

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original:

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

Date: **06/09/2024**

PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

THE PROSECUTOR v. JOSEPH KONY

Public

Kony Defence Observations on the Date of the Confirmation of Charges Hearing

Source: Defence for Mr Joseph Kony

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

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I. INTRODUCTION

1. In response to the Single Judge's order of 4 September 2024,¹ the Defence submits herewith its observations on the date of the confirmation hearings, should they be convened. The Defence is unable to submit any proposal as to an appropriate date, as it is not currently in possession of sufficient information to do so. However, it offers the following observations on factors which will necessarily impact timing.

II. DEFENCE OBSERVATIONS

A. The Prosecution's request for *in situ* hearings

2. Rule 100 of the Rules of Procedure and Evidence ("RPE") as well as the established practice of Chambers at the ICC makes it clear that the process of holding hearings "in a State other than the host State" involves several steps by multiple actors usually taking considerable periods of time:

- (i) Firstly, the Prosecution or the Defence may request to change the place where the Court sits (the Chamber may also do so *proprio motu*);²
- (ii) Secondly, the Chamber (as in the instant case) may invite the submissions of the parties and participants;³
- (iii) Thirdly, the Chamber, having considered the preliminary submissions of the parties and participants, must invite the Registry to prepare a report on the feasibility of holding hearings in the specified state;⁴
- (iv) Fourthly, as a matter of practice, the submissions of the parties will be further considered in relation to the Registry report;⁵ whereupon
- (v) Fifthly, the Chamber will decide whether to forward a recommendation to the Presidency that the Court sits in a state other than the host state,⁶ in which event;
- (vi) The Presidency will issue a decision;⁷
- (vii) If positive, discussions will then commence as to the logistical arrangements for the holding of the so-called *in situ* hearings.

¹ ICC-02/04-01/05 – Single Judge Order requesting the parties and participants to submit observations on the date of the confirmation of the charges hearing – public, 4 September 2024, 14:26.

² See, e.g., [ICC-01/14-01/21-337-Red](#), [ICC-02/11-01/15-241](#).

³ See, e.g., [ICC-02/04-01/15-258](#).

⁴ See, e.g., [ICC-01/04-02/06-438](#). See also, [ICC-02/11-01/15-292](#); [ICC-01/09-01/11-617](#).

⁵ See, e.g., [ICC-01/14-01/21-243](#), para. 33.

⁶ See, e.g., [ICC-02/04-01/15-300](#); [ICC-02/11-01/15-316](#); [ICC-01/14-01/21-389-Red](#).

⁷ [ICC-02/04-01/15-330](#); [ICC-01/09-01/11-875-Anx.](#)

3. A number of requests have been made for *in situ* hearings at the ICC.⁸ None has ever taken place. As matters currently stand, the Pre-Trial Chamber (“PTCIII”) is simply seized of a request from the Prosecution pursuant to Rule 100(1), in other words, the process is still at steps (i)-(ii) above. The Prosecution estimates, although on what basis is not clear, that the process of commencing logistical arrangements (step (vii)) will take three months.⁹ Due to the fact that many of the steps involved are beyond the control of PTCIII or the parties, estimating the time it will take from the first request until a decision of the Presidency is difficult, but there is some precedent from the *Ntaganda* case.¹⁰ In that case, where only one venue for trial was explored, it took eight months from the issuance of the first Chamber request for a Registry report until the Presidency ultimately declined to accept the recommendation.¹¹ Accordingly, it is not fanciful to imagine that from the current date to the point of actually holding a hearing in Uganda will likely span a period of a year or more.¹²

B. Disclosure

4. The Defence will not repeat herein its comments on the likely duration of the disclosure process, although in due course some additional submissions will be advanced concerning the need to consider further the protocols before it commences.

