ICC: First Appearance of Kenya Suspects

Questions and Answers
April 2011

On April 7 and 8, 2011, six people summoned by the International Criminal Court (ICC) in connection with the court's Kenya investigation are expected to make their initial appearances before the ICC. The six—William Samoei Ruto, Henry Kiprono Kosgey, Joshua arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali—include senior politicians and government officials suspected of involvement on both sides of Kenya's 2007-2008 post-election violence. On March 8, 2011, a pre-trial chamber of the court issued summonses to appear for the six, following the ICC prosecutor's requests on December 15, 2010.

The Kenya investigation—the ICC's fifth—was opened in March 2010 after the prosecutor received authorization from the court. Kenya ratified the Rome Statute, which created the court, 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.

The following questions and answers are about the current developments. For additional information about the Kenya cases and related developments, please see "Kenya: Q&A on Kenya and the International Criminal Court," January 25, 2010.

1. What are the cases about?

On March 8, an ICC pre-trial chamber—by a vote of two-to-one—issued three summonses in each of two related cases.

In the first case, Ruto, Kosgey, and Sang are accused of committing the crimes against humanity of murder, forcible transfer, and persecution by their involvement in a plan to attack perceived supporters of President Kibaki's Party of National Unity (PNU). Ruto and Kosgey are senior members of the then-opposition party Orange Democratic Movement

(ODM), as well as members of parliament, and, until recently, cabinet ministers. Sang was a radio host on the Eldoret-based Kass FM at the time of the post-election violence.

In the second case, Muthaura, Kenyatta, and Ali are accused of committing the crimes against humanity of murder, forcible transfer, rape, other inhumane acts, and persecution by using the Mungiki, a Kenyan criminal gang, to attack perceived ODM supporters in Nakura and Naivasha or by instructing the police not to interfere with these attacks. Muthaura is the head of the public service and secretary to the cabinet, while Kenyatta is the deputy prime minister and finance minister. Ali was the Kenyan police commissioner at the time of the violence.

2. What is a summons to appear? How does it differ from an arrest warrant?

Like an arrest warrant, an ICC summons to appear contains the crimes an individual is alleged to have committed and triggers proceedings that may ultimately bring a case to trial. But unlike an arrest warrant, the summons imposes only an obligation on the individual to appear before the court in The Hague; it does not impose any obligation on the Kenyan authorities or the authorities of any other ICC state party to arrest the person.

In the Kenya cases, the ICC prosecutor requested summonses rather than arrest warrants, believing that they would be sufficient to ensure the appearance of the six people before the ICC. The pre-trial chamber agreed.

Although a summons does not lead to the person's detention, the pre-trial chamber may, in some circumstances, impose conditions short of detention to restrict the accused's liberty. Here, the pre-trial chamber ordered all six individuals not to have contact or interfere with victims or witnesses, not to commit crimes that come under ICC jurisdiction, and to attend all ICC hearings.

Defense counsel for Kenyatta, Muthaura, and Ali have filed a joint application with the pre-trial chamber requesting a modification of the prohibition on contact with witnesses to limit it to contact with prosecution witnesses. They contend that the current prohibition will limit their ability to participate in preparing their defense and to call witnesses on an equal footing with the prosecutor, guarantees provided to the accused under article 67 of the Rome Statute. A decision on the application is pending.

Failure to comply with a summons or with the conditions of a summons could subject an individual to arrest.

3. The six people have been ordered to appear before the ICC on April 7 and 8. What will happen during these proceedings?

The proceedings scheduled for April 7 and 8 are known as "initial proceedings." Their purpose is limited. The pre-trial chamber will satisfy itself that the six people have been informed of the crimes they are alleged to have committed and their rights under the Rome Statute. These include the right to counsel, to legal assistance and to be presumed innocent until proved guilty before the court.

It is likely that the pre-trial chamber will also set dates for a "confirmation of charges" hearing in each case. The hearing is to determine whether the prosecutor has sufficient evidence to send a case to trial. In other recent cases, the ICC has set the date for such hearings for five to six months later.

