

**Cour
Pénale
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**International
Criminal
Court**

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Date: **23 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 supplementary information regarding the request to hear *viva voce* witnesses at the confirmation hearing (ICC-02/04-02/05-579)” ICC-02/04-02/05-589-Conf’

Source: Defence for Mr Joseph Kony

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I. INTRODUCTION

1. The Prosecution has requested authorisation from the Pre-Trial Chamber to hear the testimony of five witnesses *viva voce* during the confirmation of charges hearing for several purposes: (i) to give the witnesses a chance to tell their story, as “it currently cannot be foreseen if there will ever be a trial”; (ii) to better preserve the witnesses’ testimony “for any trial that may ultimately occur”, after the Prosecution has had the opportunity “to refresh their memory and prepare them for testimony”; (iii) to ensure that “justice is not only done but seen to be done” given that “the Chamber has declined to hold the hearing *in situ* even in part”; and (iv) to offer the Chamber “the ability to ask questions”.¹

2. The purposes advanced by the Prosecution for hearing this testimony are contrary to the Court’s statutory framework, as well as the standards established by the Court’s prior practice as reflected in the Chambers Practice Manual. They are also extraneous to the purposes of a confirmation hearing and, indeed, appear to be expressly designed to stage a “mini-trial”. This is despite the fact that the protective measures sought by the Prosecution, if granted, would largely frustrate the symbolic justifications it invokes for hearing the testimony *viva voce*.

3. Incredibly, the Prosecution submissions make no mention of the risk of re-traumatisation of the four fact witnesses, who would be required to describe terrible events in public and without being led. Although re-traumatisation is a necessary risk in a criminal trial, given the applicable standards of evidence and proof, the witnesses are being exposed to this risk unnecessarily given the requirements of a confirmation proceeding. The risk of re-traumatisation is real given the horrific events the Prosecution proposes to adduce through these four vulnerable witnesses. Relevantly, P-0056 and P-0015 [REDACTED]. P-0056 [REDACTED].

4. Each of these four fact witnesses has already given statements that are more than adequate for the purposes of the confirmation proceedings, and the events they describe are also supported by an abundance of other testimonial and documentary information. Unnecessarily adducing their evidence at a confirmation hearing through *viva voce* testimony is particularly irresponsible as these witnesses might be required to testify again at any subsequent trial for their evidence to be given equal weight or taken into account at all. This contradicts the Prosecution’s own advice to civil society organisations warning against unnecessary multiple interviews – let alone

¹ [Prosecution’s supplementary information regarding the request to hear *viva voce* witnesses at the confirmation hearing \(ICC-02/04-02/05-579\)](#), ICC-02/04-01/05-589-Conf, 14 April 2025, paras 4, 7, 8 (“Supplementary Information”).

multiple testimony – of witnesses who are required to recount potentially re-traumatising subject-matter.²

5. The testimony of the expert witness does not give rise to the same risk of re-traumatisation. However, the content of [REDACTED] testimony is more than adequately set out in [REDACTED] expert report and there is always a risk that protective measures will not conceal [REDACTED] identity [REDACTED]. Indeed, [REDACTED].

II. LEVEL OF CONFIDENTIALITY

6. The Defence files this response as confidential, pursuant to regulation 23bis(1) and (2) of the Regulations of the Court, as it relates to submissions of the same designation which include sensitive information about the Prosecution’s witnesses. A public redacted version will be filed within the time limits set by the Chamber.

III. PROCEDURAL HISTORY

7. 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.”³

8. On 28 March 2025, the Prosecution filed its “submission of witness materials and related requests for protective measures, witness preparation, and testimony via video link,” in which it proposed “five *viva voce* witnesses for the confirmation hearing.”⁴ The Prosecution did not, in this filing, make any submissions justifying the hearing of the testimony of these witnesses *viva voce*.

9. On 7 April 2025, the Defence responded to this filing, opposing the request to hear these witnesses *viva voce*.⁵ The Defence noted, in particular, that the Chambers Practice Manual, on

² Office of the Prosecutor, Eurojust and EU Genocide Network, [Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations](#), 21 September 2022, p. 15.

³ [Decision Setting the Disclosure Regime](#), ICC-02/04-01/05-537, 12 December 2024.

⁴ [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 of witness materials and related requests”), para. 1.

