

The ICC and Kenya

Understanding the Confirmation of Charges Hearings

CASE 1



William Samoei Ruto

CHARGES

- Murder
- Forcible transfer of population
- Persecution



Henry Kiprono Kosgey

CHARGES

- Murder
- Forcible transfer of population
- Persecution



Joshua Arap Sang

CHARGES

- Murder
- Forcible transfer of population
- Persecution

CASE 2



Francis Kirimi Muthaura

CHARGES

- Murder
- Forcible transfer
- Rape
- Persecution
- Other inhumane acts



Uhuru Muigai Kenyatta

CHARGES

- Murder
- Forcible transfer
- Rape
- Persecution
- Other inhumane acts



Mohammed Hussein Ali

CHARGES

- Murder
- Forcible transfer
- Rape
- Persecution
- Other inhumane acts

Background

After more than a year of inaction and missed deadlines by Kenya's authorities in prosecuting the post-election violence perpetrators, on July 9 2009 Mr. Kofi Annan (former UN Secretary General) in keeping with the recommendations of the Commission of Inquiry into the Post-Election Violence (CIPEV), forwarded the matter to the International Criminal Court (ICC) through ICC Prosecutor Luis Moreno- Ocampo. On November 26th, 2009 Mr. Ocampo announced that he would request ICC judges to allow him permission to proceed with an investigation into Kenya's 2007/2008 post-election violence. On March 31st 2010 Mr. Ocampo's request was granted and he started his investigation into the Kenya situation.

On December 15 2010 the ICC Prosecutor requested the issuance of 'summonses to appear' for six persons 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. In March 2011, the Pre-Trial Chamber (PTC) issued summonses to appear for the suspects.

In case one, **Francis Muthaura** and **Uhuru Kenyatta** are alleged to be indirect coperpetrators of the crimes against humanity of murder, forcible transfer, rape, persecution, and other inhumane acts in Nakuru (Nakuru District, Rift Valley Province) and Naivasha (Naivasha District, Rift Valley Province) while **Gen Mohammed Ali** is alleged to have contributed to the commission of crimes in the same areas.

In case two, **William Ruto**, and **Henry Kosgey** are alleged to be indirect co-perpetrators of the crimes against humanity of murder, forcible transfer, and persecution in Turbo town, the

The International Criminal Court and Kenya



greater Eldoret area (Huruma, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town while **Joshua Sang** is alleged to have contributed to the commission of crimes in the same areas.

In April 2011, upon the suspects appearing at the ICC to hear the crimes that they had been charged with, the Pre-Trial Chamber (PTC) set the dates for the confirmation of charges hearings for 1st and 21st of September 2011.

How were the investigations done in Kenya?

Once the Pre-Trial Chamber authorized the Prosecutor to carry out investigations into the Kenyan situation, the Prosecutor sent a team of independent ICC investigators to Kenya to carry out investigations. In order to avoid endangering victims, the investigations were carried out in a discrete manner. The investigations took place between January and December of 2010.

The purpose of conducting investigations into the 2007-2008 post-election violence in Kenya was to provide the Pre-Trial Chamber with evidence that would prove that there were reasonable grounds to believe that the suspects the Prosecutor had identified committed crimes as specified under the Rome Statute.

The Prosecutor's investigations led him to identify six individuals that he alleged were responsible for crimes against humanity. On December 15, 2010, he submitted an application requesting the court to issue summonses for these six people, divided into two separate cases. The Pre-Trial Chamber reviewed this evidence and determined that there were "reasonable grounds" to believe that the named individuals had committed the crimes alleged in the Prosecutor's application.

What are the challenges to jurisdiction and admissibility about?

The government and some of the suspects challenged the admissibility of the Kenya cases and the jurisdiction of the ICC

on post election violence in Kenya.


A case is **not** admissible before the ICC if:

1. The state which has jurisdiction over the crimes committed is actively pursuing the persons responsible for the crimes.
2. The cases have been investigated and the state has decided not to prosecute the persons concerned.
3. The persons concerned have already been tried for the same crimes the ICC is pursuing.
4. The case is not of sufficient gravity to justify intervention by the ICC.

In the Kenyan situation some of the suspects have challenged the admissibility of the ICC cases against them on the basis that the crimes in question are not of sufficient gravity to warrant action by the ICC.

