

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **02 June 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
With Public Redacted Annexes A and B

**Public Redacted Version of Kony Defence Request Concerning the Publicity of
Proceedings, ICC-02/04-01/05-607-Conf, 28 May 2025**

Source: Defence for Mr Joseph Kony

Document 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 Zavala Giler, Osvaldo

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and Reparations
Section

☐ Other

I. INTRODUCTION

1. The Prosecution request for the ICC’s first *in absentia* confirmation hearing against Mr Joseph Kony was justified, in part, on the purported basis that a hearing would enable “*the public airing of the evidence*”.¹ A public confirmation of charges cannot proceed without public discussion of the witnesses whose testimonies underpin those charges. A valid and effective challenge to the evidence necessarily requires reference to the witnesses concerned. The Prosecution’s current approach to confidentiality of the evidence in this case will make a public airing of the evidence all but impossible.

2. The Defence has now received disclosure of 11,596 items of evidence. Of these, 11,214 items have been designated confidential, including publicly available press articles.² Only 382 items are classified as public. The Pre-Trial Chamber ordered the Prosecution to provide **legal and factual grounds** for any non-public classification.³ This has not been done. For example, the Prosecution’s classification for 10,603 items cites to Rule 81(4) of the Rules of Procedure and Evidence (“Rules”) and Rome Statute provisions relating to witness protection.⁴ Rule 81(4) requiring **a Chamber** to authorise the non-disclosure of witness identities prior to the commencement of a trial.

3. The Prosecution has also now indicated that it intends to rely on the testimonial evidence of 182 people in the confirmation of charges proceedings.⁵ Regulation 42(2) of the Regulations of the Court requires the Prosecution, in discharging its disclosure obligations, to inform the Defence of any protective measures already in place.⁶ This has not been done.⁷ A Defence review

¹ [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. 15.

² See e.g., [UGA-OTP-0236-0022](#); also available [REDACTED]. See also, [UGA-OTP-0025-0297](#); [UGA-OTP-0130-0058](#); [UGA-OTP-0263-2289](#).

³ [Decision Setting the Disclosure Regime](#), ICC-02/04-01/05-537, 12 December 2024, paras 39-40.

⁴ Rule 81(4), [Rules of Procedure and Evidence](#) “The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.”

⁵ [Annex A to Prosecution’s submission of its revised Witness Table](#), ICC-02/04-01/05-597-Conf-AnxA, 30 April 2025.

⁶ Regulation 42(2), [Regulations of the Court](#) “When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.”

⁷ On 21 May 2025, the Defence asked the Prosecution “which of the 182 people are subject to protective measures in Ongwen, and whether you would consent to our access to these underlying orders.” The Prosecution responded that it would revert back with a list of overlapping witnesses consider whether access to the underlying orders is possible.

of the confidential judgment in the *Ongwen* case⁸ revealed that [REDACTED] out of 182 of these people are the subject of previous orders for witness protective measures in that case.⁹ However, aside from the five witnesses it is seeking to call *viva voce*,¹⁰ the Prosecution has not sought protective measures for any of the witnesses on whom it seeks to rely in the *Kony* case, nor provided the Defence with any basis for classifying their identity or evidence as confidential.

4. By way of example, the Defence has learned through the disclosure process that [REDACTED] is being relied upon by the Prosecution as a central witness in the case against Mr Kony. On 6 May 2025, the Defence asked for confirmation from the Prosecution that [REDACTED] during the confirmation hearing.¹¹ The Prosecution responded on 13 May 2025 that “P-0455’s status as a witness is confidential.”¹² In course of further *inter partes* exchanges, the Prosecution indicated that “it is the consistent practice at the Court to discuss witness evidence at the confirmation stage publicly only if revealing the information would not pose an objectively justified risk of harm to the witness”.¹³ The Prosecution then invited the Defence to liaise in advance of the confirmation hearing regarding any of the Prosecution’s witnesses “to discuss whether and to what extent information can be made public.”¹⁴ The Prosecution thereby not only reverses the default position concerning confidentiality, but also seeks to shift the burden of maintaining the publicity of the proceedings to the Defence, with no information as to why witnesses were unilaterally designated as “confidential” by the Prosecution in the first place.

