18-2285-Conf, ICC-01/14-01/18-2285-Red, 30 July 2024, para. 15 ("The vulnerability of P-0460 is undisputable, and summoning her would put her at risk of re-traumatization and cause unnecessary hardship, disproportionate to the purported significance of her evidence"); *Prosecutor v. Said*, [Public Redacted Version of "Prosecution's second request to introduce prior recorded testimony pursuant to rule 68\(2\)\(b\)"](#), ICC-01/14-01/21-307-Conf, dated 13 May 2022, ICC-01/14-01/21-307-Red, 24 May 2022, para. 40 ("the Seven Witnesses would be saved the risk of potential re-traumatization related to revisiting difficult experiences"); [Public Redacted Version of "Prosecution's sixth request to introduce prior recorded testimony pursuant to rule 68\(2\)\(b\)"](#), ICC-01/14-01/21-328-Conf, dated 23 May 2022, ICC-01/14-01/21-328-Red, 27 May 2022, para. 46 ("the Nine Witnesses would be saved the potential stress and risk of re-traumatization related to testifying about sensitive topics as well as the disruption of having to travel to appear in court. Moreover, the Court would preserve valuable resources that could be used for other purposes.")

10. Similar considerations apply in respect of the security concerns. The Prosecution submits that each of the crime-base witnesses has “expressed fear of harassment and/or stigmatisation should their testimony become known publicly” and that “witnesses, who are victims of the LRA continue to face stigma in their communities”.¹⁸ The Prosecution submits that using pseudonyms and face and/or voice distortion would minimise the risks of identification, and will enable the crime-base witnesses to testify in “complete confidence without any fears for their safety or facing the opinions or judgment of the public”.¹⁹ However, in the Defence submission and experience, it is difficult to assert in absolute terms that the risk of identification is completely eliminated through the use of in-court protective measures, especially when others in the community are aware of details of the witness’ experiences. This is the case despite the best efforts of the parties, whose good faith should be presumed. It is particularly the case here where, by way of example, one of the crime-base witnesses [REDACTED].²⁰ The extent and scope of this third-party knowledge is a factor which remains unknown to the parties and the Pre-Trial Chamber, making it impossible definitively to assert that none of the public testimony will be in any way identifying.

11. Even if all possible risks of identification could definitively be eliminated by in-court protective measures, no suggestion is made by the Prosecution that the proposed supportive measures would remove entirely any psychological and emotional impact of both the proposed preparation sessions, and subsequent testimony. Rather, the additional psychological and emotional supportive measures are characterised by the Prosecution as being able merely to “minimise” the impact of testifying.²¹ Again, the extent of this psychological and emotional impact on the crime-base witnesses is a factor which cannot be known to the parties or the Pre-Trial Chamber until after the preparation sessions and testimony has taken place.

¹⁸ [Prosecution’s submission](#), para. 13.

¹⁹ *Id.*, para. 18.

²⁰ [REDACTED].

²¹ [Prosecution’s submission](#), para. 17.

12. Nor can the presentation of oral rather than written testimony be justified on the basis that live evidence is of greater weight, or impact, for the Pre-Trial Chamber. As the Prosecution has previously argued at confirmation, “[t]here is no hierarchy within the types of evidence that may be offered at the confirmation hearing, and no basis for the underlying theory that *viva voce* testimony must necessarily be given greater weight than documentary evidence”²² This reflects the consistent approach across the ICC, that the weight accorded to evidence depends on the content of the testimony and not the means by which it is introduced.²³

13. For all these reasons, the Defence submits that the crime-base witnesses should not be called live, but rather that their written statements should be admitted into evidence for the purpose of the confirmation hearing. Should the Prosecution continue to seek to call the crime-base witnesses as live witnesses despite these risks, the Defence would ask that each of the crime-base witnesses be informed that the Defence has no intention of questioning them during their testimony and has asked that they not be called to give evidence, out of concern for their safety and well-being.

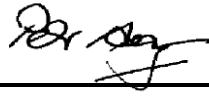
C. Expert Witness

14. As regards the proposed expert witness, the Defence takes no position on whether [REDACTED] can justify the imposition of in-court protective measures. However, given the nature of his proposed testimony as reflected in his written report, the standard for oral testimony at the confirmation phase, the limited purpose of the confirmation hearing and the absence of instructions from the suspect, the Defence does not object to his report being admitted into evidence for the purpose of the confirmation hearing, *in lieu* of oral testimony.

²² *Prosecution v. Ruto & Sang*, [Decision on the Defence Applications for Leave to Appeal the Single Judge’s Order to Reduce the Number of Viva Voce Witnesses](#), ICC-01/09-02/11-275, 1 September 2011, para. 19 (“*Ruto Witnesses Decision*”) citing *Prosecutor v. Kenyatta*, [Prosecution’s consolidated response to Mr. Ali’s and Mr. Kenyatta’s requests for leave to appeal the “Order to Reduce the Number of Witnesses to be called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses”](#), ICC-01/09-02/11-256, 19 August 2011, para. 13.

²³ *Prosecutor v. Muthaura*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-02/11-382-Red, 23 January 2012, para. 85, citing to [Ruto Witnesses Decision](#), paras 26-27. See also [Kenyatta Order to Reduce Witnesses](#), para. 18.

The whole respectfully submitted

A handwritten signature in black ink, appearing to read 'Peter Haynes', is positioned above a solid horizontal line.

Peter Haynes, KC
Counsel for Joseph Kony

Dated this 7 April 2025

At The Hague, Netherlands