The Pre-Trial Chamber rejected the government's challenge on the jurisdiction of the ICC in the Kenyan cases finding that there was no existing process at the national level to prosecute leading perpetrators of post-elections crimes. It is yet to deliver a ruling on the applications by the suspects on admissibility.

The Pre-Trial Chamber may deliver their ruling on the admissibility challenge prior to or at the same time as the decision on the confirmation of charges.

 The Prosecutor's investigations led him to identify six individuals that he alleged were responsible for crimes against humanity.

Confirmation of charges

What is the confirmation of charges hearing?

The confirmation of charges hearing serves as a check on the evidence the prosecutor has collected and as a test on the strength of the evidence. At this stage, the Pre-Trial Chamber judges will look into the witness statements and decide whether the evidence is strong enough to show that there are substantial grounds to believe the persons prosecuted have committed the crimes as charged by the prosecutor.

At the point of applying for summons against the six suspects, the Prosecutor had to provide the PTC with **“reasonable grounds”** to believe that the suspects charged committed crimes against humanity as specified under the Rome statute. At the confirmation of charges stage the standard of evidence against the suspects is raised and the Prosecutor must provide evidence that proves that there are **“substantial grounds”** to believe that the suspects charged, committed crimes against humanity as set out by the Rome Statute.

Is a confirmation of charges hearing a trial?

No, the confirmation of charges hearing is not a trial, nor is it the beginning of a trial. Rather, it is a public hearing during which the ICC's Pre-Trial Chamber will decide whether there is enough evidence to proceed to a trial. The judges of the Pre-Trial Chamber consider the charges and decide if there is enough evidence to support each of the allegations. The Pre-Trial Chamber does not make a decision about the suspects' innocence or guilt, this can only be decided during a trial.

What happens during a confirmation of charges hearing?

During these hearings, the prosecution must provide enough evidence, for each of the charges, to establish substantial grounds to believe that each of the suspects committed the crimes charged. The prosecution may do this by means of documentary or summary evidence and/or by calling witnesses and experts.

The defence teams may object to the charges and challenge the prosecution's evidence. They may also present evidence that is favourable to their case, such as evidence that raises questions about the suspects' guilt. Like the prosecution, defence teams may present their evidence to the Pre-Trial Chamber in a number of ways, including through witness testimony. In addition to hearing submissions by the prosecution and the defence teams, the Pre-Trial Chamber will hear submissions from the legal representatives of those victims authorised by the judges to participate.

In the Kenyan situation confirmation of charges hearings, the Prosecutor decided that he would not call live witnesses and

requested that the Pre-Trial Chamber judges allow the identity of his witnesses to be concealed from the suspects' defence teams and members of the public. On the other hand the defence teams who had initially requested to present numerous witnesses were only allowed to present two witnesses each.

It is not necessary to present witnesses at the confirmation of charges hearings. At this stage the Pre-Trial Chamber will be looking at the strength of the Prosecutors evidence and assessing whether it is enough to sustain a trial against the individuals charged or whether the defence teams presented enough evidence to cast doubt on the strength of the Prosecutor's case.

When will the Pre-Trial Chamber announce its decision on the confirmation of charges?

In accordance with the Rome Statute, the parties in both cases have a maximum of 6 weeks, following the conclusion of the hearings, within which to provide written observations to the chamber. These observations are optional and are restricted to the issues raised during the confirmation of charges hearings. Following this period, and in accordance with the regulations of the court, the chamber will be required to deliver its written decision within 60 days. Thus in the Ruto, Kosgey and Sang case, it is anticipated that the decision will be rendered by 24th December, 2011 and by 16th January, 2012 in the Muthaura, Uhuru and Ali Case.

The Judges however, do not necessarily have to wait for the 60 days to lapse and may deliver their decisions before then. The Judges may also decide to deliver the decisions in both cases at the same time or in close succession

Several names have been mentioned during the confirmation of charges hearings as persons who were allegedly involved in the planning of post-election violence; can the Prosecutor bring charges against another suspect in the Kenya case?

Yes. The Prosecutor can charge further suspects but in doing so, he has to follow the proper procedure. That is, the Prosecutor must ask for clearance to conduct further investigations in Kenya, then bring his evidence to the Pre-Trial Chamber who will assess the evidence and decide if there are reasonable grounds to believe that the additional persons identified by the Prosecutor committed any of the crimes found in the Rome Statute. Thereafter the suspects have to appear before the chamber to hear in person what they have been charged with after which a date will be set for the confirmation of charges hearing.