5. Withholding the name and identifying particulars of a witness from the public during a hearing at the ICC is a protective measure.¹⁵ The Rome Statute framework provides that the Chamber, once seized of the case, is the only organ of the Court with the power to order and vary protective measures.¹⁶ By imposing Rule 87(1) protective measures on each of its witnesses,

⁸ [Annex A to the Prosecution’s submission of the Confidential Redacted Version of the Ongwen Trial Judgment](#), ICC-02/04-01/05-513-Conf-Exp-AnxA, 6 August 2024.

⁹ See Annex B, Email, Re: Witness Protective Measures Inquiry, 23 May 2025, 11:05.

¹⁰ [Annex C 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-AnxC, 28 March 2025.

¹¹ See Annex A, Email, P-04[5]5, 6 May 2025, 13:23.

¹² See Annex A, Email, RE: P-04[5]5, 13 May 2025, 13:42.

¹³ See Annex A, Email, RE: P-04[5]5, 13 May 2025, 13:42.

¹⁴ See Annex A, Email, RE: P-04[5]5, 13 May 2025, 13:42.

¹⁵ Rule 87(3)(d), [Rules of Procedure and Evidence](#) “A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia: [...] That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness”.

¹⁶ *Prosecutor v. Lubanga*, [Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU](#), ICC-01/04-01/06-2517-Red, 8 July 2010, para. 23.

unilaterally and without justification, the Prosecution has circumvented the role of the Pre-Trial Chamber and the judicial oversight put in place by the drafters to safeguard the publicity of proceedings and the rights of suspects and accused to a public hearing. It has also deprived the Defence of its right under Rule 87(2)(b) to respond to the Prosecution requests for protective measures for its witnesses. As most recently held by the Pre-Trial Chamber in *Duterte*, the Prosecution is required to submit requests for protective measures for all witnesses at the confirmation stage.¹⁷ The *Kony* case, despite being exceptional, should not be an exception.

II. LEVEL OF CONFIDENTIALITY

6. The Defence files this request as confidential, pursuant to regulation 23bis(1) and (2) of the Regulations of the Court, as it includes sensitive information about Prosecution witnesses. A public redacted version will be filed within the time limits set by the Chamber.

III. PROCEDURAL HISTORY

7. On 28 March 2024, the Prosecution, in its observations on conduct of an *in absentia* confirmation of charges submitted that it “will **only** request measures pursuant to rules 87 and 88 for the witnesses to be called **viva voce** at the confirmation hearing”.¹⁸

8. On 12 December 2024, Pre-Trial Chamber III set the disclosure regime for the *Kony* confirmation of charges proceedings.¹⁹ In which it recalled that the Prosecution “vii) **does not intend to submit any requests to withhold the identity of any witness and has not requested any security assessment for any of the witnesses**, except for those to be called *viva voce* at the confirmation of charges hearing, which will be completed at the latest by 31 May 2024”.²⁰

9. On 12 December 2024, Pre-Trial Chamber III decided to convene a confirmation of charges hearing for 9 September 2025.²¹

¹⁷ *Prosecutor v. Duterte*, [Order on the conduct of confirmation proceedings](#), ICC-01/21-01/25-114, 17 April 2025, para. 22 “The Prosecution shall also submit any requests pursuant to rules 87 and/or 88 of the Rules, **including** with regard to the witnesses it intends to call to testify *viva voce*, accompanied by the completed security assessments for the witnesses in question, by the same time limit. The Chamber shall subsequently set out any further directions in this respect.” (emphasis added).

¹⁸ [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](#), ICC-02/04-01/05-490, 28 March 2024, para. 10 (emphasis added).

¹⁹ [Decision Setting the Disclosure Regime](#), ICC-02/04-01/05-537, 12 December 2024, paras 39-40.

²⁰ [Decision Setting the Disclosure Regime](#), ICC-02/04-01/05-537, 12 December 2024, para. 10 (emphasis added).

