



Original: English

No. ICC-02/04-01/05

Date: 28 May 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

Decision on the Prosecution's request to hear *viva voce* witnesses at the confirmation of charges hearing

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☒ Legal Representatives of the Victims

☐ Legal Representatives
of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☒ The Office of Public Counsel
for Victims

☐ The Office of Public Counsel
for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

☐ Counsel Support Section

☒ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and Reparations
Section

☐ Other

PRE-TRIAL CHAMBER III of the International Criminal Court (the ‘Court’) issues this Decision on the Prosecution’s request to hear *viva voce* witnesses at the confirmation of charges hearing, pursuant to articles 61(3)(b), (5) and (6) and 68 of the Rome Statute (the ‘Statute’), rules 87, 122(1) and 126 of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 48 of the Regulations of the Court.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 8 July 2005, Pre-Trial Chamber II issued a warrant of arrest against Joseph Kony (‘Mr Kony’), which was amended on 27 September 2005.¹
2. On 19 January 2024, the Prosecution submitted the ‘Document Containing the Charges’ (the ‘DCC’),² which was amended on 17 April 2025.³
3. On 29 October 2024, the Chamber issued the ‘Decision on the criteria for holding confirmation of charges proceedings *in absentia*’.⁴
4. On 12 December 2024, the Chamber issued the ‘Decision Setting the Date of the Confirmation of Charges Hearing and Related Time Limits’,⁵ which set 9 September 2025 as the date for the confirmation hearing.
5. On the same day, the Chamber issued the ‘Decision Setting the Disclosure Regime’, instructing, *inter alia*, 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’.⁶
6. On 28 March 2025, the Prosecution indicated its intention to call five *viva voce* witnesses at the confirmation hearing, consisting of four crime-base witnesses (the ‘Crime-Based Witnesses’) and one expert witness (the ‘Expert Witness’ and collectively, the ‘Witnesses’) and submitted summaries of their evidence as well as

¹ Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, ICC-02/04-01/05-28-US-Exp, under seal and *ex parte*, only available to the Prosecution (public redacted version issued on 13 October 2005, [ICC-02/04-01/05-53](#)).

² [ICC-02/04-01/05-474](#), public.

³ [Amended Document Containing the Charges](#), ICC-02/04-01/05-591.

⁴ [ICC-02/04-01/05-532](#).

⁵ [ICC-02/04-01/05-539](#).

⁶ [ICC-02/04-01/05-537](#), para. 27.

information concerning their relevance to the Prosecution's case (the 'Prosecution Request').⁷ The Prosecution requests the Chamber to adopt in-court protective and supportive measures for the Witnesses,⁸ allow the Prosecution to prepare the Witnesses according to a proposed protocol⁹ and organise the testimony of four of the Witnesses through audio-visual link (the 'Prosecution Procedural Requests').¹⁰

7. On 7 April 2025, the Office of Public Counsel for Victims, acting as the Legal Representatives of Victims (the 'LRVs'), submitted its response to the Prosecution Request (the 'LRV Response').¹¹ In support of the Prosecution Request, the LRVs aver that the Chamber should adopt the measures proposed therein.¹²

8. On the same day, the Defence submitted a response to the Prosecution Request (the 'Defence First Response'),¹³ in which it alleges that the Prosecution 'has not demonstrated that the proposed *viva voce* testimony "cannot be properly substituted by a written statement," as required',¹⁴ especially in light of the jurisprudence of the Court that accords weight to evidence depending 'on the content of the testimony and not the means by which it is introduced.'¹⁵ It submits that the Court's statutory framework, most notably article 61(5) of the Statute, supplemented by the Chambers Practice Manual, provides that the use of live witnesses should be exceptional and be subject to specific authorisation by the Chamber. Such an authorisation is granted only when the calling party satisfactorily demonstrates that the oral testimony cannot be properly substituted by a written statement or other documentary evidence.¹⁶ This approach, the Defence argues, is 'align[ed] with the purpose and scope of the confirmation process',

⁷ 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 (public redacted version filed on the same day, [ICC-02/04-01/05-579-Red](#)).

⁸ [Prosecution Request](#), paras 7-22.

⁹ [Prosecution Request](#), paras 23-27.

¹⁰ [Prosecution Request](#), paras 28-31.

¹¹ Victims' Response to the "Prosecution's submission of witness materials and related requests for protective measures, witness preparation, and testimony via video link", ICC-02/04-01/05-584-Conf (public redacted version filed on the same day, [ICC-02/04-01/05-584-Red](#)).

¹² [LRV Response](#), paras 12-19.

¹³ 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 (public version filed on the same day, [ICC-02/04-01/05-585-Red](#)).

¹⁴ [Defence First Response](#), paras 3, 7.

¹⁵ [Defence First Response](#), para. 12.

