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PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Iulia Motoc
Judge Haykel Ben-Mahfoudh

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

THE PROSECUTOR v. JOSEPH KONY

Public

Kony Defence Response to Prosecution's Observations and Victims' response on the conduct of the confirmation proceedings *in absentia* and Requests for the adoption of certain protocols and an *in situ* hearing in Uganda

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. These observations address the propriety of *in situ* hearings in Uganda, and certain proposed protocols and modalities of the confirmation proceedings. They also demonstrate and exemplify the negative impact on the fairness and expeditiousness of this case, by proceeding thus far without input from Counsel representing Mr Kony's interests.

2. Pre-Trial Chamber III ("PTCIII") has properly taken steps to remedy retroactively the Defence's belated involvement in these proceedings. Counsel appointed to represent Mr Kony's interests has now been given an opportunity to offer submissions on a number of issues for the first time.¹ Some of those issues necessarily implicate, or are intertwined with, matters that have ostensibly already been decided. As such, this has not been a straightforward exercise of simply adding the Defence Observations to the record, for completeness. By way of illustration, the Defence Observations of 28 August 2024, concerning two prior decisions of Pre-Trial Chamber II ("PTCII") have prompted further rounds of submissions by the Prosecution and Defence that will, of necessity, require that the original decisions be reconsidered.²

3. Such reconsideration has, in fact, now become the norm in these proceedings, with the process for the appointment of Counsel,³ the briefing schedule following Defence

¹ [Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing *in absentia*](#), ICC-02/04-01/05-517-Red, 28 August 2024.

² [Prosecution's Request for Leave to Reply to Defence Observations](#), ICC-02/04-01/05-518, 2 September 2024; Email Decision, "ICC-02/04-01/05 - Single Judge Decision on the 'Prosecution's Request for Leave to Reply to Defence Observations' (filing no. 518) – public", 3 September 2024, 15:12.

³ [Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence](#), ICC-02/04-01/05-481, 4 March 2024; [Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence](#), ICC-02/04-01/05-481, 4 March 2024; [Prosecution's observations on the "Registry's Report on the Implementation of "Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence", 25 March 2024 \(488\)](#), ICC-02/04-01/05-489, 28 March 2024; [ICCBA observations on the process of selecting counsel to represent the rights and interests of Joseph Kony *in absentia* confirmation proceedings](#), ICC-02/04-01/05-496, 22 April 2024; [OPCD submissions on Registry's proposed process for selection of counsel representing Mr Kony's rights and interests](#), ICC-02/04-01/05-497, 22 April 2024; [Prosecution's response to the OPCD's and ICCBA's observations on the process of selecting counsel to represent the rights and interests of Joseph Kony during *in absentia* confirmation proceedings](#), ICC-02/04-01/05-498, 24 April 2024; [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024; [Registry's Report on the implementation of "Decision on the Procedure for Appointing Counsel" dated 2 May 2024 \(499\)](#), ICC-02/04-01/05-501, 14 June 2024; [Order to Appoint Counsel](#), ICC-02/04-01/05-502, 19 June 2024; [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, 21 June 2024.

observations,⁴ and the date for the confirmation of charges hearing⁵ all having changed since the Defence has been heard in these proceedings. This is an unsurprising consequence of a pre-confirmation procedure conducted without submissions from one of the parties.

4. The Prosecution's request that the confirmation proceedings be held in Uganda is a totemic example of this problematic procedure. This request was made on 28 March 2024, **after** PTCII had scheduled the start of the confirmation hearings for 15 October 2024. On 3 July 2024, the Prosecution opposed the postponement of this start date, even though it had already missed its own (optimistic) estimate for completing disclosure to the Defence (which had only just been appointed).⁶ Only after the Defence's observations of 28 August 2024 did the Prosecution finally acknowledge that the confirmation hearings could not commence on 15 October 2024, and propose a new date to PTCIII.⁷ In other words, a wide range of pending issues, some of which could only be resolved based on submissions from the Defence, required that the date for any potential confirmation hearings be reconsidered and rescheduled.

5. In a procedure where the suspect is absent, concerns for fairness are necessarily heightened. Given the enormity of what is being attempted – the first ICC confirmation hearing in the absence of a suspect who has never appeared before the Court – and the precedent that these proceedings seek to establish, the procedure followed ought to have been unimpeachable. This procedural failing alone provides ample reason to consider that there is no good cause to hold a confirmation hearing *in absentia* at this time.

6. These observations are offered without prejudice to the principal Defence position, as set out in its Observations of 28 August 2024, concerning the impermissibility of *in absentia*

⁴ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024, para. 28: “[F]urther submissions by the Prosecution and/or the Office of Public Counsel for Victims on the aforementioned matters shall not be entertained.”; Email Decision, “ICC-02/04-01/05 - Single Judge Decision on the ‘Prosecution’s Request for Leave to Reply to Defence Observations’ (filing no. 518) – public”, 3 September 2024, 15:12; [Public redacted version of “Prosecution’s Reply to Defence Observations”](#), ICC-02/04-01/05-520-Conf, ICC-02/04-01/05-520-Red, 5 September 2024.

⁵ Email Order, “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; [Prosecution’s observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-523, 6 September 2024; [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), ICC-02/04-01/05-522, 6 September 2024; [Victims’ observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-521, 6 September 2024.