²¹ [Decision Setting the Date of the Confirmation of Charges Hearing and Related Time Limits](#), ICC-02/04-01/05-539, 12 December 2025, para. 8.

10. On 27 January 2025, the Prosecution disclosed the first items in this case,²² in a process that concluded on 28 March 2025.²³ The disclosure revealed that [REDACTED] was a key Prosecution witness against Mr Kony.

11. On 6 May 2025, the Defence requested confirmation from the Prosecution that [REDACTED] could be referred to by name in public proceedings.²⁴ The Prosecution responded on 13 May 2025, stating that “P-0455’s status as a witness is confidential because there are legitimate concerns that disclosure to the public of his status as a Prosecution witness would pose risk of harm especially to his immediate family.”²⁵ On the same day, the Defence requested disclosure of the material justifying this designation.²⁶ The Prosecution has acknowledged receipt, but no additional documents have been disclosed.²⁷

12. On 21 May 2025, the Defence wrote to the Prosecution regarding witness protective measures, recalling the statutory presumption of publicity of ICC proceedings (Articles 67(1), 64(7), Rule 121, Regulation 20) and the requirement under Rule 87(1) for protective measures to be judicially authorised by the Pre-Trial Chamber.²⁸ The Defence explained its position that the Prosecution’s blanket classification of all 182 individuals in the *Kony* case circumvents this framework, undermining the Chamber’s oversight and prejudicing the Defence’s ability to investigate and publicly challenge the evidence. The Defence also asked whether the Prosecution would oppose the transfer of applications and decisions from the *Ongwen* case in relation to any overlapping victims.

13. On 23 May 2025, the Prosecution responded to the Defence “maintain[ing] that it is within its right to designate as confidential evidence that it discloses to the Parties, Participants and the Chamber at the confirmation stage”.²⁹ It indicated that it would revert with a list of overlapping witnesses, corresponding filing numbers, and confirm whether the Defence could be granted full access. On 27 May 2025, the Defence responded to the Prosecution, asking for an indication of which items of evidence may be referred to publicly.³⁰

²² [Prosecution’s First Communication of the Disclosure of Evidence](#), ICC-02/04-01/05-549, 27 January 2025.

²³ [Prosecution’s Seventeenth Communication of the Disclosure of Evidence](#), ICC-02/04-01/05-581, 1 April 2025, para. 8.

²⁴ See Annex A, Email, P-04[5]5, 6 May 2025, 13:23.

²⁵ See Annex A, Email, RE: P-04[5]5, 13 May 2025, 13:42.

²⁶ See Annex A, Email, RE: P-04[5]5, 13 May 2025, 16:39.

²⁷ See Annex A, Email, RE: P-04[5]5, 14 May 2025, 10:53. See also, Annex A, Email, RE: P-0455, 21 May 2025, 1:02PM.

²⁸ See Annex B, Email, Witness Protective Measures Inquiry, 21 May 2025, 11:25.

²⁹ See Annex B, Email, Re: Witness Protective Measures Inquiry, 23 May 2025, 11:05.

³⁰ See Annex B, Email, Re: Witness Protective Measures Inquiry, 23 May 2025, 12:06.

IV. APPLICABLE LAW

14. Proceedings before the ICC must be public unless otherwise provided in the legal framework or ordered by the Chamber.

15. According to Articles 67(1) of the Rome Statute “the accused shall be entitled to a public hearing” and Article 64(7) states “[t]he trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in Article 68, or to protect confidential or sensitive information to be given in evidence.”

16. Rule 121(1) of the Rules of Procedure and Evidence provides that,

A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, **the person shall enjoy the rights set forth in article 67.**³¹

17. Regulation 20 of the Regulations of the Court provides that

“1. All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

2. When a Chamber orders that certain hearings be held in closed or private session, the Chamber shall make public the reasons for such an order.