¹⁶ [Defence First Response](#), paras 4-5.

considering that the credibility of witnesses can only be properly addressed at trial, where they will be called to testify and their evidence properly tested.¹⁷

9. Furthermore, the Defence ‘does not believe that it would be in the interests of justice to compel [the Crime-Based Witnesses] to recount highly traumatic events, with all the potential risks of re-traumatisation [...], when their evidence could be presented in written form’¹⁸ and highlights the ‘security concerns’ that would remain even after the adoption of protective measures.¹⁹ Concerning the Expert Witness, the Defence avers that it ‘does not object to his report being admitted into evidence for the purpose of the confirmation hearing, in lieu of oral testimony’, given, *inter alia*, the nature of the proposed testimony.²⁰

10. On 14 April 2025, pursuant to the Chamber’s order,²¹ the Prosecution provided supplementary information concerning the reasons underlying its request to allow the Witnesses to testify live during the confirmation hearing (the ‘Supplementary Submissions’).²² It avers that the Chambers Practice Manual allows for a margin of appreciation for the parties²³ to determine the best way to persuade the Chamber²⁴ and that the proceedings will remain expeditious even if the Witnesses are to testify live.²⁵ In their view, the fact that confirmation proceedings will be held *in absentia* sets this case apart from all other proceedings that had taken place in the past, where the suspect was present, which is the scenario underlying the Chambers Practice Manual’s approach.²⁶ The witnesses proposed for *viva voce* testimony were selected to testify on aspects not adjudicated in the *Ongwen* case, thus providing them with the first opportunity to recount their stories before the Court.²⁷ Moreover, the proposed preparatory process for testifying live would give the Witnesses ‘the opportunity to

¹⁷ [Defence First Response](#), para. 6.

¹⁸ [Defence First Response](#), paras 8-9, 11.

¹⁹ [Defence First Response](#), para. 10.

²⁰ [Defence First Response](#), para. 14.

²¹ Email from Pre-Trial Chamber III on 10 April 2025, 11:14 hrs.

²² Prosecution’s supplementary information regarding the request to hear *viva voce* witnesses at the confirmation hearing (ICC-02/04-02/05-579), 14 April 2025, ICC-02/04-01/05-589, confidential (public redacted version filed on 16 April 2025, [ICC-02/04-01/05-589-Red](#)).

²³ [Supplementary Submissions](#), para. 3.

²⁴ [Supplementary Submissions](#), para. 3.

²⁵ [Supplementary Submissions](#), para. 6.

²⁶ [Supplementary Submissions](#), para. 4.

²⁷ [Supplementary Submissions](#), para. 6.

refresh their memory’ and the Chamber would be able to appreciate their narratives, including their ‘important nuances’.²⁸

11. On 22 April, the Defence responded to the Supplementary Submissions (the ‘Defence Second Response’),²⁹ reiterating its argument that confirmation proceedings are limited in scope and *viva voce* testimonies are discouraged.³⁰ It further avers that the Prosecution has failed to establish that the proposed live testimonies cannot be properly substituted by documentary evidence, as, *inter alia*, at least one written statement exists for each of the Witnesses, all of which have ‘adequate indicia of presumptive authenticity’³¹ to be tendered as evidence in written form.³² Moreover, the Defence considers the Prosecution’s request to be a ‘manifest abuse of process’,³³ as it asks the 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’³⁴ and also risks ‘re-traumatising witnesses for reasons not required by the stage of judicial proceedings’.³⁵ The Defence claims that the Witnesses may express their views and concerns through their legal representatives without making a *viva voce* statement.³⁶

II. DETERMINATION

12. As a preliminary matter, the Chamber recalls the Single Judge’s email decision³⁷ deferring the decision on the need for responses to the OTP’s additional submissions on the matter of *viva voce* witnesses until ‘after having received and considered [the] submissions [already before it]’. The Defence Second Response was submitted before receiving the Chamber’s further instructions. Nevertheless, since the Supplementary Submissions address matters which should have formed part of the Prosecution’s initial request, the Chamber will consider the Defence Second Response.

²⁸ [Supplementary Submissions](#), para. 7.

²⁹ 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-02/04-01/05-596-Conf (public redacted version filed on 23 April 2025, [ICC-02/04-01/05-596-Red](#)).

³⁰ [Defence Second Response](#), paras 14-18.

³¹ [Defence Second Response](#), para. 19.

³² [Defence Second Response](#), para. 19.

³³ [Defence Second Response](#), para. 25.

³⁴ [Defence Second Response](#), para. 24.

³⁵ [Defence Second Response](#), para. 25.

³⁶ [Defence Second Response](#), paras 46-48.

³⁷ Email from Pre-Trial Chamber III on 10 April 2025, 16:15 hrs.

13. Rule 122(1) of the Rules of Procedure and Evidence ('Rules') provides that '[t]he Presiding Judge shall determine how the hearing is to be conducted and, in particular, may establish the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented'.³⁸

14. Concerning *viva voce* testimony during confirmation hearings, article 61(5) of the Statute provides that the Prosecution 'shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.' In doing so, the Prosecution 'may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial'.³⁹ The probative value of an evidentiary item does not *per se* depend on whether it is presented in writing or *viva voce*; rather, it is assessed 'on a case-by-case basis and in light of the evidence as a whole'.⁴⁰

15. The Chambers Practice Manual provides further guidance by stating that the '[u]se 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'.⁴¹ The 'preferred modality' for introducing evidence at the stage of the confirmation of charges proceedings' is the submission of documentary evidence.⁴²

16. Therefore, the aforementioned Court's legal framework, as supplemented by the Chambers Practice Manual and the jurisprudence of the pre-trial chambers, provides that the introduction of *viva voce* witness during confirmation proceedings is to be regarded as an exceptional measure: ordinarily, the Pre-Trial Chamber will only

³⁸ Rule 122 of the Rules sets the proceedings for confirmation hearings "in the presence of the person charged". Pursuant to rule 126 of the Rules, this provision applies *mutatis mutandis* to confirmation proceedings held in the absence of the person concerned.