⁵ [Kony Defence Response to “Prosecution’s submission of witness materials and related requests for protective measures, witness preparation, and testimony via video link” \(ICC-02/04-01/05-579-Conf\)](#), ICC-02/04-01/05-585-Conf, 7 April 2025 (“Defence Response to Prosecution’s submission of witness materials and related requests”).

the basis of established case law, prescribes 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.”⁶

10. On 10 April 2025, the Single Judge wrote to the Prosecution and noted the section of the Chambers Practice Manual quoted by the Defence, albeit without making any express reference to the Defence filing. While noting that the Prosecution had previously made submissions concerning the “‘the exceptional nature of the proceedings *in absentia*’ and with a view to ‘[g]iving a voice’ to those victims who were not represented in the *Ongwen* proceedings”, the Chamber found that “those submissions are too generic and broad in nature, and fail to address the reasons why the proposed oral testimony ‘cannot be properly substituted by a written statement or other documentary evidence.’”⁷ The Single Judge concluded that “[a]ccordingly, the Prosecution is instructed to supplement the Request with specific and precise information to this effect, by no later than Monday 14 April 2025.”⁸

11. On 10 April 2025, the Defence sought confirmation that the deadline for any response to the Prosecution’s filing would be 22 April 2025.⁹ The same day, the Single Judge responded “that the Chamber will decide on the need for responses to the Prosecution’s additional submissions on the matter of *viva voce* witnesses after having received and considered these submissions.”¹⁰ At the time of filing, the Defence remains without further indication from the Chamber regarding the deadline for the filing of any response.

12. On 14 April 2025, the Prosecution filed supplementary information to hear *viva voce* witnesses at the confirmation hearing.¹¹

⁶ *Id.*, para. 5.

⁷ Email Decision, ICC-02/04-01/05 – Order to the Prosecution to provide supplementary information as regards the request to hear *viva voce* witnesses at the confirmation hearing (ICC-02/04-02/05-579) – public, 10 April 2025, 11:14.

⁸ Email Decision, ICC-02/04-01/05 – Order to the Prosecution to provide supplementary information as regards the request to hear *viva voce* witnesses at the confirmation hearing (ICC-02/04-02/05-579) – public, 10 April 2025, 11:14.

⁹ Kony Defence response Email to ICC-02/04-01/05 – Order to the Prosecution to provide supplementary information as regards the request to hear *viva voce* witnesses at the confirmation hearing (ICC-02/04-02/05-579) – public, 10 April 2025, 11:55.

¹⁰ Email Decision, ICC-02/04-01/05 – Single Judge Decision on the Defence Request to respond to the Prosecution’s additional submissions on *viva voce* witnesses – public, 10 April 2025, 16:15.

¹¹ [Supplementary Information](#).

13. Noting that, according to the protocols for filings in the instant case, the deadline for this response is 22 April 2025,¹² the Defence files this response pursuant to Regulation 24(1) of the Regulations of the Court. Regulation 24(1) prescribes that “[t]he Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.”¹³ This is subject only to the exception in Regulation 24(4), that such a response “may not be filed to any document which is itself a response or a reply.” The Prosecution’s “supplementary information” is neither a response nor a reply. Accordingly, this response is authorised by Regulation 24(1).

IV. SUBMISSIONS

A. Pre-Trial Chambers have a limited mandate at the confirmation of charges stage, which discourages *viva voce* testimony

14. The ICC Chambers Practice Manual provides that the use of live evidence at the confirmation hearing “should be exceptional [...] The parties must satisfactorily demonstrate that the proposed oral testimony cannot be properly substituted by a written statement or other documentary evidence.”¹⁴ This reflects established 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.”¹⁵

15. This approach is a corollary of the standard of proof for confirming charges at the ICC. Article 61(7) mandates the Pre-Trial Chamber to determine only “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” As explained by the Appeals Chamber:

¹² [Transcript of Status Conference](#), ICC-02/04-01/05-T-013-Red-ENG, 23 July 2024, p. 23 “With a view to ensuring the expeditiousness of the present proceedings, any response to any motion shall be submitted at the latest by 1600 hours on the fifth working day following notification of a document filed by a party or participant.”

¹³ [Regulations of the Court](#), Regulations 24(1).

¹⁴ [Chambers Practice Manual](#), para. 44.

¹⁵ *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”).

[T]he confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial. This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe.¹⁶

16. As stated in the most recent confirmation of charges decision, in *Said*:

At the same time, 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. Indeed, as indicated by the Appeals Chamber, ‘the Pre-Trial Chamber’s determinations will necessarily be presumptive’, and the Pre-Trial Chamber ‘should take great care in finding that a witness is or is not credible’; the credibility of witnesses can only be properly addressed at trial, where they will be called to testify and their evidence properly tested.¹⁷

17. The *Said* Pre-Trial Chamber warned against going beyond the mandate of a confirmation hearing expressly conferred in the Statute:

