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**International
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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

Confidential

Victims' Response to the "Kony Defence Request Concerning the Publicity of Proceedings" (ICC-02/04-01/05-607-Conf)

Source: Office of Public Counsel for Victims

Pursuant to Pre-Trial Chamber III Single Judge's order, dated 11 June 2025, this document is reclassified as "Public"

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**
D35

☒ **Legal Representatives of the Victims**
V49

☐ **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**

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☐ **Other**

I. INTRODUCTION

1. Counsel of the Office of Public Counsel for Victims (the "OPCV") appointed to represent the Victims in the present case (the "Legal Representatives")¹ hereby submit their response to the "Kony Defence Request Concerning the Publicity of Proceedings" (the "Request").²

2. While the Legal Representatives agree on the importance of the publicity of the proceedings, they oppose the Request with regard to the issue of testimonial evidence. Indeed, as far as witnesses who testified in the *Ongwen* case are concerned, the Request is moot since regulation 42(1) of the Regulations of the Court (the "Regulations") applies. Concerning all other witnesses, the Request is without merit since the relevant provisions only apply to witnesses called to testify.

3. In particular, for the witnesses on whom the Prosecution seeks to rely on for the purposes of the confirmation hearing who will not testify, the Legal Representatives submit that the Prosecution's approach to confidentiality of the evidence in the present case is in line with the statutory framework of the Court, and with Mr Kony's right to public proceedings. It would indeed be overly burdensome and formalistic to require the Prosecution to request protective measures pursuant to rule 87 of the Rules of

¹ See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-101](#) and [No. ICC-02/04-01/05-252](#), 10 August 2007; the "Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-267](#), 15 February 2008; the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-125](#), 14 March 2008; the "Decision on victim's applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-356](#), 21 November 2008; and the "Decision on victim participation, legal representation, and on the OPCV's Application for recognition of the status of victims in the *Kony* case to the victims participating in the *Ongwen* case (Pre-Trial Chamber III), [No. ICC-02/04-01/05-540](#), 13 December 2024. See also, the "Decision on Victim's Participation in Proceedings Related to the Situation in Uganda" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-191](#), 9 March 2012.

² See the "Kony Defence Request Concerning the Publicity of Proceedings", [No. ICC-02/04-01/05-607-Conf](#), 28 May 2025 (the "Request").

Procedure and Evidence (the "Rules") for any witnesses whose evidence it intends to rely on during the confirmation process.

II. PROCEDURAL BACKGROUND

4. On 28 May 2025, the Defence filed the Request.³

5. On 30 May 2025, Pre-Trial Chamber III (the "Chamber") issued a decision rejecting the Prosecution's request to hear five *viva voce* witnesses at the confirmation of charges hearing.⁴

III. CONFIDENTIALITY

6. Pursuant to regulation 23bis(2) of the Regulations, this document is filed as confidential following the level of classification chosen by the Defence. A public redacted version will be filed in due course.

IV. SUBMISSIONS

7. Preliminarily, the Legal Representatives note that they were not involved in the exchange of correspondence between the Prosecution and the Defence on the issue of the publicity of the proceedings, a matter which is equally important to victims.

8. The Legal Representatives agree with the Defence on the importance of holding public proceedings. This is an issue that is of equal concern to the victims in the present case, particularly given their right to know the truth and to have their suffering recognised in a court of law.

9. Therefore, the Legal Representatives concur with the Defence that publicly available items of evidence should be classified as public for the purpose of the confirmation of charges hearing.⁵ However, they posit that the Chamber's intervention

³ *Ibid.*

⁴ See the "Decision on the Prosecution's request to hear *viva voce* witnesses at the confirmation of charges hearing" (Pre-Trial Chamber III), [No. ICC-02/04-01/05-609](#), 28 May 2025.

⁵ See the Request, *supra* note 2, para. 2.

is unnecessary at this stage,⁶ especially taking into account the Prosecution's availability to discuss, *inter partes*, whether and to what extent information contained in the record of the case can be made public.⁷ Incidentally, the Legal Representatives note that they should also be involved in said discussions.

10. Regarding the issue of testimonial evidence, the Legal Representatives submit that the Request must be dismissed.

11. Concerning the witnesses who testified in the *Ongwen* case, the Defence indicates having asked the Prosecution, seven days prior to filing its Request, which of the 182 individuals on whom it intends to rely on for the purpose of the confirmation hearing, were granted protective measures in said case.⁸ The Prosecution answered that it would provide the Defence with a list of the overlapping witnesses.⁹

12. In this regard, the Legal Representatives recall that regulation 42(1) of the Regulations stipulates that "[p]rotective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber". Therefore, all protective measures ordered in the *Ongwen* case are still fully in force in the present case, and there is no need for the Prosecution to submit requests pursuant to rules 87 and/or 88 of the Rules for any of them.