³⁹ Article 61(5), Statute.

⁴⁰ Pre-Trial Chamber II, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-01/11-373, para. 73.

⁴¹ Chambers Practice Manual, first published 4 September 2015, as amended on 21 October 2024, para. 44.

⁴² Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Decision on "Requête aux fins d'audition de témoins de la Défense à l'audience de confirmation des charges" filed by the Defence of Aimé Kilolo Musamba](#), 25 April 2014, ICC-01/05-01/13-363, p. 4.

authorise it if the party requesting the introduction of live testimony establishes that the testimony sought to be introduced cannot be substituted by documentary evidence. This is consistent with the limited scope and purpose of confirmation proceedings, which is to determine whether the case as presented by the Prosecution is sufficiently established to warrant a full trial.⁴³

17. The Chamber considers that the Prosecution has not established that the ‘proposed oral testimony cannot be properly substituted by a written statement or other documentary evidence’. As regards the proposed Crime-Based Witnesses, none of the reasons relied upon by the Prosecution as warranting live testimony at the confirmation hearing are persuasive. The fact that they have not testified in previous proceedings or the lack of detailed transcripts are circumstances common to confirmation proceedings, as is the lack of opportunities to clarify and elaborate on specific aspects of testimonies at the hearing.

18. With regard to the Expert Witness, the Chamber notes that the proposed live statement would concern ‘the complex methodology of the assessed data and how the conclusions in the expert report were reached’.⁴⁴ The Chamber observes that an entire section of the Expert’s written report is devoted to the methodology followed in the compilation, analysis, and processing of the relevant data. Further elaboration at this stage would be superfluous and would not be of assistance in determining whether to confirm the charges against the suspect.

19. The Chamber is mindful that, as recalled by both the Prosecution and the LRVs, the reasons for holding these proceedings *in absentia* include the importance of affording victims an opportunity to express their views and concerns, despite the suspect remaining at large and that, currently, it ‘cannot be foreseen whether there will

⁴³ Situation in the Central African Republic II, *Prosecutor v. Mahamat Said Abdel Kani*, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), ICC-01/14-01/21-218-Red, para. 35; [Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman \(‘Ali Kushayb’\)’, 9 July 2021, ICC-02/05-01/20-433](#), 23 November 2021, ICC-02/05-01/20-433-Corr, para. 34. See Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Decision on “Requête aux fins d’audition de témoins de la Défense à l’audience de confirmation des charges” filed by the Defence of Aimé Kilolo Musamba](#), 25 April 2014, ICC-01/05-01/13-363, pp. 3-4, in which Pre-Trial Chamber II ruled that the ‘oral testimony of [the] witnesses at the confirmation of charges hearing – as opposed to the presentation of their written statements – [wa]s not necessary for the proper elucidation of facts for the purpose of the Chamber’s final decision under article 61(7) of the Statute’.

⁴⁴ [Supplementary Submissions](#), paras 14-15.

ever be a trial, and whether any victim witness may have a chance to recount their story.’⁴⁵ However, the limited purpose and scope of confirmation proceedings remain unaffected by the *in absentia* nature of this stage of the case and do not necessitate an amendment of the general approach to the presentation of evidence at the confirmation hearing. Moreover, the Chamber notes that allowing oral testimony at the hearing is not the only way for the Crime-Based Witnesses to express their views, or for the Prosecution to be able to rely on the Expert Report. Those witnesses’ written statements and the Expert Report are already before the Chamber. Also, the Prosecution may, when exercising its discretion in formulating the content of their presentation at the hearing, opt to focus on the Crime-Based Witnesses and their views and concerns and refer to the Expert Report, with a view to ensuring that its submissions are as effective and representative of the case as possible.

20. In addition, the Chamber is also mindful of the risk of re-traumatisation of the Crime-Based Witnesses, were they to be called upon to testify *viva voce*. The Chamber also notes the broader security concerns and challenges arising from the circumstances specifically relating to some of the Witnesses, which further militate against having them testify *viva voce* at the confirmation hearing.

21. Accordingly, the Chamber rejects the Prosecution Request. The Prosecution Procedural Requests are thus dismissed as moot.

⁴⁵ [Supplementary Submissions](#), para. 4.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution Request; and

DISMISSES the Prosecution Procedural Requests as moot.

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



Judge Althea Violet Alexis-Windsor

Presiding Judge



Judge Iulia Antoanella Motoc



Judge Haykel Ben Mahfoudh

Dated this Wednesday, 28 May 2025

At The Hague, The Netherlands