[I]n light of the limited and specific scope and purpose of this stage of the proceedings, and in order to avoid any pre-determination of issues or pre-adjudication regarding the probative value of evidence, this decision only addresses what the Chamber considers necessary and sufficient for its determination on the charges – namely, whether there is sufficient evidence to establish substantial grounds to believe that Mr Said committed the crimes charged and therefore that the case brought by the Prosecution warrants a trial [...] Furthermore, the Chamber is persuaded that the specific and limited function of the confirmation proceedings also calls for a style and structure of the decision under article 61(7) of the Statute which is as simple and straightforward as possible; this also with a view to meaningfully implementing the principle that the confirmation hearing is not, nor should be seen or become, a ‘mini-trial’ or ‘a trial before the trial’.¹⁸

18. The limited scope of the confirmation proceedings, accordingly, is not only a question of

¹⁶ *Prosecutor v. Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges"](#), ICC-01/04-01/10-514, 30 May 2012, para. 48.

¹⁷ *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.

¹⁸ *Prosecutor v. Said*, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), ICC-01/14-01/21-218-Red, 9 December 2021, paras 40, 42. See also, *Prosecutor v. Katanga & Ngudjolo*, [Decision on the confirmation of charges](#), ICC-01/04-01/07-717, 30 September 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. See further, *Prosecutor v. Duterte*, [Order on the conduct of confirmation proceedings](#), ICC-01/21-01/25-114, 17 April 2025, para. 7 “The Chamber reiterates that the confirmation of charges procedure is of a limited scope and should not devolve into a mini-trial”.

efficiency, but also of respecting the importance of avoiding judicial pre-determination or making findings that are unduly specific or definite in relation to the extremely limited procedural framework. During the course of the confirmation process against 31 suspects at the ICC to date, just four Prosecution witnesses have been heard *viva voce*.¹⁹ The summary nature of the proceedings is hardly surprising, given that charges at other international tribunals are “confirmed” on the basis of an *ex parte* and *in camera* judicial review of witness statements and other documentary evidence.²⁰

B. The Prosecution has not shown that any of the proposed *viva voce* testimony “cannot be properly substituted by a written statement or other documentary evidence”

19. At least one statement exists for each of the five proposed *viva voce* fact-witnesses. On their face, each of the written statements is signed and has adequate indicia of presumptive authenticity. Furthermore, each of these statements was adduced by the Office of the Prosecutor itself, not by a third party. Some of the statements were taken very close in time to the events (as in the case of [REDACTED], P-0015 and [REDACTED]) whereas others were taken more recently (as in the case of [REDACTED]). All five of these statements bear adequate indicia to be tendered as evidence in written form under Rule 68(2)(b) or (c) at trial. Indeed, the statements of P-0015 were tendered in the *Ongwen* trial,²¹ admitted as evidence²² and referred to in the *Ongwen* Trial Judgment.²³

20. 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.”²⁴ This reflects the consistent approach at the confirmation stage that the weight

¹⁹ [Defence Response to Prosecution’s submission of witness materials and related requests](#), para. 5, fn. 7.

²⁰ ICTY, *Prosecutor v. Krnojelac*, [Decision on Prosecutor’s Response to Decision of 24 February 1999](#), IT-97-25-PT, 20 May 1999, paras 11-12; ICTY, *Prosecutor v. Kolundzija*, [Decision Rejecting Prosecutor’s Request for Leave to Amend Indictments](#), 6 July 1999 “the main function of the reviewing Judge pursuant to Rules 47 and 50 is to determine whether the Prosecutor has established a *prima facie* case against a suspect or an accused... this function is performed in *ex parte* proceedings according to the well-settled practice of the International Tribunal”; STL, *Prosecutor v. Ayyash et al.*, [Interlocutory Decision on the Applicable Law: Criminal Association and Review of the Indictment](#), STL-17-07/I/AC/R176bis, 18 October 2017, paras 100-111.

²¹ *Prosecutor v. Ongwen*, [Public Lesser Redacted Version of “Corrected version of “Prosecution’s request for introduction of previously recorded testimony pursuant to rule 68\(2\)\(b\) of the Rules”](#), 16 June 2016, ICC-02/04-01/15-465-Conf-Corr, ICC-02/04-01/15-465-Corr-Red2, 5 December 2016, paras 28-31.

²² *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), ICC-01/04-01/15-596-Red, 18 November 2016, para. 50.

²³ *Prosecutor v. Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, para. 292.

