

BRIEFING PAPER

ICC confirmation of charges hearings on Kenya situation

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THIS BRIEFING PAPER sets out the background to the pre-trial confirmation of charges hearings at the International Criminal Court against William Samoei Ruto, Henry Kiprono Kosgey, and Joseph Arap Sang, three leading Kenyan figures accused of crimes against humanity arising from the post-election violence of 2007/2008. For more details see our trial monitoring site, www.icckkenya.org.

What are the issues the case?

From December 2007 to January 2008, supporters of rival political parties in Kenya, divided largely along ethnic lines, attacked one another in the wake of a highly controversial presidential election between incumbent Mwai Kibaki, head of the Party of National Unity (PNU), and Raila Odinga, leader of the opposition Orange Democratic Movement (ODM). Murder, rape and other forms of sexual violence, the deportation or forcible transfer of the population, and other inhumane acts characterized a period in which more than 1,220 people were killed, 3,500 were injured and 350,000 were displaced.

In March 2011, the Pre-Trial Chamber II of the ICC issued summonses to appear for six Kenyans named by the prosecutor of the ICC, Luis Moreno-Ocampo—three members each from the ODM and the PNU. The six suspects [voluntarily appeared before Pre-Trial Chamber II judges](#) in The Hague on April 7 and 8 2011.

From September 1 to September 12 2011, Pre-Trial Chamber II will hold the confirmation of charges hearing for the three persons suspected of committing crimes against humanity on behalf of the ODM against supporters of the PNU. They are William Samoei Ruto, Henry Kiprono Kosgey, and Joseph Arap Sang.

Who are the Accused?

Mr. William Samoei Ruto was a senior member of the ODM, formerly a member of parliament from Eldoret (Rift Valley) and minister of higher education, science and technology in the coalition government. Facing allegations of corruption and graft, Mr. Ruto was suspended from public office in October 2010 and was finally dismissed last week.

The prosecutor alleges that Mr. Ruto is responsible as an indirect co-perpetrator (having committed crimes through another person) for the crimes against humanity of murder, forcible transfer, and persecution. More specifically, the prosecutor alleges that Mr. Ruto was the leader of a group of perpetrators who carried out attacks on residents in five areas in the northern part of Kenya's Rift Valley region between December 2007 and February 2008, and that these crimes were committed against supporters of the PNU as part of a plan to gain power in the Rift Valley province and to punish and drive out PNU supporters.

Mr. Henry Kiprono Kosgey was a senior member of the ODM and a member of parliament from Tinderet (Rift Valley), as well as minister of industrialization in the coalition government. Mr. Kosgey stepped down in January 2011 due to allegations of corruption. The prosecutor has charged Mr. Kosgey as an indirect co-perpetrator for the crimes against humanity of murder, forcible transfer, and persecution, identically to the charges against Mr. Ruto. The prosecutor alleges that Mr. Ruto and Mr. Kosgey prepared

this plan for up to a year before the elections took place, and mobilized the network they had created to execute the attacks as soon as the election results were announced.

Mr. Joseph Arap Sang is currently the head of operations at Kass FM in Nairobi. At the time of the attacks, Mr. Sang was a radio host in Eldoret, Rift Valley Province. The prosecutor alleges that Mr. Sang contributed to the crimes against humanity of murder, forcible transfer and persecution by helping to coordinate the attacks planned by Mr. Ruto and Mr. Kosgey through coded messages in his radio broadcasts.

What happens during a Confirmation of Charges Hearing?

During a confirmation of charges hearing, the Pre-Trial Chamber determines whether there are “substantial grounds” to believe that each suspect committed each of the crimes with which he has been charged. The confirmation of charges hearing is not a trial and it exists to protect persons against wrongful or unfounded charges, and to commit to trial those persons against whom sufficiently compelling charges beyond mere theory or suspicion have been brought. In other words, the hearing distinguishes between those cases that should go to trial and those that should not.

What can we expect from the Hearing?

The hearing will take place from September 1 to 12 2011. The central element of the hearing will be for the prosecutor to present evidence on crimes against humanity and on the individual liability of each of the suspects. The prosecution bears the burden of establishing substantial grounds to believe that each suspect has committed the alleged crimes. The prosecution must establish only a *prima facie* case, and will not be presenting evidence in full, which is reserved for the actual trial.

The defense plans to argue that the charges against the suspects do not meet the threshold of crimes against humanity, such that they should not be tried at the court. In doing so, the defense will be calling witnesses, two shared by Mr. Ruto and Mr. Sang, and one for Mr. Kosgey.

