

ICC: Pre-Trial Hearing Begins in First Kenya Case

Questions and Answers

August 2011

On September 1, 2011, a “confirmation of charges” hearing will begin before an ICC pre-trial chamber in The Hague. It will determine whether the first case in the Kenya situation at the International Criminal Court (ICC) should be sent to trial.

In this first case, the ICC prosecutor has accused three people – William Samoei Ruto, Henry Kiprono Kosgey, and Joshua arap Sang – of crimes against humanity committed during Kenya’s 2007-2008 post-election violence. A confirmation of charges hearing in the second Kenya case – of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammad Hussein Ali on charges also related to the post-election violence – is expected to begin on September 21.

In March, the pre-trial chamber issued summonses to appear for these six people, and all six appeared voluntarily before the court in April. The Kenya investigation – the ICC’s fifth – opened in March 2010 after the prosecutor received authorization from the court. Kenya ratified the Rome Statute, which created the ICC, in 2005.

The ICC prosecutor’s investigations have focused on the violence in Kenya that followed what was widely perceived as a rigged presidential election in favor of the incumbent, Mwai Kibaki, in December 2007. Human Rights Watch researchers documented several patterns of violence in the post-election period, including extrajudicial killings and excessive use of force by the police, and ethnic-based attacks and reprisals by militia groups on both sides of the political divide. The post-election violence claimed over 1,100 lives and forced no fewer than 650,000 people from their homes.

The following questions and answers concern the upcoming confirmation of charges hearings and other current developments in the cases. For additional information about the Kenya cases, please see “[Kenya: Q&A on Kenya and the International Criminal Court](#)” (January 2011) and “[ICC: First Appearance of Kenya Suspects](#)” (April 2011).

1. What is this case about? What crimes is the prosecutor alleging that William Samoei Ruto, Henry Kiprono Kosgey, and Joshua arap Sang committed?

Ruto, Kosgey, and Sang are accused of committing the crimes against humanity of murder, forcible transfer, and persecution by their involvement in an alleged plan to attack members of the Kikuyu, Kamba, and Kisii ethnic groups, perceived supporters of President Mwai Kibaki's Party of National Unity (PNU). The goals of the plan, the prosecutor alleges, were to punish and expel from the Rift Valley – one of Kenya's eight provinces – people perceived to support the PNU, and to gain power in the Rift Valley. The other Kenya case concerns crimes allegedly committed by those affiliated with the PNU against perceived supporters of the Orange Democratic Movement (ODM), then the opposition party.

Ruto and Kosgey are senior ODM members, as well as members of parliament, and former cabinet ministers. Sang was a radio host on the Eldoret-based Kass FM at the time of the violence.

The prosecutor contends that Ruto and Kosgey, along with Sang and others, worked for up to a year before the election to create a network to carry out the plan, and that this network was activated when the election results in favor of President Kibaki were announced. The prosecutor alleges that Ruto and Kosgey controlled the network, while Sang encouraged and then helped coordinate attacks by disseminating coded messages through his broadcasts. The prosecutor contends that perpetrators destroyed houses and businesses identified as belonging to ethnic groups thought to be PNU supporters, killing and injuring some and forcing thousands to flee. Attacks in the town of Turbo, the greater Eldoret area (Kimumu, Langas, Yamumbi, Huruma, Kiambaa), and the towns of Kapsabet and Nandi Hills form the basis for the charges.

The prosecutor is seeking to charge Ruto and Kosgey as principal co-perpetrators under article 25(3)(a) of the Rome Statute, and to charge Sang under article 25(3)(d) for contributing to the crimes allegedly committed.

2. What is the purpose of the upcoming hearing to confirm the charges?

The confirmation of charges hearing has a limited purpose. It will allow the three-judge panel of the pre-trial chamber to evaluate whether the prosecutor has enough evidence to proceed with a trial on the charges cited for each of the three defendants. To confirm a charge, the chamber must be satisfied that the prosecutor has sufficient evidence to establish “substantial grounds” to believe that the person committed the crime.

The hearing is not a trial. It will not determine the guilt of Ruto, Kosgey, or Sang, which at trial must be proven beyond a reasonable doubt. The prosecutor is not required to put forward all evidence against the three at this time, or to call those witnesses on whom he will rely at trial. Indeed, the prosecutor has indicated that he does not intend to call any witnesses during the hearing.

3. How long is the hearing expected to last?

The pre-trial chamber has indicated that the hearing will begin on September 1 and will end no later than September 12.

