



Questions and Answers

Situation in the Republic of Kenya

The course of action and procedure for an initial appearance before the Court



1. What is an initial appearance hearing?

On 31 March 2010, Pre-Trial Chamber II of the International Criminal Court (ICC) authorised, by majority, the Prosecutor to open an investigation on crimes against humanity allegedly committed in the Republic of Kenya. In the context of this situation, six Kenyan suspects have been summoned to voluntarily appear before the ICC. Upon their voluntary appearance before the Court, Pre-Trial Chamber II will hold, on 7 and 8 April, initial appearance hearings in the presence of the persons in order to satisfy itself that the suspects have been informed of the crimes which they are alleged to have committed, and of their rights under the Rome Statute.

From this moment, each of the suspects will enjoy all the rights of a defendant as recognised in the Rome Statute, including the right to have adequate time and facilities for the preparation of his or her defence and to have the assistance of a counsel, without payment if the person lacks sufficient means to pay for it.

After these hearings, the Pre-Trial Chamber will schedule the dates for hearings on the confirmation of the charges. The process of preparing these next hearings usually takes several months.

2. What is a summons to appear?

A summons to appear is an order issued by a Pre-Trial Chamber for a person to appear before the Chamber on a specified date. After reviewing the application for a summons to appear and the evidence or other information submitted by the Prosecutor, the Pre-Trial Chamber issues a summons to appear if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that a summons is sufficient to ensure the person's appearance.

As provided by article 58 of the Rome Statute, the summons has to contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.

A summons to appear is to be served on the person.

3. In the summons to appear, what conditions were imposed on the suspects by the Pre-Trial Chamber?

The Chamber issued the summonses to appear for the six suspects subject to the following four conditions:

- (i) to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which the suspects have been summoned;

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- (ii) to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence;
 - (iii) to refrain from committing crime(s) set forth in the Statute;
 - (iv) to attend all required hearings at the International Criminal Court;

4. What if one of the summoned persons fails to appear or to comply with the conditions imposed by the Pre-Trial Chamber?

If a suspect does not appear before the Court or if the Pre-Trial Chamber is convinced that a suspect has failed to comply with one or more of the obligations imposed, the Pre-Trial Chamber may, on such basis, issue a warrant of arrest in respect of that person.

5. Can the Pre-Trial Chamber amend the conditions imposed on the suspects in the summons to appear?

Yes. At the request of the person concerned or the Prosecutor or on its own initiative, the Pre-Trial Chamber may at any time decide to amend the conditions initially set out. However, before amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of amending the conditions imposed.

6. How can the suspects prepare their defence while the summonses to appear imposed a condition prohibiting contact between them and victims or witnesses?

As highlighted by Pre-Trial Chamber II's decision (*Decision Establishing Public Modalities to be Observed When Complying with Summons Conditions*) on 5 April 2011, the suspects benefit from all "minimum guarantees" of the Defence's rights, as stipulated in article 67 of the Rome Statute. This implies that the Defence may approach, in principle, any person willing to give his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly, and all parties are prohibited from trying to influence the potential witness's decision as to whether or not to agree to be contacted by the Defence. However, before such contact takes place, the Defence is ordered to communicate the name and necessary contact details to the Victims and Witnesses Unit of the Court, which will advise the Defence on whether this contact may put the person at risk and/or which security arrangements the Defence should follow. If necessary, this Unit shall be responsible for making the security arrangements, in consultation with the Defence.

7. There are fears that the six suspects will be detained after the initial appearance hearings. Is this a valid concern?

No. The six suspects are free. They are not detained and will not be detained. They will come for a hearing, and can return home immediately after the hearing.

However, if a suspect fails to comply with the conditions imposed by the Pre-Trial Chamber, the Chamber may, on its own motion or at the request of the Prosecutor, issue a warrant of arrest for that suspect.

8. What will happen after the initial appearance hearings take place?

After the initial appearance hearings, the Pre-Trial Chamber will start the process leading to the confirmation of charges hearings. This process may take several months, depending on the complexity of the cases, and also on the challenges which may arise during this period. After the initial appearances, the process of disclosure of evidence will start. During this process, the Prosecutor will have to provide to the Defence teams the evidence he has collected during his investigation and on which he wants to rely for the confirmation of charges hearings.

As indicated by the Rome Statute, the Prosecutor also has a duty to disclose exonerating information or materials to a suspect which in any way tend to suggest his or her innocence or mitigate his or her guilt, or which may affect the credibility of the Prosecution's evidence.

9. What is a confirmation of charges hearing?

A confirmation of charges hearing is not a trial. It is a public hearing during which the Pre-Trial Chamber will decide whether or not to confirm all or any of the charges brought against the persons, on which basis the Prosecutor intends to seek trial.

Exceptionally, the Pre-Trial Chamber may hold this hearing in the absence of the persons charged. At the close of the confirmation hearing, the Pre-Trial Chamber may:

- (a) Confirm, totally or partially, the charges and commit the person(s) to trial.
- (b) Decline to confirm the charges, a decision that does not prevent the Prosecutor from returning with a subsequent request on the basis of additional evidence.
- (c) Adjourn the hearing and ask the Prosecutor to consider providing further evidence or to pursue further investigation or, alternatively, to amend the charges because the available evidence shows a different crime.

The Prosecution is required to support each of the charges with sufficient evidence to establish substantial grounds to believe that the person(s) committed the alleged crimes.

If charges are confirmed against one or more person, the case will be committed to trial before a different Chamber, a Trial Chamber composed of three different judges from the Pre-Trial Chamber.

10. The Kenyan Government has challenged the admissibility of the cases in accordance with article 19 of the Rome Statute. Does this mean that the proceedings will now stop?

No. The Judges of Pre-Trial Chamber II have received the *Application on behalf of the Government of the Republic of Kenya pursuant to article 19 of the ICC Rome Statute* and they are currently in the process of reviewing the application. The Prosecution, the Defence, and the Office of Public Counsel for Victims representing the victims who have applied to participate in the proceedings, have been requested to submit written observations on the Kenyan Government's application, no later than 28 April 2011.

The Rome Statute and the Rules of Procedure and Evidence do not provide for any specific time-limit during which the Judges should decide on this application, and the ongoing proceedings will not stop.