⁶ [Prosecution’s response to “Defence Request for Variation of Deadlines and for a Status Conference”](#), ICC-02/04-01/05-506, 3 July 2024.

⁷ [Prosecution’s observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-523, 6 September 2024, para. 10.

confirmation hearings until such a time as the accused has made an initial appearance before the Court.⁸ Further and/or in the alternative, the Defence submits that the conditions for holding such a hearing have not yet been satisfied because the notification requirements have not been met; and that, even if those conditions were found to have been satisfied, no good cause to proceed with a confirmation hearing in the absence of the accused has been established.

II. PROCEDURAL HISTORY

7. On 23 November 2023, PTCII issued its first Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case in the suspect's absence.⁹ On 19 January 2024, the Prosecution submitted a new document containing the charges.¹⁰ On 4 March 2024, PTCII issued its Second Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* case,¹¹ setting the start date for the confirmation of charges hearing as 15 October 2024.¹² Furthermore, PTCII requested the Prosecution to provide information regarding disclosure and related requests.¹³

8. On 28 March 2024, the Prosecution submitted that an expedited procedure should be adopted for the selection of Defence Counsel, to ensure adequate time to prepare for the confirmation of charges hearings scheduled to begin on 15 October 2024.¹⁴

9. On the same day, observations were filed by the Prosecution concerning the procedures governing the confirmation of charges hearings, including proposed protocols for redactions, the handling of confidential information and contact with witnesses, and use of the e-Court system. Concurrently, the Prosecution requested that the confirmation of charges hearing be held in Uganda.¹⁵

⁸ [Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing *in absentia*](#), ICC-02/04-01/05-517-Red, 28 August 2024.

⁹ [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.

¹⁰ [Document Containing the Charges](#), ICC-02/04-01/05-474, 19 January 2024.

¹¹ [Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence](#), ICC-02/04-01/05-481, 4 March 2024.

¹² *Id.*, para. 12.

¹³ *Id.*, para. 14.

¹⁴ [Prosecution's observations on the "Registry's Report on the Implementation of "Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence", 25 March 2024 \(488\)](#), ICC-02/04-01/05-489, 28 March 2024, para. 2.

¹⁵ [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 + Anxs, 28 March 2024.

10. On 12 April 2024, the Office of the Public Counsel for Victims (“OPCV”) responded that it did not oppose the protocols proposed by the Prosecution. The OPCV also supported the request to hold the confirmation of charges hearings in Uganda, expressing a specific preference that they be held in Lira or Gulu.¹⁶ Additionally, OPCV encouraged PTCIII to begin a feasibility analysis regarding *in situ* hearings to ensure that the date of 15 October 2024 could be maintained.¹⁷

11. On 22 April 2024, the Office of the Public Counsel for the Defence (“OPCD”) requested PTCIII to “vacate the date of commencement of the confirmation of charges hearing until assignment of a Counsel to represent Mr Kony’s interests and with full access to the record of the case.”¹⁸

12. On 24 April 2024, the Prosecution opposed the OPCD’s request, submitting that the 15 October 2024 date should be maintained, as the notification of that date to the suspect was mandatory and that notification activities had just concluded.¹⁹

13. On 2 May 2024, PTCIII rendered its Decision on the Procedure for Appointing Counsel,²⁰ in which Defence Counsel was ordered to file observations on (i) decisions to hold a confirmation hearing *in absentia* and a related Registry report; (ii) the Prosecution request for *in situ* hearings and on the adoption certain protocols; and (iii) victims’ concerns on the Document Containing the Charges, the application for recognition of the status of victims in the Kony case to the victims participating in the Ongwen case, and any related submissions filed in the meantime. Those Defence submissions were set for 10, 20 and 30 calendar days, respectively, after the appointment of Counsel. In relation to Defence observations and responses, PTCIII advised that “further submissions by the Prosecution and/or the Office of Public Counsel for Victims shall not be entertained”.²¹

¹⁶ [Victims' response to Prosecution's requests for the adoption of certain protocols and an *in situ* hearing in Uganda \(No. 490\)](#), ICC-02/04-01/05-494, 12 April 2024.

¹⁷ *Id.*, para. 18.

¹⁸ [OPCD submissions on Registry’s proposed process for selection of counsel representing Mr Kony’s rights and interests](#), ICC-02/04-01/05-497, 22 April 2024, para. 17(b).

¹⁹ [Prosecution’s response to the OPCD’s and ICCBA’s observations on the process of selecting counsel to represent the rights and interests of Joseph Kony during *in absentia* confirmation proceedings](#), ICC-02/04-01/05-498, 24 April 2024, para. 4.

²⁰ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024.

²¹ *Id.*, para. 28.

