

Kenya: Trial of William Samoei Ruto and Joseph arap Sang at the International Criminal Court

SEPTEMBER 2013

ON SEPTEMBER 10, 2013, the trial of William Samoei Ruto and Joseph arap Sang is set to begin in The Hague. They are charged with crimes against humanity for their alleged involvement in Kenya's post-election violence of 2007-2008. This paper summarizes the relevant historical and legal background of the trial. For more details see our trial monitoring site, www.icckkenya.org.



The Defendants

William Samoei Ruto, the Deputy President of Kenya, is a former Member of Parliament from Eldoret North (Rift Valley) and former Minister of Higher Education, Science and Technology. He was suspended from public office in 2010 due to allegations of corruption, but was acquitted of all charges in April 2011. In the March 2013 general elections, Ruto ran for his current position as the running mate of Uhuru Kenyatta, who is also an ICC defendant in a second case, in the successful Jubilee coalition ticket (made of several independent parties). He was sworn in as Deputy President of Kenya on April 9, 2013.

Joshua arap Sang is a former radio personality and head of operations at Kass FM in Nairobi. He resigned his position in 2012. Sang had planned to run for the Kenyan senate seat in Trans Nzoia (Rift Valley) in the 2013 general elections but dropped the bid to focus on his upcoming ICC trial.

The Charges

Ruto is charged 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 prosecution alleges that 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 incumbent Party of National Unity (PNU) as part of a plan to gain power in the Rift Valley province and to punish and drive out PNU supporters.

Sang is charged with contributing to the crimes against humanity of murder, forcible transfer, and persecution by helping to coordinate the attacks planned by Ruto through coded messages in his radio broadcasts.

Background on the Post-Election Violence

The post-election violence in Kenya from December 2007 to February 2008 echoed the outbreaks of violence that have followed national elections since the multi-party system was established in the country in 1991. In 2007-2008, the violence was ignited by allegations of election fraud. The main opposition party, the Orange Democratic

Movement (ODM), had been successful in the parliamentary vote, and its presidential candidate Raila Odinga was showing a lead of a million votes towards the end of the vote count. However, the last few hours of vote counting resulted in an apparent victory for the incumbent President Mwai Kibaki of the PNU. Violence took place in many regions of Kenya and, as yet, few perpetrators have been held to account through domestic courts.

The ICC prosecutor alleges that the post-election violence was coordinated and intentionally targeted civilians. She argues that initially ODM opposition supporters were mobilized to attack ethnic Kikuyu and others perceived to have voted for President Kibaki of the PNU. It is further alleged that retaliation organized by Uhuru Kenyatta, who was then a member of PNU, was then targeted at people of Kalenjin, Luo, and Luhya ethnicity, who were perceived as affiliated with the ODM opposition party. There are also allegations of police violence at this time. In the period from the December 27 election to February 28, 2008 (when a power-sharing deal was struck between the two main parties), it is reported that between 1,133 and 1,220 people were killed, 3,561 were injured, and approximately 350,000 were displaced. An increased number of rapes and acts of sexual violence also took place during this time.

Jurisdiction

Kenya ratified the Rome Statute, the founding treaty of the ICC, on March 15, 2005. This allowed the court jurisdiction over war crimes, crimes against humanity, and genocide committed by Kenyan nationals or on Kenyan territory after June 1, 2005—the date that the Rome Statute entered into force in the country. However, the ICC only has jurisdiction in cases where the government proves unwilling or unable to investigate and prosecute those crimes.

The Government of Kenya established an international Commission of Inquiry on Post-Election Violence (CIPEV) in February 2008, which became known as the Waki Commission after the Kenyan Court of Appeals Judge Philip Waki, who chaired the body. The Waki Commission published a report recommending that the government establish a special tribunal of national and international judges to investigate and prosecute perpetrators of the post-election violence. However, it was made clear that if the tribunal were not set up within a certain period, information collected by the Waki Commission would be passed to the ICC, including a sealed envelope of names of those suspected to be most responsible for the violence. In February 2009, the Kenyan parliament voted against a bill to establish the special tribunal, and the government took no further action. Therefore, in July 2009, the ICC prosecutor was sent extensive documentation compiled by the Waki Commission.