13. Concerning the other witnesses, the Legal Representatives submit that the current Prosecution's approach to confidentiality of the evidence in the case is in line with the statutory framework, and with Mr Kony's right to a public trial.

14. Pursuant to article 68(1) of the Rome Statute (the "Statute"), the Prosecutor is required to take appropriate measures to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. While Mr Kony is entitled to

⁶ *Idem*, para. 30.

⁷ *Idem*, Annex B (email from OTP Kony Team of 23 May 2025 at 11:05).

⁸ *Idem*, para. 3.

⁹ *Idem*, Annex B (email from OTP Kony Team of 23 May 2025 at 11:05).

a public hearing pursuant to article 67 of the Statute, said right must be balanced against the need to safeguard the safety, integrity and well-being of victims and witnesses.¹⁰ Article 54(3)(f) of the Statute also provides the Prosecution with a discretionary power to take necessary measures to ensure the confidentiality of information and the protection of any person during the investigations. The Prosecutor has therefore a statutory obligation to ensure the safety and well-being of the witnesses at least until the intervention of a relevant Chamber is necessary in the course of the proceedings.¹¹

15. In this regard, the Legal Representatives share the Prosecution's position according to which rule 87 of the Rules only applies to testimony before a Chamber.¹² Indeed, it would be overly burdensome and formalistic to require the Prosecution to file requests pursuant to rules 87 and/or 88 of the Rules for every witnesses it intends to rely on for the purpose of the confirmation of charges proceedings, but who will not testify – either in person or in accordance with rule 68(2) of the Rules – before the Chamber. Requiring such an onerous procedure at the confirmation stage would run contrary to the specific and limited function of this phase of the proceedings, which is to filter out cases and charges for which there is insufficient evidence to justify a trial.¹³ This course of event would also not promote the efficiency and the expeditiousness of the proceedings.

¹⁰ See Article 68(2) of the Statute: “[a]s 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. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness”.

¹¹ See AMBOS (K.) (Ed.), *Rome Statute of the International Criminal Court : Article-by-Article Commentary*, 4th edition, Verlag C.H. Beck / Nomos, Munich / Hart Publishing, Oxford, 2021, pp. 1658-1659.

¹² See the Request, *supra* note 2, Annex A (email from OTP Kony Team of 13 May 2025 at 13:42).

¹³ See the “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’” (Appeals Chamber), [No. ICC-01/04-01/10-514](#), 30 May 2012, para. 47; and the “Decision on the confirmation of charges against Mahamat Said Abdel Kani” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-218-Red](#), 9 December 2021, paras. 40, 42.

16. In fact, the Defence does not provide any precedent justifying its approach. The only instance referred to by the Defence to support its argument is the *Duterte* case¹⁴ in which the Pre-Trial Chamber ruled that “*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 viva voce*”.¹⁵ However, the Defence omits to mention that said ruling was justified by the intention of the Prosecution to seek protective measures pursuant to rules 87 and 88 of the Rules in the event that it will call witnesses to testify *viva voce* at the confirmation hearing.¹⁶ The same position has been adopted by the Prosecution in the present case, as early as 28 March 2024.¹⁷ Therefore, and contrary to the Defence’s arguments, the *Duterte* precedent confirms the correctness of the Prosecution’s approach, and cannot be used to infer an obligation to submit requests for protective measures for all witnesses at the confirmation stage.¹⁸

¹⁴ See the Request, *supra* note 2, para. 5.

¹⁵ See the “Order on the conduct of confirmation proceedings” (Pre-Trial Chamber I), [No. ICC-01/21-01/25-114](#), 17 April 2025, para. 22 (footnote omitted).

¹⁶ *Idem*, para. 22 and footnote 28 referring to the “Public Redacted Version of ‘Prosecution’s Response to the Order seeking observations on matters related to the conduct of confirmation proceedings’, 4 April 2025, ICC-01/21-01/25-104-Conf”, [No. ICC-01/21-01/25-104-Red](#), 15 April 2025, para. 19: “*At this stage of the proceedings, the Prosecution would only request protective measures pursuant to rules 87 and 88 in the event that it does call witnesses to testify viva voce at the confirmation hearing. For this purpose, the Prosecution will consult with VWU at the earliest opportunity*”.

¹⁷ See the “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”, [No. ICC-02/04-01/05-490](#), 28 March 2024, para. 20.

¹⁸ *Contra* Request, *supra* note 2, para. 5.

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FOR THE FOREGOING REASONS, the Legal Representatives respectfully request the Chamber to reject the Request in its entirety.



Paolina Massidda



Sarah Pellet

Dated this 5th day of June 2025
At The Hague (The Netherlands)