²⁴ *Prosecutor v. Muthaura et al.*, [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 citing *Prosecutor v. Muthaura et al.*, [Prosecution’s consolidated response to Mr. Ali’s and Mr. Kenyatta’s requests for leave to appeal](#)

accorded to evidence depends on the content of the testimony, and not the means by which it is introduced.²⁵

21. Even if these individual statements were somehow an unsuitable substitute for *viva voce* testimony, the charges that they purport to substantiate are also supported by a large volume of other statements and documentary evidence. In respect of the charges relating to the attack on Pagak, for which the *viva voce* testimony of P-0011 is proposed, the Prosecution relies on the written statements of 18 witnesses;²⁶ in respect of the charges relating to abductions at Lwala Girls School, for which the *viva voce* testimony of P-0015 is proposed, the Prosecution relies on the written statements of 25 Prosecution witnesses²⁷ and [REDACTED];²⁸ in respect of the charges relating to the attack on Abia, for which the *viva voce* testimony of P-0056 is proposed, the Prosecution relies on the testimony of 27 witnesses;²⁹ and in respect of the charges relating to the attack on Barlonyo, for which the *viva voce* testimony of P-0467 is proposed, the Prosecution relies on 23 witnesses.³⁰ The Prosecution states that P-1052's expert report [REDACTED]³¹

22. The Prosecution does not, in its submissions, show that any of the proposed *viva voce* testimony cannot be substituted either by the written statements of the witnesses themselves, or by other documentary evidence. It is submitted that, on this basis alone, the Prosecution's request should be rejected as not satisfying the established requirements concerning the appropriate

[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.

²⁵ *Prosecutor v. Muthaura et al.*, [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 [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, paras 26-27. See also [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. 18.

²⁶ [Overview of evidence relied upon by section](#), ICC-02/04-01/05-593-AnxB, 17 April 2025 ("Overview of evidence relied upon by section"), p. 4. Even in respect of the [REDACTED] that is the most grave event described by P-0011, [REDACTED] statement is corroborated by no less than four other witnesses, according to the Prosecution. See [Pre-Confirmation Brief](#), ICC-02/04-01/05-593-Conf, 17 April 2025 ("Pre-Confirmation Brief"), para. 103.

²⁷ [Overview of evidence relied upon by section](#), p. 1.

²⁸ [Pre-Confirmation Brief](#), fn. 174. ([REDACTED]): [UGA-OTP-0024-0047](#); [UGA-OTP-0024-0053](#); [UGA-OTP-0024-0060](#); [UGA-OTP-0024-0067](#); [UGA-OTP-0024-0073](#); [UGA-OTP-0024-0075](#); [UGA-OTP-0024-0078](#); [UGA-OTP-0024-0081](#); [UGA-OTP-0024-0084](#); [UGA-OTP-0024-0088](#); [UGA-OTP-0024-0093](#)).

²⁹ [Overview of evidence relied upon by section](#), p. 2.

³⁰ *Id.*, p. 3.

³¹ [Annex A to the 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-AnxA, 28 March 2025 ("Annex A to the Prosecution's submission of witness materials and related requests"), p. 6 (emphasis added).

scope of a confirmation hearing, as set out both in the Court's prior practice and Chambers Practice Manual.

C. The other purposes set out by the Prosecution to justify hearing *viva voce* testimony are inappropriate and needlessly risk re-traumatising the witnesses

23. The Prosecution asserts various other grounds to justify hearing *viva voce* testimony including: (i) to give the witnesses a chance to tell their story because "it currently cannot be foreseen whether there will ever be a trial";³² (ii) to better preserve the witnesses' testimony after the Prosecution has had the opportunity "to refresh their memory and prepare them for testimony";³³ (iii) to ensure that "justice is not only done but seen to be done"³⁴ and (iv) for the Chamber "to appreciate the full scope of the narrative including important nuances through the Prosecution's examination-in-chief"³⁵ and to offer these particular witnesses the opportunity to "elaborate" upon their experiences.³⁶

24. Although the Prosecution does not say so expressly, these purposes can only be achieved by adducing these witnesses' testimony in a non-leading and comprehensive fashion. Furthermore, to show that justice is seen to be done, the testimony will have to be held in public to the extent compatible with not identifying the witnesses. In effect, therefore, the Prosecution is asking the Pre-Trial Chamber to hear these witnesses not because it is necessary for the purpose of confirming the charges, but to give the confirmation hearings the appearance of a trial.

25. Aside from being a manifest abuse of process, this approach risks re-traumatising witnesses for reasons not required by the stage of judicial proceedings. That risk can be justified at trial, where full testimony and cross-examination is required to allow a Trial Chamber to appreciate and make findings on reliability and credibility that are necessary to making findings of fact beyond a reasonable doubt. Confirmation hearings, on the other hand, do not involve the application of the rules of evidence, encourage submission of information in written form and require findings only of "substantial grounds to believe" that the charges are substantiated. In the past, the danger of re-traumatisation has been acknowledged as a factor weighing in favour of

³² [Supplementary Information](#), para. 4.

³³ *Id.*, para. 7.

³⁴ *Id.*, para. 8.

³⁵ *Id.*, para. 7.