14. On 21 June 2024, Peter Haynes KC was appointed as Counsel to represent the rights and interests of Joseph Kony during the confirmation proceedings.²² On 28 June 2024, the Defence requested a variation of deadline for its submissions until 10, 20 and 30 calendar days, respectively, after 15 August 2024, to allow for time to constitute the Defence team.²³ On 3 July 2024, the Prosecution and Victims responded to the Defence request.²⁴ On 5 July 2024, the Single Judge varied the time limit for the Defence submissions.²⁵

15. On 23 July 2024, a Status Conference was convened and the Single Judge ordered, *inter alia*, the Defence to address in its response to 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: (i) "whether the Defence anticipates invoking any ground for excluding criminal responsibility and/or an alibi"; (ii) "whether the Defence anticipates conducting investigations before the confirmation of charges hearing, if any", if so, specifying its intended investigative steps and timeline; (iii) "whether the Defence anticipates presenting evidence at the confirmation of charges hearing", if so, specifying the types of evidence, its "volume or anticipated length", whether redactions are required and the language of the evidence; (iv) "should the Defence intend to call witnesses", indicate if it intends to request protective measures; and (v) "whether the Defence possesses or controls any books, documents, photographs or other tangible objects that the Prosecution shall be permitted to inspect as material intended for use as evidence".²⁶

16. On 28 August 2024, as ordered by the Single Judge, 10 calendar days after the 15 August 2024, the Defence filed its Observations on holding a confirmation of charges hearing *in absentia*.²⁷

²² [Notification of the Appointment of Mr Peter Haynes KC as Counsel for Mr Joseph Kony](#), ICC-02/04-01/05-503, 21 June 2024.

²³ [Defence Request for Variation of Deadlines and for a Status Conference](#), ICC-02/04-01/05-504, 28 June 2024.

²⁴ [Prosecution's response to "Defence Request for Variation of Deadlines and for a Status Conference"](#), ICC-02/04-01/05-506, 3 July 2024; [Victims' Response to "Defence request for variation of the Deadlines and for Status Conference" \(504\)](#), ICC-02/04-01/05-507, 3 July 2024.

²⁵ [Decision on the 'Defence Request for Variation of Deadlines and for a Status Conference'](#), ICC-02/04-01/05-508, 5 July 2024.

²⁶ [Transcript of Status Conference](#), ICC-02/04-01/05-T-012-CONF-ENG, 23 July 2024, p. 22, line 5 – p. 23, line 5.

²⁷ [Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing in absentia](#), ICC-02/04-01/05-517-Red, 26 August 2024.

17. On 2 September 2024, the Prosecution filed a “Request for Leave to Reply to Defence Observations” on three particular issues that arose from the Defence’s Observations.²⁸ On 3 September 2024, the Defence filed a response to the Prosecution’s Request for Leave.²⁹ The same day, the Single Judge, in an email decision, granted leave to the Prosecution and LRV to file a response, and to the Defence to reply.³⁰ On 5 September 2024, the Prosecution filed its response.³¹ On 9 September 2024, the Defence filed its Reply to the Prosecution’s Submissions in Response to Defence Observations.³²

18. On 4 September 2024, the Single Judge ordered the parties by 6 September 2024, to file observations and proposals for a revised date of the confirmation of charges.³³ On 6 September 2024, the OPCV,³⁴ the Prosecution³⁵ and the Defence,³⁶ filed observations on a revised date. OPCV submitted the hearing should be scheduled, at the latest, at the end of January 2025,³⁷ with the Prosecution proposing to postpone “to an appropriate date in the second half of February or the beginning of March 2025”.³⁸ The Defence, having performed a review of other Rule 100 requests, noted that the period from the current date to the point of holding a hearing in Uganda will “likely span a period of a year or more”,³⁹ and that recent (and smaller) cases at the ICC suggest that “the period of time between the commencement of disclosure and the start of the confirmation hearings is generally between six and 12 months.”⁴⁰

²⁸ [Prosecution’s Request for Leave to Reply to Defence Observations](#), ICC-02/04-01/05-518, 2 September 2024.

²⁹ [Kony Defence Observations on the Decisions and Registry Report concerning the request to hold a confirmation of charges hearing in absentia](#), ICC-02/04-01/05-517-Red, 26 August 2024.

³⁰ Email Decision, “ICC-02/04-01/05 – Single Judge Decision on the ‘Prosecution’s Request for Leave to Reply to Defence Observations’ (filing no. 518) – public”, 3 September 2024, 15:12.

³¹ [Public redacted version of “Prosecution’s Reply to Defence Observations”](#), ICC-02/04-01/05-520-Conf, 5 September 2024, ICC-02/04-01/05-520-Red, 5 September 2024.

³² [Public Redacted Version of Kony Defence Reply to Prosecution’s Submissions in Response to Defence Observations](#), ICC-02/04-01/05-524-Red, 9 September 2024.

³³ Email Order, “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.

³⁴ [Victim’s observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-521, 6 September 2024.

³⁵ [Prosecution’s observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-523, 6 September 2024.

³⁶ [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), ICC-02/04-01/05-522, 6 September 2024.

³⁷ [Victims’ observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-521, 6 September 2024, para. 4.

³⁸ [Prosecution’s observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-523, 6 September 2024, para. 1.

³⁹ [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), ICC-02/04-01/05-522, 6 September 2024, para. 5.

⁴⁰ *Id.*, para. 3.

III. DEFENCE RESPONSE

A. Holding the confirmation of charges hearing in Uganda

- i. *In situ hearings may not project the desired image of justice, or satisfy the desire of victims to participate*

19. The Defence is not in a position to elect on Mr Kony's behalf as to the location where confirmation of charges should be held. However, certain observations are appropriate and necessary concerning stated justifications for holding the confirmation hearings in Uganda, in particular as they impact on the purported exercise of discretion under Article 61(2) of the Statute to hold *in absentia* confirmation hearings at all.