On November 26, 2009, following analysis of this documentation, the prosecutor requested authorization from the court to open an investigation into crimes against humanity allegedly committed in relation the post-election violence in Kenya. This was

the first time that the prosecutor had invoked the *proprio motu* powers granted to him under Article 15(3) of the Rome Statute (i.e. the right to initiate an investigation at his own instigation, without a referral from the State Party or the UN Security Council). The the pre-trial chamber authorized the request by majority decision on March 31, 2010.

In March 2011, Kenya submitted an admissibility challenge, declaring its intention to try Ruto, Sang, and their co-accused at the time, Henry Kiprono Kosgey, for the same crimes in national courts. ICC judges denied the challenge.

African Union Resolution

At the close of the Heads of State and Government summit in Addis Ababa, Ethiopia on May 27, 2013, the African Union issued a resolution calling for the ICC to halt its proceedings against Ruto and Sang, as well as in the case against Uhuru Kenyatta, in order to allow Kenya to try the suspects in its national court system. In his announcement of the resolution, AU Chairman and Ethiopian Prime Minister Hailemariam Desalegn accused the ICC of “race hunting,” and saying that the ICC has unfairly targeted Africans. Chairperson of the AU Commission Nkosazana Dlamini-Zuma said that "Now that Kenya has reformed its court... things should be left to the court."

The ICC [responded](#), saying that “the majority of the Court’s current investigations were initiated following referrals or requests from the African States” themselves. The AU resolution has no legal impact on the proceedings at the ICC.

Possible Withdrawal from the ICC

On September 5, 2013, during an emergency debate, members of Kenya’s parliament voted in favor of a motion to introduce a bill that would effectuate Kenya’s withdrawal from the Rome Statute, the treaty that established the ICC. It is expected that the bill will be introduced within 30 days of this vote.

The motion and any potential legislation will not impact the Ruto and Sang trial or the Kenyatta trial, which is scheduled to begin this November. According to the Rome Statute, a withdrawal does not take effect until one year after a state party provides written notification to the Secretary-General of the United Nations.

The Prosecution

During the confirmation of charges hearing, the prosecution detailed the “widespread and systematic” attacks against the civilian population in the Rift Valley, including the burning and looting of homes, the hacking to death of adults and babies alike, the use of bows and arrows to prevent the escape of fleeing citizens, and the intentional burning

alive of two hundred individuals—mostly women and children—who had sought refuge inside an area church.

The fact that perpetrators were systematically transported into target areas, that they established numerous roadblocks barring the escape of residents, and that they regularly utilized fuel to burn homes and businesses allegedly demonstrated that the violence had been organized in advance and directed by leadership.

The evidence submitted by the prosecution allegedly establishes that Ruto created a network, organized a series of planning meetings and then implemented the violence in the Rift Valley Province of Kenya. Sang allegedly contributed to the crimes through coded messages on his broadcasts on Nairobi-based KASS FM radio.

The Defense

Ruto

During the confirmation of charges hearings, the defense argued that there is no proof of Ruto's individual criminal responsibility, and that the evidence put forth by the prosecution is flawed and unreliable. The defense will likely argue in trial that, following the contested election in 2007:

- The Prosecution's investigation was insufficient, and their case relies largely on third-party reports and the testimony of four anonymous witnesses, for which there is no independent verification;
- The Prosecution failed to investigate possible exculpatory evidence, such as available testimony from witnesses who said they were coached to falsely implicate Ruto;
- The network over which Ruto allegedly presided remains undefined, with little evidence of its hierarchal structure that would establish the chain of command from Ruto to the perpetrators; and
- There are no "substantial grounds to believe" that Ruto planned or otherwise made an "essential contribution" to the violence.