³⁶ *Id.*, paras 12-13.

allowing testimony to be submitted in written form, even given the more exigent standards of proof and evidence required at trial.³⁷

26. Imposing this risk at confirmation on witnesses whom the Prosecution itself describes as “vulnerable”³⁸ is even less appropriate because of the possibility that they might need to testify again at any subsequent trial. Moreover, there is no guarantee that testimony adduced in this confirmation hearing would be deemed admissible in a trial. Even if it were, it would likely be accorded less probative value than if the Trial Chamber judges were able to hear directly, observe and question the witnesses as they deem necessary. Calling these witnesses at a confirmation hearing creates an unacceptable and unnecessary risk that they will have to testify twice for their testimony to be given the same weight or to be taken into account at all.

27. The risk of re-traumatisation of these fact-witnesses is real. The witnesses will be required to describe highly traumatising events including, for example, P-0467 [REDACTED];³⁹ P-0011 [REDACTED];⁴⁰ P-0056 [REDACTED];⁴¹ P-0015 [REDACTED].⁴²

28. It is also relevant that, as noted above, P-0056 and P-0015 [REDACTED].⁴³ On neither occasion [REDACTED].⁴⁴ Each of the four witnesses bears a risk of re-traumatisation, given the

³⁷ *Prosecutor v. Said*, [Public Redacted Version of the Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68\(2\)\(b\) of the Rules](#), ICC-01/14-01/21-507-Red, 21 October 2022, para. 23, fn. 42, citing to *Prosecutor v. Abd-Al-Rahman*, [Public redacted version of the First Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68\(3\)](#), ICC-02/05-01/20-559-Red, 20 January 2022, para. 15; *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), ICC-02/04-01/15-596-Red, 18 November 2016, para. 16. See e.g. ICC, [The Trauma Expert](#); *Prosecutor v. Yekatom & Ngaïssona*, [First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68\(2\)\(b\) of the Rules](#), ICC-01/14-01/18-1833-Corr-Red, 6 April 2023, paras 115, 126, 190, 224, 261, 356; *Prosecutor v. Said*, [Decision on the Prosecution’s Requests under Rule 68\(3\) to Introduce the Prior Recorded Testimony of P-2931, P-0481, P-0349, P-2328, P-0834, P-2573, P-2232, P-0884, P-2251 and P-0291](#), ICC-01/14-01/21-571-Red, 21 December 2022, para. 37; *Prosecutor v. Lubanga*, [Decision on various issues related to witnesses’ testimony during trial](#), ICC-01/04-01/06-1140, 29 January 2008, para. 3 “The prosecution recognised that the experience of testifying before the Court can be difficult for vulnerable and traumatised witnesses and, if questioning is not appropriately conducted, detrimental to the witness.”, para. 10 “The legal representative contended that in making a decision on the matter, the Chamber should take into consideration any factors tending to indicate that a witness’s appearance before the Court may lead to further traumatization”.

³⁸ [In-Court Protective and Special Measures Sought for the Prosecution Witnesses](#), ICC-02/04-01/05-579-Conf-AnxC, 28 March 2025 (“In-Court Protective and Special Measures Sought for the Prosecution Witnesses”); [Prosecution’s submission of witness materials and related requests](#), para. 3.

³⁹ [UGA-OTP-00000510-R01](#), paras 64-72.

⁴⁰ [UGA-OTP-0069-0202-R01](#), paras 57-62.

⁴¹ [UGA-OTP-0069-0681-R01](#).

⁴² [UGA-OTP-0043-0131-R01](#), paras 49-50.

⁴³ [UGA-OTP-0069-0681-R01](#), p. 2. [REDACTED].

⁴⁴ [REDACTED].

content of their expected testimony, which is not justified considering the nature of both their own statements as well as other testimonial and documentary material available.

i. P-0467

29. P-0467 [REDACTED]. The charges that are based on P-0467's written testimony, according to the Pre-Confirmation Brief, concern the attack on Barlonyo Internally Displaced Persons ("IDP") camp on or about 21 February 2004, and crimes against children.⁴⁵ P-0467 [REDACTED],⁴⁶ [REDACTED] "[REDACTED]."⁴⁷ Otherwise, [REDACTED] testimony is exclusively "crime-base" information that is corroborated by numerous other sources. The Prosecution submits that [REDACTED] testimony could "elaborate" on the experiences of children in the LRA, the pillaging of items, [REDACTED].⁴⁸ All of these aspects are discussed extensively in the witness's statement and in other documentary evidence.