The Prosecutor must provide evidence that proves that there are **“substantial grounds”** to believe that the suspects charged committed crimes against humanity as set out by the Rome Statute.

What are the next steps?

What are the possible decisions that the Pre-Trial chamber may make?

There are at least four possible scenarios following the confirmation of charges hearings:

1 Before rendering a decision, the chamber may request the Prosecutor to:

- i. Consider providing further evidence or conducting further investigations with respect to a particular charge
- ii. Amend a charge where the evidence submitted appears to establish a different crime within the court's jurisdiction.

2 If the Pre-Trial chamber determines that there is sufficient evidence to establish substantial grounds to believe that the suspects committed the crimes they are charged with, the court will confirm the charges and commit the suspects to a Trial chamber.

- i. If the charges are confirmed, the suspects still remain innocent until proven guilty beyond reasonable doubt through a trial.

3 If the Pre-Trial chamber determines that there is insufficient evidence, it will decline to confirm the charges.

- i. In this scenario, the Prosecutor still has the opportunity to collect additional evidence and apply for the confirmation of rejected charges.

4 The chamber may confirm some charges and decline to confirm other charges.

- i. In this case the trial would only proceed on the basis of the charges confirmed against the relevant suspects.

The International Criminal Court and Kenya

Can the Pre-Trial Chambers decision be appealed against?

After the Pre-Trial Chamber has announced their decision on the confirmation of charges, the defence teams and the Prosecutor will have the opportunity to appeal against the decision of the Pre-Trial Chamber if they so wish. The appeals may fail, or be partially or totally successful.

Can the suspects receive compensation from the ICC if the charges are not confirmed?

A suspect is not entitled to receive compensation merely because the charges against him have not been confirmed. However, anyone who can show that he has been a victim of unlawful arrest or detention has an enforceable right to compensation. The court can award compensation if it finds that a grave and manifest miscarriage of justice has occurred.

If charges are confirmed will the suspects be arrested?

The Rome Statute (Article 63) requires that accused persons be present during trial proceedings. The trial Chamber will be required to make a decision towards ensuring the participation

of the accused individuals in the trial proceedings. This means that, on the basis of the information available to them, the PTC judges must decide whether it is necessary to issue warrants of arrest, find other means to ensure the suspects' appearance or trust that they will present themselves at the appointed dates freely.

If the suspects are arrested under what conditions will they be detained?

The Pre-Trial Chamber issued a warning to the suspects against tampering with or intimidating witnesses or victims. If the suspects disobey this warning, the Pre-Trial Chamber may still issue a warrant of arrest. Since the ICC has no police force, the court would then be dependent on the cooperation of member states to arrest the suspects.

If the suspects are arrested they will be detained in a Dutch prison complex in Scheveningen. Detained prisoners have access to such facilities as fresh air, recreational activities, sports activities, library books, news and television.

As detainees the suspects can apply for interim release pending trial. This means the suspects may be released into a country near the Netherlands that agrees to host them during the period when they are not required to be in court.

What happens at the trial stage?

There are six judges assigned to the ICC Trial division and trials are carried out by three Judges per Chamber. These judges will be different from the judges of the Pre-Trial Chamber. Currently it is not possible to determine with precision the time it would take before trials begin. From the ongoing cases at the ICC, the time between the confirmation of charges decisions and the trial ranges between one and two years. Unless otherwise decided, the trial takes place at the seat of the court in The Hague, in the presence of the accused and the public.

As no trial has been concluded at the ICC it is difficult to set out a time frame on how long the Kenyan trials will last. Currently the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui case has been ongoing for 3 years while the Prosecutor v. Jean-Pierre Bemba Gombo case has been ongoing for less than a year.

What are the possible outcomes at the end of a trial??

After hearing the victims and witnesses called to testify by the Prosecutor and by the Defence, and considering the evidence, the judges decide whether the accused person is guilty or not guilty. The sentence is then pronounced



The International Criminal Court and Kenya

in public in the presence of the accused and victims or their legal representatives.

What penalties can the accused face if they are found guilty?

The Judges may clear the accused of all or some of the charges against them or they may find them guilty of all or some of the charges. If they find the accused guilty the Judges may impose a prison sentence, to which may be added a fine or forfeiture of the proceeds, property and assets derived directly or indirectly from the crimes committed. The court cannot

impose the death penalty and the maximum sentence is 30 years. However, in extreme cases, the court may impose a term of life imprisonment.