3. A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.”

18. Where an objectively justified risk of harm to a witness exists, a party is able to bring an application for protective measures under Rule 87(1) of the Rules:

Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

19. The Prosecutor or the Defence is then entitled to respond to such a request pursuant to Rule 87(2)(b).

20. Rule 87(3) of the Rules of Procedure and Evidence further provides that:

A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to

³¹ Emphasis added.

prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness [...]"

V. SUBMISSIONS

21. The Court's jurisprudence on the principle of the publicity of proceedings is well-established,³² and aligns closely with the precedent developed by the European Court of Human Rights³³ that "[t]he public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained."³⁴

22. The Prosecution has told the Defence that it does not intend to submit a request pursuant to Rule 87(1) for [REDACTED], given its understanding that Rule 87 applies "only to oral testimony before a Chamber." Nothing in the language of Rule 87 indicates that it is only applicable to oral testimony. On the contrary, the Court's jurisprudence reflects that protective measures are frequently requested,³⁵ including by the Prosecution³⁶ and granted for written statements admitted into evidence,³⁷ including those introduced under Rule 68 of the Rules. As Trial Chamber V has affirmed:

³² *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Defence for Mr Gbagbo's Requests for the Record of the Case to be Made Public, the Creation of a Public Database and for Email Decisions to be Placed on the Record of the Case](#), ICC-02/11-01/15-1430, 13 April 2022, para. 13; *Prosecutor v. Bemba*, [Public Redacted Version of "Decision on in-court protective measures for Witnesses 38, 22 and 87"](#), ICC-01/05-01/08-1021 of 19 November 2010, ICC-01/05-01/08-1021-Red, 27 June 2016, para. 24; *Prosecutor v. Katanga*, Trial Chamber II, [Transcript of Trial Hearing](#), ICC-01/04-01/07-T-189-ENG, 20 September 2010, p. 10, lns 17-22; *Prosecutor v. Yekatom & Ngaïssona*, [Decision on the Prosecution Request to Maintain Redactions to the Confirmation Decision](#), ICC-01/14-01/18-1041-Red, 28 June 2021, para. 6.

³³ See Article 14(1), [International Covenant on Civil and Political Rights](#); Article 8(5), [American Convention on Human Rights](#); Article 6(1), [European Convention on Human Rights](#). See further ECtHR, *Döry v. Sweden*, [Judgment](#), Application No. 28394/95, 12 November 2002, para. 37.

³⁴ ECtHR, *Sutter v. Switzerland*, [Judgment](#), Application No. 8209/78, 22 February 1984, para. 26; ECtHR, *Riepan v. Austria*, [Judgment](#), Application No. 35115/97, 14 November 2000, para. 27; ECtHR, *Krestovskiy v. Russia*, [Judgment](#), Application No. 14040/03, 28 October 2010, para. 24.

³⁵ *Prosecutor v. Yekatom & Ngaïssona*, [Version Publique Expurgée de la « Requête de la Défense de M. Yekatom aux fins de protection de l'identité de certains témoins, non divulgation de déclarations au public, et autorisation d'expurgations dans les versions publiques de déclarations »](#), ICC-01/14-01/18-2700-Conf, 23 Septembre 2024, ICC-01/14-01/18-2700-Red, 4 February 2025.

³⁶ *Prosecutor v. Yekatom & Ngaïssona*, [Public Redacted Version of "Prosecution's Request for the Protection of the Identity of Witnesses P-2546, P-2393, P-1964, P-2132, P-1654 in the Public Redacted Versions of their Statements"](#), ICC-01/14-01/18-2072-Conf-Exp, 31 August 2023, ICC-01/14-01/18-2072-Red, 13 February 2024, para. 5; *Prosecutor v. Yekatom & Ngaïssona*, [Public redacted version of "Prosecution's Request for the Non-Publication of P0460, P-0732, P-1864, and P-1871's Prior Recorded Testimonies, or in the alternative, Request for the Protection of their Identities in the Public Redacted Versions of their Prior Recorded Testimonies"](#), 22 December 2023, ICC-01/14-01/18-2287-Conf-Exp, ICC-01/14-01/18-2287-Red, 30 June 2024, para. 5.