Before the confirmation of charges hearing, the prosecutor must provide the people who have been charged with a document containing the charges on which he seeks to bring them to trial, and he must also inform them of the evidence on which he intends to rely in the hearing (a process known as "disclosure"). The prosecutor can continue his investigations and may amend or withdraw charges, provided sufficient advance notice is given of the confirmation of charges hearing.

No trial date will be set until after the pre-trial chamber has determined whether to confirm charges.

4. Didn't the prosecutor originally seek counts against the six individuals that are not included in the summonses issued by the pre-trial chamber? Why are there no counts for crimes in Kibera and Kisumu?

In each case, the pre-trial chamber declined to issue summonses on some counts sought by the prosecutor.

In the Ruto et al. case, the pre-trial chamber did not find reasonable grounds to believe that the crime against humanity of torture had been committed.

In the Kenyatta et al. case, the prosecutor alleged that rape had been committed as part of the attacks in Nakuru and Naivasha. He also contended that forced circumcision amounted to the crime of "other forms of sexual violence." Based on the evidence presented by the

prosecutor, the pre-trial chamber did not find reasonable grounds to believe that rape had been committed in Naivasha (although it did for Nakuru and included rape there as a count). It also found that forced circumcision was more properly characterized as an "other inhumane act," a different constituent act under the Rome Statute that can also amount to a crime against humanity when part of an attack directed at a civilian population.

In addition, the pre-trial chamber declined to include any counts against Kenyatta et al. for allegedly instructing the police to target perceived ODM supporters and to suppress their protests in Kisumu, a city in Nyanza province, and Kibera, an informal settlement in Nairobi.

Although the prosecutor had alleged that crimes in Kisumu and Kibera were part of the same plan as those in Naivasha and Nakuru, the pre-trial chamber did not find a sufficient link between the two sets of crimes. It therefore considered them separately, finding reasonable grounds to believe that the crimes in Naivasha and Nakuru were committed under a policy of the Mungiki criminal organization, and thus reasonable grounds to believe that they were crimes against humanity under the Rome Statute.

With regard to Kisumu and Kibera, the pre-trial chamber found reasonable grounds to believe that the Kenyan police used excessive force in Kisumu; that they raided Kibera, resulting in deaths, injuries, and rapes; and that the Mungiki also committed acts of violence in Kibera. But it faulted the prosecutor for failing to provide a legal or factual submission that would require it to consider whether these acts of violence were committed under state policy. In addition, the pre-trial chamber found it "even more compelling" that there were not reasonable grounds to find any of the three people accused—Kenyatta, Muthaura, or Ali—responsible for events in Kisumu and Kibera. It therefore declined to include counts related to Kisumu and Kibera in the summonses.

The pre-trial chamber did not grant the prosecutor's application to appeal the exclusion of counts relating to Kibera and Kisumu or the re-characterization of forced circumcision from "other forms of sexual violence" to "other inhuman acts."

In addition, the pre-trial chamber changed what is known as the "mode of liability"—that is, the manner in which the person charged is alleged to have committed the crime—for Sang in one case and for Ali in the other. The prosecutor had originally alleged that Sang and Ali were principal perpetrators under article 25(3)(a) of the Rome Statute along with Ruto and Kosgey, on the one hand, and Kenyatta and Muthaura, on the other. But the pre-trial chamber only found reasonable grounds to believe that Sang and Ali *contributed* to committing crimes, a different mode of liability provided for in article 25(3)(d). The pre-trial

chamber noted that its findings were without prejudice to further evidence later that would establish responsibility under a different mode of liability.

5. Some Kenyan government officials are seeking the deferral of the ICC's investigations and prosecutions by the United Nations Security Council under article 16 of the Rome Statute. What is article 16?

Article 16 allows the UN Security Council to pass a resolution under its Chapter VII authority to defer an ICC investigation or prosecution for a renewable period of 12 months.

Article 16 states in full: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions."

Chapter VII of the UN Charter empowers the Security Council to take measures to "maintain or restore international peace and security" if it has determined "the existence of any threat to the peace, breach of peace or act of aggression." Article 16 was not intended for use in other than exceptional circumstances, and the Security Council has never deferred an ICC investigation or prosecution.