Convicted persons serve their prison sentences in a State that has been designated by the court from a list of States which have indicated to the court their willingness to accept convicted persons. Since the ICC process has yet to convict any persons accused of crimes against humanity, it is not possible to determine where persons would be imprisoned if sentenced.

Witnesses and victims



Why are the Prosecution's witnesses anonymous?

In order to guarantee the safety of witnesses who come to testify before the court, the court provides the prosecution and defence teams with administrative and logistical support to ensure that the experience of testifying does not result in further harm, suffering or trauma for the witnesses.

There is no obligation for either party to have witnesses appear at the confirmation of charges hearings. In the Kenya case the Prosecutor decided not to call witnesses and has requested that the Pre-Trial Chamber judges allow for the identity of his witnesses to be concealed from the suspects' defence teams and members of the public. The ICC also ensures the security of persons mentioned in testimony and may, for example redact (conceal) their names from witness statements shared with the suspects' defence teams.

How does the ICC protect witnesses?

The Pre-Trial Chamber may grant protective measures where it is necessary to ensure the safety, well-being, dignity or privacy of a witness called to testify by either the Prosecution or the Defence. The Court can only provide its protection services in relation to, and in proportion with, those threats connected to the witness' involvement with the Court.

The court may, on an exceptional basis, choose not to reveal a witness's identity to the press or public by holding part of the proceedings in a closed session or by using electronic or other special means to conceal the evidence of the witness in the court room.

The court can also have a witness who is afraid of being targeted or who has been targeted moved to a safe location in the field. A protective measure of last resort is placement in a protection program and subsequent relocation of the witness and his or her close relations away from the source of the threat.

Who can be a witness?

The Office of the Prosecutor and the defence teams can ask victims or any other person who has witnessed crimes to testify before the court. They can also call experts to testify on pertinent issues.

The office of the Prosecutor and defence teams select witnesses based on the relevance of their testimony to their cases, their reliability and their credibility.

The International Criminal Court and Kenya



What witnesses do we expect to see at the ICC proceedings?

Eye-witnesses: The Defence or Prosecutor may call eye-witnesses if they have personally witnessed something that is relevant to the case.

Expert witnesses: The Defence or Prosecutor may call an "expert witness" to explain a piece of evidence that is outside the ordinary knowledge of the judges.

Character witnesses: The Defence or Prosecutor may call a character witness to give evidence of the good or bad character of the suspect.

Why are victims involved in the ICC proceedings?

With the establishment of the International Criminal Court (ICC), the victims' role in criminal proceedings was acknowledged and the Rome Statute empowered the victims to hold perpetrators accountable for the crimes they committed and protected those who testified from harassment. The Rome Statute also established the Trust Fund for Victims (TFV) which works towards enabling victims to rebuild their lives and that of their communities through reparations. In this way the dignity of victims, who were often forgotten or sidelined in other international tribunals, can be restored.

How do victims participate in the ICC process?

Victims of crimes under ICC investigation have a right to participate in judicial proceedings related to the harm they have suffered. Victim participation allows victims to have an independent voice in the proceedings and make their own representations with a view to establishing the truth.

In the preliminary stages of the Kenyan cases, victims were given the opportunity to present their views on whether the ICC should take up the cases of post election violence in Kenya. Their contribution resulted in the PTC Judges decision to authorise the Prosecutor to begin investigations into the post-election violence.

At the confirmation of charges hearings, victims were able to share their views with the court through their legal representatives. The victims will have this same opportunity at the trial and at the end of the trial. Victims will also have an additional opportunity to participate in reparation hearings.

What is the role of the legal representatives for the victims?

The legal representatives for victims will attend the hearings on the victims' behalf. They will make opening and closing statements explaining why the victims wish to participate in the proceedings and how their personal interests are affected by the proceedings. The legal representatives will also be able to intervene on matters of fact and law which might affect the interests of their clients.

This voluntary participation of the victims allows them to present opinions independent from the parties (the Prosecution and Defence) and gives them the opportunity to speak about their own concerns and interests. However, the victims' right to participate is exercised under the judges' control and will not undermine in any way the rights of the defence.

What can victims expect at the end of a trial?