30. The risks of re-traumatisation for P-0467 are obvious, given the content of [REDACTED] statement. [REDACTED]: "[REDACTED]."⁴⁹ [REDACTED].⁵⁰ In a prior statement, P-0467 [REDACTED].⁵¹ P-0467's written testimony also avers that [REDACTED] "[REDACTED]."⁵²

31. P-0467's testimony is liable to be re-traumatising if [REDACTED] is required to testify publicly and comprehensively about these events. Conversely, [REDACTED] lengthy [REDACTED] statement is perfectly suitable in form to support the charges and material facts cited by the Prosecution,⁵³ given the limited scope of confirmation hearings. Furthermore, P-0467 might be required to testify again if Mr Kony is ever brought for trial and [REDACTED] account needs to be tested according to the instructions of the accused, based on the admissibility standards applicable at trial, and adjudication based on proof beyond reasonable doubt. It is irresponsible to require this witness unnecessarily to recount these events four separate times (*i.e.*, statement-taking, preparation, confirmation and trial), whereas [REDACTED] written statement is now in appropriate form and suitable in content for all of the purposes upon which it is relied by the Prosecution.

⁴⁵ [Pre-Confirmation Brief](#), fns 255, 259, 271.

⁴⁶ [UGA-OTP-00000510-R01](#), para. 80 [REDACTED]

⁴⁷ *Id.*, paras 80-82.

⁴⁸ [Supplementary Information](#), para. 13.

⁴⁹ [UGA-OTP-00000510-R01](#), para. 65.

⁵⁰ *Id.*, para. 71.

⁵¹ *Id.*, para. 132; [UGA-OTP-0127-3323](#).

⁵² [UGA-OTP-00000510-R01](#), para. 108.

⁵³ [Supplementary Information](#), para. 13.

32. Furthermore, P-0467 [REDACTED].

ii. P-0011

33. P-0011's statement [REDACTED]. Rather, it consists of "crime-base" information concerning an attack on Pagak IDP camp on 16 May 2004. This statement appears to support paragraph 75 and Counts 1, 3, 4, 7, 10 of the Amended DCC. The material facts supporting these charges through the witness' statement include [REDACTED]⁵⁴ [REDACTED],⁵⁵ [REDACTED]⁵⁶ and [REDACTED]⁵⁷ [REDACTED] Pagak. Each of these material facts and charges is supported by the text of the witness' statement and multiple other witnesses. The Prosecution submits that *viva voce* testimony could "allow P-0011 to explain why [REDACTED] referred to these individuals as rebels", however, that is already obvious from [REDACTED] statement.

34. The risk of re-traumatisation for P-0011 is self-evident. [REDACTED] describes, amongst other events, [REDACTED]. During this event, [REDACTED]⁵⁸ The Prosecution also asserts that [REDACTED]⁵⁹

35. The material facts and charges for which P-0011's testimony is relied upon by the Prosecution are general in nature, concern crime-base evidence only and are corroborated by a substantial number of other witnesses and by documentary evidence. Nothing in the current stage of proceedings justifies putting [REDACTED] at risk of re-traumatisation by giving oral testimony, where [REDACTED] written statement is more than adequate for the purposes of confirmation.

iii. P-0056

36. P-0056's statements [REDACTED]⁶⁰ [REDACTED] written testimony is relied upon by the Prosecution to substantiate "crime-base" information concerning attacks on Abia and Barlonyo IDP camps,⁶¹ as well as alleged crimes against children.⁶² This information is corroborated, the

⁵⁴ See also [Pre-Confirmation Brief](#), fn. 299.

⁵⁵ *Id.*, fn. 313.

⁵⁶ *Id.*, fn. 315.

⁵⁷ *Id.*, fn. 323.

⁵⁸ [UGA-OTP-0069-0202-R01](#), para. 57.

⁵⁹ [In-Court Protective and Special Measures Sought for the Prosecution Witnesses](#), p. 1.

⁶⁰ [UGA-OTP-0069-0681-R01](#), para. 71.

⁶¹ [Pre-Confirmation Brief](#), fns 217, 223, 236, 419.

⁶² *Id.*, fns 419, 421.

Prosecution asserts, by numerous other witnesses.⁶³ P-0056 [REDACTED],⁶⁴ which included [REDACTED],⁶⁵ and [REDACTED]⁶⁶

37. The Prosecution's request for protective measures indicates that [REDACTED]⁶⁷

38. The risk of re-traumatisation for P-0056 arising from being required to give comprehensive public testimony is self-evident. On the other hand, [REDACTED] crime-base testimony is not necessary for the purposes of the confirmation proceedings as it is adequately reflected in [REDACTED] written statement and corroborated by numerous other statements and documents.⁶⁸ It is not necessary to call [REDACTED] to testify to "elaborate on the experiences of children abducted and integrated into the LRA",⁶⁹ as these experiences are depicted in detail in documentary evidence.

iv. P-0015

39. P-0015's two statements to the Prosecution [REDACTED]. The proposed charges that are supported by P-0015's testimony mainly concern the abductions at Lwala Girls School in June 2003⁷⁰ and sexual and gender based violence against women and girls within the LRA.⁷¹ [REDACTED];⁷² [REDACTED];⁷³ and [REDACTED].⁷⁴ [REDACTED].