5. An assessment of the most recent cases reaching confirmation at the ICC suggests that the period of time between the commencement of disclosure and the start of the confirmation hearings is generally between six and 12 months. Specifically, in *Abd Al-Rahman*, the period was nine months,¹³ in *Al Hassan*¹⁴ and also *Mokom*,¹⁵ it was over one year, in *Said*, about six months,¹⁶ and in *Yekatom and Ngaissona*, eight months.¹⁷ Of note, in the other (smaller) case

⁸ [ICC-01/19-34](#), para. 11.

⁹ [ICC-02/04-01/05-490](#), para. 34.

¹⁰ [ICC-01/04-02/06-526](#); [ICC-01/04-02/06-645-Red](#).

¹¹ [ICC-01/04-02/06-645-Red](#).

¹² See also [ICC-01/09-01/11-763](#); [ICC-01/09-01/11-875-Anx](#) (seven months from request to Presidency decision).

¹³ In *Abd-Al-Rahman*, the first batch of INCRIM and Rule 77 evidence was disclosed on 31 August 2020 and the confirmation of charges hearing took place from 24-26 May 2021. See, [ICC-02/05-01/20-170](#); [ICC-02/05-01/20-238](#).

¹⁴ In *Al Hassan*, the first batch of INCRIM evidence was disclosed on 6 July 2018 and the confirmation of charges hearing took place from 8-17 July 2019. See, [ICC-01/12-01/18-67](#); [ICC-01/12-01/18-313](#); [ICC-01/12-01/18-390](#).

¹⁵ In *Mokom*, the first batch of INCRIM evidence was disclosed on 5 July 2022 and the confirmation of charges hearing took place from 22-24 August 2023. See, [ICC-01/14-01/22-66](#); [ICC-01/14-01/22-276](#), para. 4.

¹⁶ In *Said*, the disclosure started on 14 April 2021 and the confirmation of charges hearing took place from 12-14 October 2021. See, [ICC-01/14-01/21-55-Red](#); [ICC-01/14-01/21-218-Red](#), para. 21.

¹⁷ In *Yekatom and Ngaissona*, the disclosure started on 28 January 2019 and the confirmation of charges hearing took place from 19-25 September 2019 and on 11 October 2019. See, [ICC-01/14-01/18-105](#); [ICC-01/14-01/18-403-Corr-Red](#).

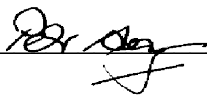
in this Situation, *Ongwen*, the Prosecution Senior Trial Attorney estimated at the start of the disclosure process, that it would be completed “a year from now” with at least seven staff members dedicated to the task.¹⁸

C. Appellate Proceedings

6. This is the first case in which the Prosecution has requested that the charges against an accused be confirmed in his absence. There is clearly a broad church of opinion as to the proper interpretation of Article 61 of the ICC Statute. The topic is plainly ripe for an appellate decision, not just in relation to the instant proceedings but as guidance for judges and prosecutors of the future. An application for leave to appeal PTCIII’s ultimate decision on whether to hold an *in absentia* confirmation hearing is almost inevitable. Indeed, it may be that certain aspects of the decision are open to appellate review without the need for leave of PTCIII. The issue as to the admissibility of the case features prominently in the Prosecution’s Reply to Defence Observations.¹⁹ Indeed, it may yet be that the issue of admissibility will be ventilated before PTCIII and involve parties other than those currently directly involved in proceedings, such as States Parties and other *amici curiae*, leading to further uncertain delay.

7. Like proceedings before the Presidency, the appellate process is beyond the control of the Chamber or the parties, meaning that the extent of the interruption (if it is only that) to the pre-trial litigation is a matter of guesswork. Moreover, any appellate challenge to preliminary issues such as admissibility or the validity of Pre-Trial Chamber II’s Decisions would place a complete brake on proceedings, including the disclosure process.

The whole respectfully submitted.



Peter Haynes KC

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The Hague, The Netherlands,

Friday, 6 September 2024

¹⁸ [ICC-02/04-01/05-T-011-Conf-ENG ET](#), pp 14-15.

¹⁹ [ICC-02/04-01/05-520-Red](#), paras 11-12.