At the end of a trial, if a person accused before the ICC is found guilty, ICC judges may decide to order that person to make reparations to victims for the harm they have suffered as a result of the crimes committed. Victims can use ICC victims' participation and reparation standard forms to make their request to the ICC Judges. It is important to note that the judges of the court will decide whether an applicant is entitled to reparation or not after careful review of the application and such a process can take a long time. The types of reparations will also be decided by the judges.

Measures ordered as reparations can be individual or collective. They may include monetary compensation, the return of property, and symbolic measures such as public apology or commemoration or memorial. To complement the court's work on reparation, an independent Trust Fund for Victims was established. The ICC judges may ask the Trust Fund to carry out its orders of reparations against a convicted person.

The International Criminal Court and Kenya

In addition, the Fund can use the contributions it receives to finance projects for the benefit of victims.

What form of reparations can victims expect if the suspects are found guilty?

Victims have the right to participate in proceedings related to reparations. It is likely that many of the reparations awarded to victims of crimes under ICC investigation will be collective, some might also be symbolic. However, it is important to bear in mind that reparations will only be given out once the accused is found guilty of the charges laid against him/her. The forms of reparation will be determined by the judges. Since no case has been concluded at the ICC, it is difficult to make clear predictions on the outcome of reparations proceedings.

How do victims apply for participation in the ICC cases?

In order to participate in the ICC proceedings, victims have to apply in writing through the prescribed application forms, as developed by the Victims Participation and Reparations Section (VPRS) of the ICC. Once an application form has been completed, the form may be sent to the VPRS who then submit it to the judges dealing with the case. Once the application is submitted, the judges of the ICC will examine each application and decide whether the applicant is entitled to participate in ICC proceedings.

In order to make their decision, the ICC judges will check whether an applicant is a genuine victim. The judges ascertain whether the applicant is a victim of a situation or a case by considering whether that person suffered the requisite harm. Under the Statute, victims are defined as individuals who have suffered harm as a result of a crime falling within the jurisdiction of the court. Such harm includes physical, psychological or material harm. The harm has to have resulted from the commission of at least one of the crimes the ICC has jurisdiction over. Lastly, there has to be a clear causal link between the alleged crime and the harm suffered. This means that it must be clear that the harm was caused by the crime in question.

What criteria do the ICC judges use to decide whether a victim can participate in proceedings?

ICC judges use the following criteria to determine whether a victim can participate at a particular stage in ICC proceedings:

- Is the person a victim of the situation or case that is being dealt with by the Chamber?
- Are the victim's personal interests affected at that point in the proceedings?

- Is it appropriate for the victim to present his or her views and concerns at that particular point in the proceedings?

What happens once an applicant has been declared a victim?

When filling out the victims participation form, applicants are asked to specify in their application at which stage or stages of proceedings they would like to participate. The judges of the court will then decide at what stage(s) the applicant is entitled to participate in proceedings and assign them a the legal representative. Starting from the preliminary examination stage, the information provided by the applicant in the application form will help the judges to make their decision.

What can Kenyans do if the Pre-Trial Chamber does not confirm any of the charges?

If no charges are confirmed, the Prosecutor still has an opportunity to conduct further investigations into the crimes committed during the 2007/2008 post-election violence and bring these cases to the ICC. It is worth noting that The ICC is not a substitute for national courts. According to the Rome Statute, it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.

In addition the Prosecutor only pursues those who are considered to hold the greatest responsibility for the crimes that were committed. Thus middle and lower level perpetrators of violence are not targeted by the ICC. To date there are hundreds of victims who are unable to obtain redress for the crimes committed against them.

It is therefore still very important for the Kenyan government to establish a local mechanism to prosecute the post-election crimes in order to bridge the gap in accountability as it relates to other perpetrators of violence.

Conclusion

Following the confirmation of charges hearings, it remains undisputed that Kenyans suffered heinous violations during the post election crisis and that individuals planned and committed these acts. While there have been spirited efforts by the Government of Kenya challenging admissibility of the cases before the ICC and demanding that they be referred back to Kenya, there has been no credible action showing that the government is serious about pursuing the main perpetrators of post-election violence. Nor has there been action to secure accountability for middle and lower-level culprits. The government must therefore establish a credible local mechanism to exact accountability for these crimes."



KENYANS FOR PEACE WITH TRUTH & JUSTICE, (KPTJ) a coalition of citizens and organizations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 presidential election and the violence that followed it. Members include: Africa Centre for Open Governance (AfriCOG), Bunge la Mwananchi, Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle-the Children's Foundation, Constitution and Reform Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay And Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

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