40. The Prosecution first interviewed P-0015 [REDACTED]. The witness describes [REDACTED]⁷⁵ P-0015 explains in detail in the course of [REDACTED] statements [REDACTED], which is the primary reliance placed on P-0015's statements by the Prosecution in respect of the proposed charges.

41. The Prosecution itself concedes that [REDACTED]⁷⁶ For the purpose of confirming charges [REDACTED] two [REDACTED] statements are more than adequate. There is no need to

⁶³ [Overview of evidence relied upon by section](#), p. 4.

⁶⁴ [In-Court Protective and Special Measures Sought for the Prosecution Witnesses](#), p. 4 [REDACTED].

⁶⁵ [UGA-OTP-0069-0681-R01](#), paras 20-23 [REDACTED].

⁶⁶ *Id.*, para. 25 [REDACTED]

⁶⁷ [In-Court Protective and Special Measures Sought for the Prosecution Witnesses](#), p. 4.

⁶⁸ *See e.g.* [Overview of evidence relied upon by section](#), p. 2.

⁶⁹ [Supplementary Information](#), para. 12.

⁷⁰ [Annex A to the Prosecution's submission of witness materials and related requests](#), pp 2-3.

⁷¹ *Id.*, pp 2-3.

⁷² [UGA-OTP-0069-0681-R01](#), para. 33.

⁷³ *Id.*, paras 49-50.

⁷⁴ *Id.*, para. 67.

⁷⁵ *Id.*, para. 56; [UGA-OTP-0160-0084-R01](#), paras 23-26.

⁷⁶ [In-Court Protective and Special Measures Sought for the Prosecution Witnesses](#), p. 3.

require [REDACTED] to testify in person to [REDACTED],⁷⁷ [REDACTED],⁷⁸ nor “to clarify certain important aspects”⁷⁹ of [REDACTED] detailed witness statements. The risk of re-traumatisation should be assessed as particularly significant in respect of P-0015 because, [REDACTED].⁸⁰

42. Given the limited purposes of a confirmation hearing, the witness’ extensive written statements, and the corroboration of the proposed charges arising from other testimonial and documentary information, there is no justification for risking P-0015’s re-traumatisation by requiring [REDACTED] to testify at this stage of proceedings. If there is a subsequent trial on these issues, it would be highly inappropriate to require such a vulnerable witness to testify yet again on such potentially re-traumatising events, even though this would be the only stage of proceedings where [REDACTED] testimony would need to be tested fully for the purposes of determining the facts beyond a reasonable doubt.

v. *P-1052*

43. P-1052 does not face an evident risk of re-traumatisation but has expressed concerns that [REDACTED].⁸¹ [REDACTED],⁸² [REDACTED]⁸³ The Defence suggests that [REDACTED]. Protective measures are not infallible, and it is hard to see how any significant portion of the witness’ testimony could be given in public without the witness being relatively easily identified, especially by collaborators or those familiar with [REDACTED] work. [REDACTED] testimony would likely therefore have to be held almost entirely in private session, which would frustrate the symbolic justifications invoked by the Prosecution for hearing [REDACTED] testimony *viva voce*.

vi. *The purported willingness of the witnesses to testify*

44. The Prosecution states that all five witnesses “have confirmed that they **would welcome** the possibility to testify before the Chamber”,⁸⁴ but the document cited in support of this claim only

⁷⁷ [Supplementary Information](#), para. 11.

⁷⁸ *Id.*, para. 11.

⁷⁹ *Id.*, para. 11.

⁸⁰ [UGA-OTP-0069-0681-R01](#), para. 66.

⁸¹ [In-Court Protective and Special Measures Sought for the Prosecution Witnesses](#), p. 7.

⁸² *Id.*, p. 7.

⁸³ *Id.*, p. 7.

⁸⁴ [Supplementary Information](#), para. 6 (emphasis added).

notes that the expert witness P-1052 has [REDACTED],⁸⁵ with no similar indication for the four crime base witnesses.

45. Even assuming that the four other witnesses have also [REDACTED], the Pre-Trial Chamber should take an active role in safeguarding them. In particular, [REDACTED] are meaningful only if the witnesses understand fully the risk of re-traumatisation and the nature of the testimony that will be expected of them; are informed that their testimony is neither required nor particularly helpful for the purpose of confirming the charges and that they might be required to testify about the same events again at a subsequent trial if and when it were to take place. The agency of the witnesses is a factor to be taken into account in assessing their well-being but only when it is fully informed and ultimately, the Pre-Trial Chamber's determination as to what is legally necessary should be a prior consideration .