4. What rights do the defendants have during the hearing?

In advance of the hearing, the three defendants have been provided with a document containing the charges sought by the prosecutor, as well as the evidence on which the prosecutor intends to rely during the hearing. At the hearing, the defendants, through their defense counsel, may object to the charges and challenge the prosecution's evidence.

Their counsel is also permitted to put forward evidence on their behalf. Kosgey has indicated that he intends to call one witness, while Ruto and Sang plan to call two witnesses each. Initially, all three defendants had sought to call a larger number of witnesses. But the pre-trial chamber ordered the defendants to call no more than two each, in keeping with the limited scope of this pre-trial proceeding. The ICC has an obligation to protect the well-being and safety of all witnesses, and, where necessary, may put in place certain protective measures, including permitting a witness to testify in a session closed to the public.

5. May victims participate in the hearing to confirm the charges?

The Rome Statute provides for victim participation in proceedings before the ICC, a role that is distinct from that of testifying as a witness.

This system – which permits victims to make their views and concerns known to the court through legal representatives – is an important innovation with the potential to ensure that the proceedings engage those directly affected by the alleged crimes. Victim participants who cannot afford legal representation may benefit from financial assistance provided by the court, and the court has an obligation to victim participants to ensure their safety and well-being. The judges, in their role, ensure that victims' participation is not prejudicial to, or inconsistent with, the defendants' fair trial rights.

The court has accepted 327 people – represented by a single, common legal representative appointed by the chamber – to participate in the confirmation of charges hearing. The common legal representative is expected to make opening and closing statements during the hearing, and may seek the court’s permission to question witnesses and make written submissions to the chamber.

Several hundred additional people have applied to participate as victims in the confirmation of charges hearing, reflecting the strong interest among Kenyans in these proceedings. But the court’s registry, citing resource constraints, has been unable to process all applications in advance of this hearing. The ICC’s budget is set annually by member countries and an increase in the court’s workload is placing pressure on its budget. ICC members should ensure that the court has the resources necessary to carry out its mandate, including to enable victims to exercise their rights under the Rome Statute.

6. What happens after the hearing?

After the hearing, the judges will have 60 days to provide a written decision. If the chamber decides that there are “substantial grounds” to believe that a defendant has committed the crime alleged, the charge will be confirmed. The case will then proceed to trial.

The judges could decide that there is not enough evidence to confirm some or all of the charges for one or more of the defendants. If that happens, the prosecutor can submit additional evidence to support the charge or charges in question and then request a second confirmation of charges hearing.

The judges could also adjourn the hearing and ask the prosecutor to consider providing more evidence or conducting further investigations in relation to a particular charge. In addition, they could ask the prosecutor to consider amending a charge because the evidence appears to establish a different crime.

7. The Kenyan government challenged the admissibility of the ICC cases, citing its plans to prosecute the cases at home. On August 30, the ICC appeals chamber – in a majority decision – confirmed the pre-trial chamber’s decision rejecting the challenge. What is an admissibility challenge? What did the court say?

On March 31, the Kenyan government challenged the admissibility of the two Kenyan cases, citing its plans to begin or continue investigations of those responsible for the post-election violence in the context of a range of reforms mandated by the new constitution promulgated in Kenya in August 2010. Under article 19 of the Rome Statute, ICC judges may decide that a case is inadmissible because genuine national investigations or prosecutions are taking

place. The ICC is a court of last resort, and the Rome Statute clearly recognizes that the ICC may only act where national authorities are unable or unwilling to do so.

But the pre-trial chamber, in a May decision, rejected the government's admissibility challenge. The judges found no evidence that the government was actually investigating any of the six people named in the two cases. The judges held that, under the court's case law, a promise to investigate is not enough to stop existing ICC cases.

The government exercised its right of appeal under the Rome Statute. On August 30, the appeals chamber – in a majority decision – confirmed the pre-trial chamber decision. The appeals chamber agreed that the Kenyan government would have had to demonstrate that it was investigating the same six people for the same conduct for which they were summoned by the ICC for the cases to be inadmissible. The appeals chamber found no clear error in the pre-trial chamber's determination that the Kenyan government failed to provide evidence that it was undertaking specific investigative steps in these cases.

Under the Rome Statute, a state may only challenge the admissibility of a case once. But in exceptional circumstances, the court can grant leave for a second challenge to be brought.