6. On what basis is Kenya seeking an article 16 deferral?

Initially, Kenyan officials primarily argued that a deferral was needed to undertake reforms necessary to permit the national prosecution of post-election violence cases in Kenya. They have subsequently claimed, however, that the ICC cases could be divisive and threaten the broader reform process under way in Kenya.

This shift in their argument perhaps reflects recognition that national trials are not a basis for an article 16 deferral. Indeed, Kenya has recently challenged the admissibility of the two cases before the ICC under article 19 of the Rome Statute on the grounds that it is genuinely willing and able to prosecute cases domestically (see questions eight and nine). However, an admissibility challenge under article 19 is distinct from deferral under article 16 and is made to the court, not to the Security Council.

But efforts to paint the ICC as divisive ring hollow. There is continued strong support for the court's efforts in Kenya. There is also no indication that the ICC's investigations and prosecutions in Kenya pose a threat to international peace and security. The Security Council should not be held hostage in its decision-making by the idea that at some time in the future

violence could be stirred up should a deferral not be granted. This would set a dangerous precedent and would make the international community susceptible to blackmail. A deferral by the Security Council on this basis would only reinforce the climate of impunity in Kenya and could embolden those responsible for the crimes committed during the post-election violence.

7. What is the status of efforts to seek a deferral?

Those within the Kenyan government seeking a deferral secured the backing of the Assembly of Heads of State and Government of the African Union (AU), which endorsed Kenya's request for a deferral during the AU summit meeting in January. This was in spite of widespread opposition by civil society and the disavowal of the deferral request by Prime Minister Raila Odinga's Orange Democratic Movement, which is now one-half of the Kenyan coalition government.

In the weeks since the AU summit, Kenyan government officials have carried out a strong diplomatic campaign for a deferral with UN Security Council members. The Security Council held an informal dialogue on March 18 to discuss the request in the presence of representatives of Kenya and the African Union. However, Kenya failed to find support for a deferral among Council members, including African members. France, the United States, and the United Kingdom—permanent Security Council members—have each publicly stated their opposition.

Kenya has asked for another Security Council meeting on its deferral request, but it remains unclear whether the Council will take any further action. The Orange party opposes the request.

8. On March 31, the Kenyan government challenged the admissibility of the ICC cases. What is an admissibility challenge?

Under article 19, the 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.

Either the person or persons charged or a state with jurisdiction over the case may challenge a case's admissibility any time before a trial starts. Except in exceptional circumstances, a person or state may only bring such a challenge once. In addition, while an individual may also challenge the court's jurisdiction, a state with jurisdiction over the case may only

challenge admissibility on the grounds that it is investigating or prosecuting the case, or that it has done so.

Under existing ICC case law, for a case to be found inadmissible there must be national proceedings encompassing both the person and the conduct that are the subject of the case before the ICC. Even if proceedings exist, the state must demonstrate its genuine willingness and ability to conduct those proceedings. The Rome State provides guidance about the meaning of "unwillingness" and "inability" in article 17, which sets out admissibility criteria.

A state may be considered "unwilling" if:

- its proceedings are for the purpose of shielding the person concerned from criminal responsibility;
- there has been an unjustified delay that, under the circumstances, is inconsistent with an intent to bring the person concerned to justice; or
- the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner that, under the circumstances, is inconsistent with an intent to bring the person to justice.

When considering a state's ability to conduct genuine national proceedings, the Rome Statute instructs the judges to consider "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

9. What is the basis for the Kenyan admissibility challenge? Is Kenya prosecuting crimes committed during the post-election violence?

In its admissibility challenge, the Kenyan government claims that on the basis of a range of reforms under the new constitution, promulgated in August 2010, its national courts are now or will shortly be capable of trying post-election violence cases, including those before the ICC. It sets out a six-month timetable for completing key judiciary reforms by the end of September 2011. It says that if additional time is required, the government will notify the pre-trial chamber.

It does not purport to be investigating the ICC cases. But it claims that the appointment of a new director of public prosecutions by the end of May —as required under the new constitution, which creates a directorate of public prosecutions independent of the attorney general—will permit it to begin investigating those responsible for the post-election violence

at the highest levels, including the ICC cases. The application proposes reporting on the progress of the investigations—as well as police reforms —at the end of July and again in August and September, when it expects to report on "readiness for trials in light of judicial reforms."