20. The Prosecution asserts that holding an *in absentia* confirmation hearing in Uganda would “bring the Court close to the victims and the affected communities” and “reinforce the importance of justice and the Court's work to the population of Uganda.”⁴¹ The OPCV asserts that holding hearings in Lira or Gulu (but not Kampala)⁴² would substantially enhance the “accessibility, transparency and visibility” of the proceedings, and the “meaningful participation of victims.”⁴³

21. *In absentia* criminal proceedings are not legal within the Ugandan justice system.⁴⁴ Holding a criminal adjudication hearing in a Ugandan courtroom where such a proceeding would normally be illegal may raise questions amongst the public at large as well as victims about the legitimacy, propriety and purpose of such proceedings, as well as the quality and nature of justice being rendered. Rather than bringing justice “close to the victims and the affected communities,”⁴⁵ the spectacle of a foreign court holding a few days of proceedings in

⁴¹ [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. 31.

⁴² [Victims' response to Prosecution's requests for the adoption of certain protocols and an *in situ* hearing in Uganda \(No. 490\)](#), ICC-02/04-01/05-494, 12 April 2024, para. 16.

⁴³ *Id.*, para. 15.

⁴⁴ Uganda [Constitution](#), 5 January 2018, Article 28(5) “Except with his or her consent, the trial of any person shall not take place in the absence of that person unless the person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and the trial to proceed in the absence of that person”; Uganda, High Court, International Crimes Division, [Rules](#), 2016, Rule 16; Uganda, [Trial on Indictments Act](#), Chapter 23, 14 February 2020, Rule 54.

⁴⁵ [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. 31.

Uganda, and then leaving, may simply reinforce the sense amongst local communities that international justice is transitory, exceptional and symbolic – rather than real and effective.

22. Arguably at least, a more real and enduring commitment to local justice would be reflected by the ICC handing over the *Kony* case to the International Crimes Division of the Ugandan High Court. In parallel, other measures could be adopted that would accomplish the two other goals of an *in situ* hearing identified by the Prosecution and OPCV: (i) raising the profile of the *Kony* case to increase the chances of his arrest;⁴⁶ and (ii) giving victims the opportunity to “feel that their concerns are duly being taken into account and that justice is being done.”⁴⁷

23. The suggestion that *in situ* hearings will “improve interests and opportunities” to arrest Mr Kony is highly speculative. The Prosecution does not explain how holding confirmation hearings *in situ* could “lead to the identification of Mr Kony’s current location.”⁴⁸ As for the purported effect of “improv[ing] interests and opportunities to arrest and surrender” Mr Kony for trial, this may be read as implying that the purpose of the hearings is to increase pressure on States who may, at some unknown date in the future, obtain custody of Mr Kony. Aside from being highly speculative, if the Prosecution is asking PTCIII to hold a hearing to put pressure on States, then this is a poor and possibly improper reason for seeking to hold a criminal hearing against an individual, especially in their absence.

24. The second objective – victim participation – may well be more effectively accomplished by holding a genuine truth and reconciliation process. Such a procedure could be much more responsive to hearing victims than an *in absentia* confirmation hearing could ever be, and include hearings held closer to the affected communities. Indeed, any added value of a judicial hearing is greatly diminished by the absence of the accused. As the OPCV has previously argued:

For the victims, the presence of the suspect during the confirmation hearing is an essential point in the procedures [...] For the victims, the presence of the suspect at the hearing to establish whether or not there are substantial grounds to believe that those who could have committed the crimes also is important in the fights against impunity

⁴⁶ *Id.* “holding the hearing in Uganda, will raise the profile of the case in Uganda and surrounding countries, which could lead to the identification of Mr Kony’s current location and improve interests and opportunities to arrest and surrender him for trial.”

⁴⁷ [Victims' response to Prosecution's requests for the adoption of certain protocols and an *in situ* hearing in Uganda \(No. 490\)](#), ICC-02/04-01/05-494, 12 April 2024, para. 14.

⁴⁸ [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. 31.

[...] [f]or the victims in the proceedings and in view of the role of the proceedings for the community and for the appearance of justice being done and for justice to be understood, the presence of a person in judicial settings is just as important as the justice itself and the law applied.⁴⁹

25. The outcome of confirmation proceedings will likely prove to be a disappointment to victims. No final judgment will be issued that can be relied upon in any other proceedings, for example, in subsequent civil proceedings. Furthermore, no reparations award can be made in favour of any victim. Victims and the public at large may be left with questions as to the purpose of such a visibly costly exercise, especially compared to domestic criminal proceedings.

26. In short, the suggested salutary effects of holding a confirmation hearing in Uganda may be excessively optimistic. On the contrary, there is the possibility that conducting an element of a criminal procedure in a country where it would otherwise be impermissible, and proximate to those who might be most disappointed by its shortcomings and limitations, will actually undermine perceptions of the ICC.

ii. The untimely nature of the Prosecution's request for hearings in Uganda causes uncertainty as to the date on which confirmation hearings can be held

27. For reasons expanded in the “Defence Observations on the Date of the Confirmation of Charges Hearing”,⁵⁰ it was obvious from the moment the Prosecution made its request for *in situ* hearings that PTCII’s scheduled date for the confirmation of charges hearing was untenable. Given the procedural steps which must precede a hearing away from the seat of the Court, it is not fanciful to imagine that from now until the point of actually holding a hearing in Uganda could span a period of a year or more.⁵¹

⁴⁹ *Prosecutor v. Katanga and Ngudjolo*, [Transcript of Confirmation of Charges Hearing](#), ICC-01/04-01/07-T-46-ENG, 11 July 2008, p. 17, lines 9-22.