³⁷ *Prosecutor v. Yekatom & Ngaïssona*, [Annex 4 to Fifth Registry Quarterly Report on Decisions issued by way of e-mail from 11 June to 31 October 2021](#), ICC-01/14-01/18-1167-Anx4-Red, 5 November 2021; *Prosecutor v. Ntaganda*, [Public redacted version of "Preliminary ruling on prior recorded testimony pursuant to Rule 68\(2\)\(b\) in relation to sentencing"](#), ICC-01/04-02/06-2385-Red, 23 August 2019.

As previously indicated, the evidence presentation shall be held in public to the extent possible (see Initial Directions, ICC-01/14-01/18-631, para. 45). The Chamber considers that the same principle applies to testimony which was previously obtained and introduced under Rule 68 of the Rules.³⁸

The Prosecution's restrictive reading of its obligations under Rule 87 accordingly has no basis.

23. The Prosecution then argues that “this provision is not necessary to ensure the confidentiality of witness identities *vis-à-vis* the public, due to the measures already available to the Prosecution in the Court's statutory regime”. However, no statutory provisions or measures are cited. The Prosecution's approach is inconsistent with the Court's legal framework, under which any protective measure, including the use of a pseudonym, must be authorised by the Chamber pursuant to Rule 87(1) of the Rules and Regulation 20 of the Regulations, ensuring the least restrictive means are used and the fair trial rights of the suspect or accused are respected.³⁹

24. In justifying this approach, the Prosecution asserts that “for all witnesses, disclosed to the defence in written form, including those the Prosecution seeks to rely on for the purposes of the confirmation hearing, **it is the Prosecution's prerogative** and obligation to designate as confidential any information, which cannot legitimately be made public at this stage of the proceedings.”⁴⁰ The Defence agrees that certain information can and should remain confidential, where an objectively justifiable risk exists. However, the Prosecution presumes a unilateral power to determine the scope of this confidentiality, which runs contrary to Article 64(7) of the Statute. It is for the Pre-Trial Chamber – not the Prosecution – to determine whether and why certain information may be withheld from the public. The Defence shares the Prosecution's position that public discussion of a witness's evidence should never result in harm. This is precisely why protective measures must be sought, enabling judicial oversight and ensuring that any such restrictions are grounded in law. Absent a request for protective measures, the information must be public.

25. The Prosecution's reliance on Article 68(1) of the Statute, which requires the Court to take measures to protect victims and witnesses, and Article 68(2), which allows for exceptions to public hearings, is also misplaced. Article 68(2) provides that:

³⁸ *Prosecutor v. Yekatom & Ngaïssona*, [Annex 4 to Fifth Registry Quarterly Report on Decisions issued by way of e-mail from 11 June to 31 October 2021](#), ICC-01/14-01/18-1167-Anx4-Red, 5 November 2021, p.3.

³⁹ See e.g., *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor's application for protective measures for Witness P-0428](#), ICC-02/11-01/15-1155-Red, 20 April 2018, para. 6; *Prosecutor v. Ruto & Sang*, [Public redacted Version of Further public redacted version of Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses'](#), ICC-01/09-01/11-902-Red3, 11 December 2017, paras 10-14.

⁴⁰ See Annex A, Email, RE: P-04[5]5, 13 May 2025, 13:42 (emphasis added).

As an exception to the principle of public hearings provided for in article 67, **the Chambers of the Court may**, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.⁴¹

While the Prosecution is accordingly correct that these provisions allow for measures to protect victims, authority for these orders rests with the “the Chambers of the Court”, and not with the parties.