8. Has Kenya prosecuted serious crimes committed during the post-election violence?

From March to May, Human Rights Watch interviewed police, judicial officials, lawyers and victims and reviewed court files across Kenya to determine what steps have been taken to prosecute those responsible for crimes during the post-election violence. We found that more cases have led to prosecutions and trials than is often reported, but they rarely targeted senior leaders or police officers accused of using excessive force. The dozens of convictions for petty crimes, and the handful of convictions for more serious crimes such as murder or robbery with violence, are far outnumbered by withdrawals or acquittals for petty and serious crimes alike.

Human Rights Watch found that files on post-election violence cases have been collected from police stations in recent months by investigators sent from police headquarters, but as of May, no prosecutors we interviewed had received recent orders to initiate prosecutions, and none of the police we interviewed had been directed to carry out new or renewed investigations.

In support of its appeal, the government sought to introduce an updated report of its investigations. That report – dated July 1 – indicated that the government had interviewed 35 people and that all six ICC suspects would be interviewed by the Kenyan authorities as suspects under Kenyan law. But the report also indicated that the investigations had not

yielded any evidence to connect the six ICC suspects to crimes alleged by the ICC prosecutor or other crimes. The appeals chamber rejected the report, noting that the appeal would be determined on the basis of the record developed before the pre-trial chamber.

Credible national trials will be necessary to complement the ICC's prosecutions and to widen accountability for the post-election violence. In spite of important reforms under way, Kenya's judicial system faces a number of challenges in meeting that goal. Many factors have prevented effective prosecution of the post-election violence. Police investigations have been inadequate, and police prosecutors have limited legal training and are reluctant to prosecute their colleagues. A new independent witness protection agency is not fully operational and will require more experience before it is up to the task of protecting witnesses in high-profile cases. Now that more than three years have passed since these crimes were committed, investigations will be even more difficult.

Human Rights Watch continues to support the creation of a special judicial mechanism to prosecute post-election violence in Kenya. A special mechanism would bridge existing gaps if it is insulated from political interference and equipped with the necessary expertise through a mix of national and international judges, prosecutors, investigators, and witness protection experts, while rooted in Kenyan law and procedure. If properly established and administered, it would also contribute to the long-term strengthening of the judicial system.

9. What can the ICC do to ensure that Kenyans know what is happening during courtroom proceedings?

The ICC should maintain and strengthen communication and outreach efforts in Kenya.

These efforts are necessary to ensure that the confirmation of charges hearings are meaningful for and understood by the people in communities most affected by the crimes under investigation, who are at some distance from the proceedings in The Hague. If further proceedings are held in the case, additional people may be accepted as victim participants. Outreach efforts are therefore also necessary to ensure that crime victims are informed of their right to participate. While support for the ICC has been high in Kenya, recent polls show that this support may be dropping, particularly in the home areas of the six people appearing before the court. In other ICC situations – like Uganda, where ICC outreach efforts were slow to develop – opponents of the ICC were able to make use of an information vacuum about the ICC to pursue a contrary agenda.

The court's Public Information and Documentation Section has already done considerable work in Kenya through national and local media, including training journalists about the ICC. The court has produced three episodes of a television and radio series addressing frequently

asked questions through interviews with court officials and staff, broadcast on six Kenyan television stations and translated into four local languages for broadcast on an additional 13 radio stations. For the confirmation of charges hearings in both Kenya cases, the court has produced print and radio spots about the hearings to be published in national papers and broadcast on a number of radio stations over the course of the hearings. The court also plans a radio and television program at the conclusion of the hearings summarizing the proceedings.

There is a need to scale up activities at the grass-roots level and to ensure that affected communities in remote areas have increased access to information. In other ICC situations, establishing a direct dialogue between ICC staff and these communities has been key to tailoring outreach to their questions and concerns.

In addition, the court should revisit the possibility of “in situ” proceedings. Although the ICC is headquartered in The Hague, it may conduct proceedings in other locations. In June, the pre-trial chamber solicited the views of the parties and victim applicants about whether the confirmation of charges hearings should be held in Kenya, but decided not to pursue the proposal after several concerns were expressed, including the safety of court staff, witnesses, and victims.

In situ proceedings – which have yet to be held in any of the court’s cases – could increase media coverage of ICC activities and provide affected communities with a more direct sense of what proceedings involve. They could also stimulate national focus and debate on the ICC’s work and national justice processes. They do, however, present security and logistical challenges. If the Kenya cases are sent to trial, the court should consider whether these challenges and the concerns expressed by the parties and victims could be addressed to permit some portions of the trial – such as opening or closing statements, or the delivery of a verdict – to be held in Kenya.