It will be up to an ICC pre-trial chamber to determine the merits of the Kenyan application. The application has no bearing on the validity of the existing summonses, and is not expected to delay the initial appearances of the six people named in the summonses.

10. What is the track record of the Kenyan authorities when it comes to national trials?

This is not the first time Kenyan authorities have promised to carry out investigations into the post-election violence. In December 2008, President Kibaki and Prime Minister Raila Odinga agreed to create a special tribunal to try those most responsible for the post-election crimes, but their efforts failed in parliament. The Kenyan cabinet in July 2009 abandoned plans altogether for a tribunal, and took no other steps toward national trials of the serious post-election crimes.

To date, there have been no effective investigations and prosecutions of the serious post-election crimes. Of the limited cases brought, at least two ended in acquittals. A case against a prominent local leader for inciting violence ended with a decision not to proceed (known as a "nolle prosequi") by the attorney general.

It was based on this inaction that the ICC prosecutor announced in November 2009 that he would seek authorization from the pre-trial chamber to open an investigation. In authorizing the investigation, the pre-trial chamber found that there were no relevant national proceedings regarding the types of offenses and high-level individuals likely to be targeted in the ICC investigation. The chamber also noted that the information it had received demonstrated "inadequacies or reluctance" on the part of the Kenyan government to address the post-election violence as a general matter.

In its admissibility challenge, the Kenyan government contends that national prosecutions were not possible prior to the adoption of the new constitution and the current reform process. It seeks a six-month period to implement these reforms and carry out investigations.

The government's track record on prosecutions of the post-election violence—coupled with efforts to secure a deferral of the ICC cases—should raise questions as to whether renewed promises for national trials are aimed at bringing accountability or at stopping the ICC

process. In addition, while credible national trials are necessary to complement the ICC's prosecutions, the government's timetable for reforms seems overly ambitious.

Kenya's judicial system faces multiple challenges to prosecuting these crimes credibly. 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. There have also been a number of delays in key appointments and in establishing procedures for vetting judges, as required under the new constitution.

Human Rights Watch continues to support the creation of a special tribunal in Kenya with a mix of Kenyan and international staff to handle cases not being prosecuted by the ICC; in our view, this is necessary to address adequately questions of independence and insulate the tribunal's work from political interference.

11. What should the ICC do to ensure that people in Kenya know about courtroom developments in The Hague?

The ICC should carry out strong communication and outreach efforts about its activities for a number of reasons.

First, the ICC needs to make sure its trials are meaningful for and understood by the communities most affected by the crimes in the situations under investigation, who are at some distance from the proceedings in The Hague.

Second, under the Rome Statute, victims may participate in court proceedings, even beyond testifying as witnesses. This system—for victims to make their views and concerns known to the court through legal representatives, and, in some circumstances, appear before the court—is unique in international justice proceedings and is an important innovation with the potential to ensure that the proceedings engage those directly affected by the alleged crimes. The judges' role is to ensure that victims' participation is not prejudicial to, or inconsistent with, the defendants' rights. To make the victim participation provisions effective, however, victims must be informed of their rights.

Finally, while public support for the ICC's investigations remains high, some government officials have made numerous efforts to undermine the ICC process (see questions five to seven above regarding an article 16 deferral). 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 spread a contrary agenda.

The ICC should, therefore, make every possible effort to communicate objective information about court proceedings to Kenyans. These outreach and communication activities are inextricably linked with the ICC's ability to carry out its mandate successfully and effectively. ICC states parties, which set and fund the court's budget, should ensure the court has the resources necessary for its outreach efforts.

The Public Information and Documentation Section of the ICC has started activities in Kenya. For example, it recently began "Ask the Court," a television and radio program about the ICC addressing frequently asked questions through interviews with court officials and staff. The program will be broadcast on at least six Kenyan television stations, translated into four local languages for broadcast on an additional 13 radio stations, and made available on YouTube. As proceedings unfold in The Hague, it will be important for the ICC to intensify its activities, and to ensure that affected communities in remote areas also have access to information. If cases go to trial, the ICC should consider holding some of the trial proceedings in Kenya (known as "in situ" proceedings), as permitted under the ICC treaty.