⁵⁰ [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), ICC-02/04-01/05-522, 6 September 2024.

⁵¹ [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), ICC-02/04-01/05-522, 6 September 2024, para. 3. In *Ntaganda*, it took eight months from the issuance of the first Chamber request for a Registry report on the venue for trial, until the Presidency declined to accept the recommendation, see *Prosecutor v. Ntaganda*, [Transcript of Status Conference](#), ICC-01/04-02/06-T-15-ENG ET, 17 October 2014, p. 19, lines 3-12; *Prosecutor v. Ntaganda*, [Decision on the recommendation to the Presidency on holding part of the trial in the State concerned](#), ICC-01/04-02/06-645-Red, 15 June 2015. In *Ruto & Sang*, it took seven months from the order requesting observations in relation to the Defence application for an *in situ* hearing, until the Presidency declined to change the place of the proceedings, see *Prosecutor v. Ruto & Sang*, [Order requesting observations in relation to the “Joint Defence Application for change of place where the Court Shall Sit for Trial](#), ICC-01/09-01/11-580, 1 February 2013; *Prosecutor v. Ruto & Sang*, [Decision of the Plenary of Judges on the Joint Defence Application](#)

28. Indeed, such a request should not have been made before Defence Counsel had been appointed to represent Mr Kony's interests. There is no precedent for any such step being taken in any case at the ICC whilst an accused is unrepresented.⁵² In due course, any Registry feasibility report, if ordered, will determine what substantive submissions the Defence may have to make as to the practicalities of the exercise. Had the request been made at an appropriate stage of proceedings, there would undoubtedly have been constructive discussions about that aspect of the case and a revised timeline. Importantly, the Prosecution's submissions of 6 September 2024 on the date of the confirmation hearing did not engage with the past practice and timelines of similar requests, submitting only that outstanding procedural questions "could be progressed in a timely fashion",⁵³ without acknowledging how much of the process falls outside the control of the parties to these proceedings or PTCIII.

B. Observations on the proposed Redaction Protocol, Protocol on the handling of confidential information and contacts with witnesses, and e-Court Protocol⁵⁴

29. The Prosecution requests the Chamber to adopt the Redaction Protocol,⁵⁵ and the Protocol on the handling of confidential information and contacts with witnesses as set out in the Chambers Practice Manual ("Contact Protocol").⁵⁶

[for a Change of Place where the Court Shall Sit for Trial in the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang](#), ICC-01/09-01/11-875-Anx, 26 August 2013.

⁵² For example, in the *Ruto & Sang* case, Counsel was appointed as early as March 2011 (see *Prosecutor v. Ruto & Sang*, [Information submitted to the Chamber by the Counsel Support Section](#), ICC-01/09-01/11-18, 30 March 2011), while the discussion to hold an *in situ* confirmation of charges was held in June 2011 (see *Prosecutor v. Ruto & Sang*, [Joint Defence Application for a Change of Place where the Court Shall Sit for Trial](#), ICC-01/09-01/11-567, 24 January 2013, paras 6-9.) Similarly in the *Ongwen* case, Counsel was appointed in February 2015, while the discussion on *in situ* confirmation of charges was held in June 2015 (see *Prosecutor v. Ongwen*, [Registration of the appointment of Mr. Kripus Ayena Odongo as Counsel of Mr. Dominic Ongwen](#), ICC-02/04-01/15-201, 24 February 2015; *Prosecutor v. Ongwen*, [Prosecution's submissions on conducting the confirmation of charges hearing in situ](#), ICC-02/04-01/15-264, 13 July 2017.) While in *Said* and *Gbagbo*, discussions on *in situ* proceedings occurred more than a year after the appointment of Counsel (see, *Prosecutor v. Gbagbo & Blé Goudé*, [Notification of the appointment of counsel](#), ICC-02/11-02/11-49, 26 March 2024; *Prosecutor v. Gbagbo & Blé Goudé*, [Registration of the Appointment of counsel for Mr. Laurent Koudou Gbagbo](#), ICC-02/11-01/11-11, 01 December 2011; *Prosecutor v. Gbagbo & Blé Goudé*, [Notification of the Appointment of Mr Jean Pierre Madoukou as Counsel for Mr Mahamat Said Abdel Kani](#), ICC-01/14-01/21-5, 26 January 2021; *Prosecutor v. Said*, [Annex IV to the Notification of the Appointment of Mr Jean Pierre Madoukou as Counsel for Mr Mahamat Said Abdel Kani](#), ICC-01/14-01/21-5-AnxIV, 26 January 2021; *Prosecutor v. Said*, [Public Redacted Version of "Prosecution's request for the trial be held partially in Bangui"](#), ICC-01/14-01/21-337-Conf, dated 30 May 2022, ICC-01/14-01/21-337-Red, 3 June 2022.)

⁵³ [Prosecution's observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-523, 6 September 2024, para. 8.

⁵⁴ [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, paras 26-29.

⁵⁵ ICC, [Chamber Practice Manual](#), paras 98-100.

⁵⁶ [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, paras 26-28.

30. Since the adoption of the template Contact and Redaction Protocols in 2017,⁵⁷ five cases have reached confirmation.⁵⁸ In each of these cases, the Defence was invited to make detailed submissions on the proposed protocols,⁵⁹ and amendments were adopted to reflect and adapt to the specifics of the case at hand.⁶⁰ The wholesale adoption of these Protocols in the present case, without any case-specific adaptations, would already be unusual.