26. The Prosecution then cites paragraph 12 of the *Protocol on Handling Confidential Information* (“Protocol”), which prohibits revealing to third parties that a witness is involved with the Court. However, a contextual reading of this section is essential. While paragraph 12 of the Protocol requires that the parties shall not reveal to third parties that the witness is involved with the activities of the Court, paragraph 10 provides that “[t]his section of the Protocol applies to witnesses whose identity or relationship with the Court has not been made public or who are subject to other protection measures known to the investigating party, including those applicable in other cases before the Court.” Meaning, that paragraph 12 does not give rise to an independent and automatic right of the Prosecution to designate all its witnesses as “confidential” in a blanket manner, unless otherwise indicated. Rather, it indicates that a person can indeed become a “witness whose identity has not been made public”, through an order granting a request for this level of protection. In this case, no such measures have been sought.⁴²

27. The need for judicial oversight is illustrated by the Prosecution’s approach to the purported “confidentiality” of [REDACTED] himself. In its initial email to the Prosecution, the Defence asked whether it could assume that “his status as an OTP witness is not the subject of any protective measure”.⁴³ The Prosecution responded that his status should remain confidential, as public disclosure of [REDACTED]’s identity would apparently give rise to an “objectively justifiable risk of harm to persons part of his immediate and wider family [REDACTED]”. In a later email, the Prosecution stated that public discussion of his status would “pose risk of harm **especially** to his immediate family.”⁴⁴ It is unclear from this wording whether the Prosecution considers this risk to also extend to [REDACTED] himself, or how such a risk could be justified given his current [REDACTED]. The Defence request for disclosure of the material underlying

⁴¹ Emphasis added.

⁴² [Protocol on the Handling of Confidential Information during Investigation and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant](#), Chambers Practice Manual, 21 October 2024, para. 10.

⁴³ See Annex A.

⁴⁴ Emphasis added.

this risk assessment remains unanswered. Importantly, Article 68(1) of the Statute refers to the protection of the safety and well-being of victims and witnesses, and not their families. If indeed the Prosecution's position is that a genuine risk exists, it should be substantiated before the Chamber through a formal application for protective measures, adjudicated with reference to a Defence response.

28. The Prosecution approach in the *Kony* case also erroneously places the burden for ensuring publicity for the proceedings on the Defence. It is for the party requesting protective measures to establish the legal and factual basis for such a request. In this case, the burden lies with the Prosecution, should it wish to maintain certain identifying particulars of its witnesses as confidential *vis-à-vis* the public. However, the Prosecution has instead stated that it “remain[s] open to discussing with you in advance of the confirmation hearing whether and to what extent information can be made public, on a case-by-case basis”,⁴⁵ and only after this question was raised by the Defence. This position not only improperly shifts this process back to the Defence, but effectively requires the Defence to challenge confidentiality without being informed of the underlying justification.

VI. CONCLUSION AND RELIEF REQUESTED

29. The Prosecution's blanket approach to confidentiality in this case cannot be reconciled with its reliance on the “public airing of the evidence” to justify this extraordinary *in absentia* procedure. A largely anonymous and closed session confirmation hearing, held in The Hague, is miles away from the “meaningful milestone for victims” as initially described.⁴⁶ Any oral submissions the Defence wishes to make on the credibility of [REDACTED], would all need to be conducted out of the public eye.

30. The Pre-Trial Chamber has an obligation to ensure that these proceedings are fair and expeditious and are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. By refusing to submit its protective measures to the Rule 87(1) procedure, the Prosecution has cut the Pre-Trial Chamber out of this process and deprived it of its role and obligation to balance protection of victims and witnesses as against the rights of

⁴⁵ See Annex B, Email, Re: Witness Protective Measures Inquiry, 23 May 2025, 11:05.

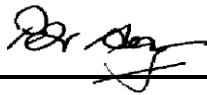
⁴⁶ [Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence](#), ICC-02/04-01/05-466, 23 November 2023, para. 15, para. 7.

the suspect, including to a public hearing. On this basis, the Defence requests Pre-Trial Chamber II to:

ORDER the Prosecution to submit requests pursuant to Rule 87 and/or 88 of the Rules, accompanied by the completed security assessments, for any witnesses whose identity or evidence it considers should not be made public during the confirmation proceedings; and

INVITE the Prosecution to review the confidentiality of the evidence it seeks to rely on at confirmation, with a view to classifying as much as possible as public in order to ensure a transparent and public hearing.

The whole respectfully submitted



Peter Haynes, KC
Counsel for Joseph Kony

Dated this 02 June 2025

At The Hague, Netherlands