D. Expressing “views and concerns” does not require witness testimony

46. The Prosecution further argues that the Pre-Trial Chamber should deviate from the standards for hearing *viva voce* testimony set out in the Chambers Practice Manual “against the backdrop of the reasons for convening these *in absentia* proceedings”⁸⁶ – by which the Prosecution presumably means Pre-Trial Chamber II's statement that an *in absentia* hearing “would be an opportunity [for the victims of the alleged crimes of Mr Kony] to express their views and concerns, in accordance with article 68(3) of the Statute.”⁸⁷ Similarly, this Pre-Trial Chamber has referred to these “views and concerns” as reflecting “the scope of the specific rights available to victims under the Statute” and that “victims may, in view of the passage of time, not or no longer be in a position to express their views and concerns in the context of the ICC proceedings against Mr Kony.”⁸⁸

47. The Prosecution conflates “views and concerns” with testimony. The expression of views and concerns pursuant to article 68(3), which was relied upon by the Pre-Trial Chambers to justify *in absentia* proceedings, does not require testimony. The Prosecution indicates that each of the proposed witnesses is “also applying for participation in this case”,⁸⁹ which means that their views and concerns will be presented by their legal representatives regardless of whether

⁸⁵ [In-Court Protective and Special Measures Sought for the Prosecution Witnesses](#), p. 8.

⁸⁶ [Supplementary Information](#), para. 6.

⁸⁷ [Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence](#), ICC-02/04-01/05-466, 23 November 2023, para. 66.

⁸⁸ [Decision on the criteria for holding confirmation of charges proceedings in absentia](#), ICC-02/04-01/05-532, 29 October 2024, para. 90.

⁸⁹ [Supplementary Information](#), para. 6.

they testify. Indeed, testimony is not an opportunity to express “views and concerns”; on the contrary, witnesses who believe that their testimony represents such an opportunity are likely to be disappointed.

48. Furthermore, at least two of the witnesses proposed for *viva voce* testimony as a purported means of participation have already testified. P-0011 testified in the Ugandan trial proceedings against Thomas Kwoyelo. [REDACTED] testified in open court and without protective measures,⁹⁰ [REDACTED] even recounted [REDACTED] story on the news following the judgment.⁹¹ P-0015’s statement was tendered in the *Ongwen* case. Although [REDACTED] does not appear to have been a registered victim in the *Ongwen* case, [REDACTED] must know that [REDACTED] testimony was submitted to the Trial Chamber, that it was admitted, and that it was ultimately relied upon in the Trial Judgment of this Court convicting Dominic Ongwen. As compared with any impact that [REDACTED] unnecessary *viva voce* testimony could have on these confirmation proceedings, P-0015’s has already contributed more substantially to the course of justice through the submission of [REDACTED] written statement in *Ongwen*. Calling a witness to give testimony where it is unnecessary for judicial proceedings but in order to achieve some performative goal, is inappropriate.

V. CONCLUSION AND RELIEF REQUESTED

49. The Prosecution boldly asserts that the Chambers Practice Manual gives it almost unconstrained latitude to conduct the confirmation of charges hearings as it sees fit.⁹² The Defence challenges the correctness of this contention. The Chamber’s Practice Manual, reflecting the Statute and Rules, clearly vests the authority and the responsibility as to how evidence will be presented during confirmation proceedings in the Pre-Trial Chamber.

50. This Pre-Trial Chamber should only permit procedures at the confirmation stage tailored to that purpose. Allowing procedures that give it the appearance of a trial will be misleading to the witnesses, the public and to victim communities. They also impose an entirely unjustified risk of re-traumatisation on those called to testify *viva voce*. Further, such testimony is not justified by one of the factors cited by the Pre-Trial Chamber for permitting *in absentia* hearings, which is to

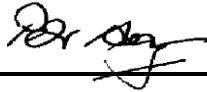
⁹⁰ High Court of Uganda, *Uganda v. Thomas Kwoyelo*, [Judgment](#), 13 August 2024, paras [REDACTED].

⁹¹ [REDACTED].

⁹² [Supplementary Information](#), para. 3 “On the other hand, it also recognises a certain margin for ‘the parties to determine the best way to persuade the Chamber’, and emphasises that ‘there is no basis for the Chamber to impose on the parties a particular modality/format to argue their case and present their evidence.’”

permit the “views and concerns” of victims to be heard pursuant to article 68(3), which may still be expressed through victims’ designated legal representatives.

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 23 April 2025

At The Hague, Netherlands