31. Importantly, both the Contact Protocol and the Redaction Protocol were designed to address cases in which the suspect (and then accused) is present. Their adoption as such in a case where the Prosecution intends to proceed in the absence of the suspect, is problematic. Indeed, even according to the Prosecution, the security and protection landscape is different when there is no suspect as the end-recipient of protected information. The Prosecution has argued, for example, that for an *in situ* hearing “witnesses would not face unmanageable security concerns, nor would they have to fear Mr Kony’s presence”.⁶¹ There is therefore a

⁵⁷ Annex: Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, adopted in the [Chamber Practice Manual of 12 May 2017](#), also in the seventh revision of the [Chamber Practice Manual](#).

⁵⁸ *Prosecutor v. Al Hassan*; *Prosecutor v. Yekatom & Ngaïssona*; *Prosecutor v. Abd-Al-Rahman*; *Prosecutor v. Said*; and *Prosecutor v. Mokom*.

⁵⁹ *Prosecutor v. Al Hassan*, [Response to the “Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant”](#), ICC-01/12-01/18-29, 11 May 2018; *Prosecutor v. Yekatom & Ngaïssona*, [Response to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses](#), ICC-01/14-01/18-51, 7 January 2019; *Ngaïssona Defence Observations on the Protocol on the Handling of Confidential Information during Investigations and Contacts with Witnesses*, ICC-01/14-01/18-144, 11 March 2019; *Réponse de la Défense de M. Alfred Rombhot Yekatom et de M. Patrice Edouard Ngaïssona à la « Prosecution’s Request to Vary the Decision on Disclosure and Related Matters (ICC-01/14-01/18-64-Red) »*, ICC-01/14-01/18-160, 28 March 2019; *Prosecutor v. Abd-Al-Rahman*, [Observations en réponse à l’Ordonnance ICC-02/05-01/20-14 \(29 juillet 2020, ICC-02/05-01/20-106-Conf\)](#), ICC-02/05-01/20-106-Red, 19 August 2020; *Prosecutor v. Said*, [Version publique expurgée de la « Réponse consolidée de la Défense à la « Prosecution’s Submissions on the Modalities and Procedure for Evidence Disclosure » \(ICC-01/14-01/21-11-conf\) et à la « Prosecution’s Proposal for Protocol on the Handling of Confidential Information and Contacts with Witnesses » \(ICC 01/14-01/21-13\) »](#), ICC-01/14-01/21-32-Red, 9 April 2021.

⁶⁰ See *Prosecutor v. Al Hassan*, [Decision on the Adoption of a Protocol on the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant](#), ICC-01/12-01/18-40-tENG, 31 May 2018; [Decision on the Evidence Disclosure Protocol and Other Related Matters](#), ICC-01/12-01/18-31-tENG, 16 May 2018, paras 27-35; *Prosecutor v. Yekatom & Ngaïssona*, [Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses](#), ICC-01/14-01/18-156, 22 March 2019; *Prosecutor v. Yekatom*, [Public Redacted Version of “Decision on Disclosure and Related Matters”](#), ICC-01/14-01/18-64-Red, 23 January 2019, paras 23-32; *Prosecutor v. Abd-Al-Rahman*, [Order on disclosure and related matters](#), ICC-02/05-01/20-116, 17 August 2020, paras 12-13; *Prosecutor v. Said*, [Public redacted version of ‘Order on disclosure and related matters’](#), 7 April 2021, ICC-01/14-01/21-50-Conf, ICC-01/14-01/21-50-Red, 12 May 2021, paras 34-44.

⁶¹ [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. 32.

distinction to be drawn between protection and security issues in a case where a suspect is present, and *in absentia* proceedings and those *in personam*.

32. As such, both the Redaction Protocol and the Contact Protocol should be adapted to reflect the fact that the Defence is not in contact with, nor sharing information with a client. Indeed, Regulation 101(1) of the Regulations of the Court provides that: “[a]t the request of the Prosecutor, the Chamber seized of the case may, if the interests of the proper administration of justice so require, order that the detained person’s access to the information be limited, in particular if unrestricted access could jeopardize the outcome of the proceedings against him or any other investigation.” No such jeopardy exists in a case where there is, in fact, no “detained person”.

33. Other adaptations also appear appropriate. Paragraph 5 of the Redaction Protocol⁶² cites to the possibility of non-disclosure of witnesses’ identities **before the commencement of the trial**. However, since no possibility of trial *in absentia* arises in the instant case, the provisions cannot apply. More generally in the Redaction Protocol, it would be appropriate to distinguish between information that should not be disclosed to a suspect and information that should not be disclosed to the Defence (where the accused is absent but represented by court appointed counsel). The mere fact that the Defence may take possession of information concerning the Prosecution’s investigations cannot in itself be sufficient to justify redactions. The Prosecution must demonstrate, on a case-by-case basis, how specifically informing the Defence could have an impact on the investigation. In addition, the Redaction Protocol should require that the Pre-Trial Chamber receives a copy of the material in order to verify redactions.