Additionally, the legal representative of victims will have an opportunity to render both an opening and a closing statement.

Mr. Ruto has applied to waive his right to attend the hearing. He intends to be present the first day of the hearing, and “will make efforts to be present on any other date that his counsel or the court requires,” but has indicated his inability to be present for the “entirety” of the hearing.

What happens after a confirmation of charges hearing?

According to the rules of the court, the judges of the Pre-Trial Chamber have sixty days to make a determination of whether sufficient grounds exist for a case to go to trial. If the judges are satisfied that substantial grounds exist, the chamber will authorize a trial against the suspects, to be conducted by a Trial Chamber. If the Pre-Trial Chamber determines that substantial grounds do not exist, the suspects are exonerated of their charges and the case will not go to trial.

Timeline

December 27, 2007: General elections take place in Kenya.

December 30, 2007: Incumbent President Mwai Kibaki of the PNU is declared the winner of the general elections, though his ‘victory’ over opposition candidate Raila Odinga of the ODM amidst allegations of election fraud on both sides triggering outbreaks of violence.

February 5, 2008: The International Criminal Court Prosecutor says his office has begun a preliminary examination of the post-election violence in Kenya.

February 28, 2008: A mediation team, led by former UN Secretary-General Kofi Annan, oversees the signing of a power-sharing agreement called the National Accord and Reconciliation Act, which establishes a coalition government with Kibaki as president and Odinga as prime minister. It also set up the Commission of Inquiry on Post-Election Violence (CIPEV), which later became known as the Waki Commission after its chair, Judge Philip Waki.

October 15, 2008: The Waki Commission submits its report and recommendations to the government of Kenya; recommendations include the establishment of a special tribunal of national and international judges to investigate and prosecute perpetrators of the post-election violence. The report also states that if the tribunal is not set up within six months, information collected by the Waki Commission will be passed to the ICC, including a sealed envelope of names of those suspected to be most responsible for the violence.

February 12, 2009: The Kenyan parliament votes against the establishment of the proposed tribunal made up of Kenyan and international judges to address the post-election violence.

July 3, 2009: Three Kenyan Cabinet ministers sign an agreement with the ICC committing Kenya to establish a credible and independent tribunal to try perpetrators of post-election violence by August.

July 16, 2009: The Prosecutor is sent six boxes containing documents and supporting materials compiled by the Waki Commission during its investigations. The documentation includes a sealed envelope that contains a list of suspects identified by the Waki Commission as those most responsible for the violence.

November 9, 2009: Parliament begins debate on another constitutional amendment to form a local tribunal. To date that debate has not concluded.

November 26, 2009: ICC Prosecutor Luis Moreno-Ocampo files a request seeking authorization from Pre-Trial Chamber II to open an investigation in relation to the crimes allegedly committed during the 2007-2008 post-election violence in Kenya.

March 31, 2010: Pre-Trial Chamber II issues its majority decision (2-1) that there is a reasonable basis to proceed with an investigation into the situation in Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between June 1, 2005 and November 26, 2009.

December 15, 2010: The ICC Prosecutor requests the issuance of ‘summonses to appear’ for six people in the court’s Kenya investigation – William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang (case one) and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohamed Hussein Ali (case two) – for their alleged responsibility in the commission of crimes against humanity.

March 8, 2011: Pre-Trial Chamber II issues the summonses to appear for the aforementioned six individuals, as it finds reasonable grounds to believe that they committed the crimes alleged by the Prosecutor.

March 31, 2011: Kenyan government files an application challenging the ICC’s jurisdiction over the cases. Pre-Trial Chamber II dismissed the challenge to admissibility and said the cases can continue. The Kenyan government quickly appeals.

April 7, 2011: The first three defendants (Ruto, Kosgey, and Sang) made their initial appearance before the Court in The Hague.

April 8, 2011: The second three defendants (Muthaura, Kenyatta, and Ali) made their initial appearance before the Court in The Hague.

August 30, 2011: The Appeals Chamber at the ICC dismisses Kenya’s request to appeal the decision rendering the cases admissible for the confirmation of charges hearings at the Court.

September 1, 2011: Confirmation of charges hearing begin for the first three defendants (Ruto, Kosgey, and Sang).

September 21, 2011: Confirmation of charges hearing is scheduled to begin for the second three defendants (Muthaura, Kenyatta, and Ali).

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