34. Further changes are also necessary because of the connection and overlap of the *Ongwen* case with the *Kony* case, and the need to clarify the sharing of confidential information as between them. Specifically, in order for some paragraphs of the Contact Protocol to be effective, the Defence needs to be made aware of relevant decisions or witness protective measures being carried over from the *Ongwen* proceedings. Paragraph 4(e), for example, prohibits a party from sharing “any information ordered not to be disclosed to third parties by **any** Chamber of the Court”. The Contact Protocol should be adapted to ensure the Defence is informed of any relevant orders arising from the *Ongwen* case. The OPCV has also asked for

⁶² ICC, [Chamber Practice Manual](#), para. 100(5), p. 29.

the adoption of a protocol on dual status individuals.⁶³ While victims would not normally be participating at this stage of proceedings, applications for victims' participation have already been granted in this case.⁶⁴ As such, the Defence agrees that a protocol on dual status individuals is also now appropriate.

35. Finally, the Prosecution's request to adopt a new version of the eCourt Protocol for the use of JWP for disclosure and evidence management⁶⁵ is now moot, as the Prosecution has indicated that it does not consider it feasible due to several technical issues.⁶⁶ The Defence awaits a new proposed protocol on this matter and is, accordingly, unable to comment further.

36. For these reasons, the Defence submits that the wholesale adoption of the Redactions Protocol and Contact Protocol is not fit for the purpose in the instant case as it makes for gaps and uncertainty in the regulation of the highlighted issues, particularly in the uncharted territory of the first *in absentia* confirmation hearing, and given the overlap with the *Ongwen* case. The Prosecution should submit concrete and tailored proposals for Protocols, taking into account the factors which are specific to the *Kony* proceedings. Following consideration of these proposed adaptations, the Defence would then be in a position to provide meaningful observations on the Protocols to be adopted.

C. Defence Response to Oral Order

37. At the status conference on 23 July 2024, the Single Judge ordered the Defence to address:

Whether the Defence anticipates invoking any ground for excluding criminal responsibility and/or an alibi;

⁶³ [Victims' response to Prosecution's requests for the adoption of certain protocols and an *in situ* hearing in Uganda \(No. 490\)](#), ICC-02/04-01/05-494, 12 April 2024, para. 12.

⁶⁴ See *Situation in Uganda*, [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](#), ICC-02/04-01/05-252, 10 August 2007; *Situation in Uganda*, [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](#), ICC-02/04-125, 14 March 2008; *Situation in Uganda*, [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](#), ICC-02/04-01/05-267, 15 February 2008; *Situation in Uganda*, [Decision on legal representation of Victims a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0090/06 to a/0096/06, a/0098/06, a/0102/06, a/0103/06, a/0112/06, a/0115/06, a/0117/06, a/0118/06, a/0120/06 to a/0126/06, a/0076/07 to a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07 to a/0103/07, a/105/07 to a/0108/07, a/0112/07, a/0115/07, a/0117/07, a/0118/07 and a/0123/07](#), ICC-02/04-176, 9 February 2009.

⁶⁵ [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. 29.

⁶⁶ [Transcript of Status Conference](#), ICC-02/04-01/05-T-012-CONF-ENG ET, 23 July 2024, p. 7, line 11 – p. 11, line 16.

Whether the Defence anticipates conducting investigations before the confirmation of charges hearing, if any. If so, the Defence shall, specify its intended investigative steps, including a timeline;

Thirdly, whether the Defence anticipates presenting evidence at the confirmation of charges hearing and, if so, it shall specify the types of evidence it intends to present, the volume or anticipated length of each of such type of evidence, whether any redactions are required, and the language in which the evidence will be made available;

Fourth, should the Defence intend to call witnesses, it shall indicate whether it intends to request protective measures for any of them; and

Lastly, whether the Defence possesses or controls any books, documents photographs or other tangible objects that the Prosecution shall be permitted to inspect as material intended for use as evidence under Rule 78 of the Rules.⁶⁷

38. Disclosure has not yet occurred.⁶⁸ The Defence has not reviewed the Prosecution evidence, which is the starting point for the planning of investigations. The Prosecution has indicated that the scope of disclosure is in the order of 20,000 documents (around 143,000 pages), as well as 100 videos and 391 audio recordings (over 400 hours).⁶⁹ Putting aside the audio and video evidence, which will require the assignment of a language assistant to the Defence team, and with a generous estimate of 250 pages per day, it would take one person 560 days to read 140,000 pages just once. With 260 working days in a year, it would take two members of the Defence team doing nothing else but reading the evidence (as opposed to summarising or notetaking), over one year simply to read this volume of materials. The Prosecution has had every opportunity to reduce the scope of its case and accordingly, the size of its disclosure. Its choice to disclose in these quantities, has a knock-on effect on Defence preparation.

39. In March 2024, the Prosecution shared its plan for “a thematic disclosure, which is designed to aid the Defence”.⁷⁰ Pursuant to this plan, disclosure would have commenced on 15 April 2024 and have continued in themed steps thereafter, every Thursday, until 6 June 2024, spanning seven weeks.⁷¹ When making revised submissions on the date for the confirmation hearing on 6 September 2024, the Prosecution revealed it had abandoned this seven-week plan

⁶⁷ [Transcript of Status Conference](#), ICC-02/04-01/05-T-012-CONF-ENG ET, 23 July 2024, pp 22-23.

⁶⁸ [Kony Disclosure Plan](#), ICC-02/04-01/05-490-AnxA, 28 March 2024.

⁶⁹ [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, paras 9-11; [Kony Disclosure Plan](#), ICC-02/04-01/05-490-AnxA, 28 March 2024.

⁷⁰ [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. 9.

⁷¹ [Kony Disclosure Plan](#), ICC-02/04-01/05-490-AnxA, 28 March 2024, p. 1.

of weekly disclosure, in favour of a straightforward two-week upload. The Prosecution submitted that “disclosure could be initiated from the moment the Chamber authorises, and then finalised within two weeks to allow for the technical uploads.”⁷²

40. Condensing the disclosure process from seven weeks to two weeks represents a false economy. Disclosure is not a one-sided process. The Prosecution uploading the material on Nuix is only the first stage of this process, which then triggers the Defence’s own receipt and organisation of this material in a manner that will facilitate Defence triage and review. Replacing a staggered thematic disclosure “designed to aid the Defence”⁷³ with what is effectively a document dump, will not move the parties more quickly towards a confirmation hearing, given the time it takes to receive, organise, and review this material on the Defence side. It is no accident that in the more recent (and smaller) ICC cases, the time between the commencement of disclosure and the start of the confirmation has generally been between six and 12 months.⁷⁴ Defence review must be meaningful.

41. At the same time that the Defence receives and reviews Prosecution disclosure, it will endeavour to locate and seek the assignment of resource person(s) and/or investigator(s) who can facilitate Defence investigations on the ground. The Defence then anticipates putting together an investigative strategy, and seeking approval for mission plans by the Counsel Support Section to conduct investigations.

42. Once investigations have been conducted, the Defence will be in a position promptly to inform the Pre-Trial Chamber of any grounds for excluding criminal responsibility and/or alibi, as well as any intention to present evidence during the confirmation of charges hearing, including any protective measures required, and whether it possesses materials that the Prosecution should be permitted to inspect under Rule 78 of the Rules.

⁷² [Prosecution’s observations on the date of the confirmation of charges hearing](#), ICC-02/04-01/05-523, 6 September 2024, para. 5.

⁷³ [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. 9.

⁷⁴ *Abd Al-Rahman* (nine months), *Al Hassan* (12 months), *Mokom* (13 months), *Said* (six months), *Yekatom* and *Ngaïssona* (eight months), see [Kony Defence Observations on the Date of the Confirmation of Charges Hearing](#), ICC-02/04-01/05-522, 6 September 2024, para. 5, fns 13-17.

IV. CONCLUSION

43. PTCII first instructed the Registry “to commence the process of selection of counsel to represent the rights and interests of Mr Kony during the confirmation process and the confirmation hearing” on 4 March 2024.⁷⁵ Counsel was not assigned until 21 June 2023, three and a half months later. At the time Counsel came into the case, the confirmation of charges hearing was scheduled to be held in The Hague, on 15 October 2024. A wealth of directly relevant material remained *ex parte* and unavailable to the Defence, requiring litigation and orders from the Single Judge to facilitate its disclosure,⁷⁶ in order for the Defence to be able to prepare observations on the many procedural steps that had gone before. The Prosecution had represented that disclosure would be organised in a helpful and staggered manner over a period of seven weeks. There was no indication that the Prosecution would be permitted to file further submissions following the Defence observations,⁷⁷ or that the Prosecution would make assertions as to the admissibility of the case.⁷⁸

44. The landscape of this case has, therefore, altered dramatically in the last few months. The framework put in place by PTCII has required numerous revisions and amendments, including in respect of issues that are determinative or whether and how such a hearing should be held. This has required that various issues be revisited.

45. These numerous course corrections have been implemented by PTCIII with the fairness of the proceedings in mind. This does not diminish the fact that they are remedial. The logical conclusion is that the extent to which the confirmation proceedings were allowed to progress without input from Counsel representing Mr Kony’s interests, and the resulting procedural uncertainty and unpredictability, is another factor which can properly be weighed in PTCIII’s

⁷⁵ [Second decision on the Prosecution’s request to hold a confirmation of charges hearing in the Kony case in the suspect’s absence](#), ICC-02/04-01/05-481, 4 March 2024, para. 15.

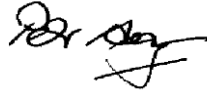
⁷⁶ [Kony Defence Request for Reclassification of 459-SECRET-Exp and 2047-SECRET-Exp](#), ICC-02/04-01/05-509, 9 July 2024; [Prosecution’s Response to Defence Request for Reclassification of two Registry Reports \(509\)](#), ICC-02/04-01/05-510, 16 July 2024; [Decision on the Kony Defence Request for Reclassification of ICC-02/04-01/05-459-SECRET-Exp and ICC-02/04-01/05-463 SECRET-Exp \(ICC-02/04-01/05-509\) and other reclassification matters](#), ICC-02/04-01/05-514, 08 December 2024; Email Instructions, “ICC-02/04-01/05: Instructions as regards Defence access to a confidential redacted version of the Ongwen Trial Judgment”, 31 July 2024, 11:53; Email Order, “ICC-02/04-01/05 – Order in relation to ‘Joint submissions on the Defence’s access to documents and proposed redactions’ (ICC-02/04-01/05-516-Conf-Exp) – Public”, 21 August 2024, 16:48.

⁷⁷ [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024, para. 28.

⁷⁸ [Prosecution’s Reply to Defence Observations](#), ICC-02/04-01/05-520, 5 September 2024, paras 11-12.

consideration of whether there is cause to hold a confirmation hearing against Mr Kony in his absence, let alone in Uganda.

The whole respectfully submitted.



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Wednesday, 11 September 2024