Sang

As with Ruto, Sang's defense team will likely argue that the Prosecution's witnesses are unreliable (and themselves criminals), and that there is no evidence of individual criminal liability:

- The Prosecution has not procured any of the incriminating broadcasts allegedly made by Sang;
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- There is no evidence of the meetings where Sang allegedly participated in inciting violence and distributing money and weapons actually took place. Regardless, the Defense has presented evidence that Sang and his co-accused were elsewhere at the times of the planning meetings; and
- The case relies on third-party reports, including from the UN and Human Rights Watch, and not from the Prosecution's own investigation.

Witness Interference

In the lead up to the trial, there have been numerous reports in local media about the intimidation of Prosecution witnesses. The Office of the Prosecutor said that the level of witness interference in the Kenya cases has been “[unprecedented](#)” and in an [April 5th public statement](#) the Prosecutor stated that “[w]itness protection remains one of our highest priorities.” Public court filings have also noted that security concerns have prevented witnesses from guaranteeing that they will be able to testify at trial. Ruto's lawyer has [denied interfering with witnesses](#).

Trial Procedure

When it proceeds to trial, the prosecution will first call witnesses to testify against Ruto and Sang, and the defense will have the opportunity for cross-examination. The prosecution has indicated that they will call 42 witnesses. After that, Ruto and Sang's lawyers will present their defense. After both sides present closing statements, the judges will then adjourn to weigh the evidence presented before delivering a final judgment.

As in previous trials at the ICC, it is possible that some victims may apply to present their views and concerns in person at some stage during the trial. As of the Confirmation of Charges stage, 327 victims have been approved to participate in the proceedings. Throughout the trial, however, the victims who have been accepted as participants will be represented by lawyers in the courtroom. If the judges find Ruto and/or Sang guilty, the court can sentence them to a length of time in prison and/or order property taken in order to pay reparations to victims. Ruto and Sang will not receive the death penalty if found guilty, as that is prohibited under ICC rules. If they are found not guilty, they will go free and will retain the presumption of innocence.

Ruto's Partial Excusal from Trial

On June 18, 2013, in an unprecedented move, the Trial Chamber [conditionally granted](#) Ruto's request to be excused from being continuously physically present at the Court in order to accommodate his position as Deputy Head of State. He is still required to be present for the opening and closing statements of all parties and participants, and during any in-person victim participation. The majority made clear that its decision is not to be a precedent for future cases at the ICC because it reached its conclusions based on the particular circumstances of the Kenya case.

One judge issued a [dissenting opinion](#), arguing that the Rome Statute requires the presence of the accused during the trial. The OTP is appealing the decision, and until the Appeal Chamber makes a final ruling, Ruto must attend all hearings in The Hague.

Why This Case is Important

In Kenya, accountability for international crimes committed during the post-election violence of 2007-08 remains important to survivors and their communities. To date, there have been minimal attempts at accountability for those responsible for orchestrating or committing abuses that resulted in the deaths of over 1,000 people and the displacement of hundreds of thousands.

Upon Kenyatta and Ruto's election in March 2013, Kenya became the second country to have a sitting president indicted by the ICC (the first being Sudan under President al-Bashir). It will be the first time a sitting elected leader will be tried by the ICC. A former vice president, [Jean-Pierre Bemba](#) of the Democratic Republic of the Congo, has been on trial since November 2010, and a former president, Laurent Gbagbo of Cote d'Ivoire, recently appeared for a confirmation of charges hearing.

According to the ICC, the fact of Ruto's position has no bearing on its jurisdiction. Article 27 of the Rome Statute says that "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute," and that "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

Related Cases

On March 8, 2011, the ICC issued summonses to appear for six Kenyans allegedly involved in orchestrating the post-election violence. Three individuals were members of the PNU: Kenyatta, Francis Muthaura, and Muhammed Hussein Ali. Summons to appear were also issued to three ODM members: William Samoei Ruto, Joshua arap Sang, and Henry Kiprono Kosgey.

The ICC pre-trial chamber did not confirm the charges against Kosgey and Ali because the prosecution's evidence failed to reach the evidentiary threshold required under the Rome Statute. In March 2013, the prosecution also dropped all charges against Muthaura, a former Kenyan civil servant, after a key witness recanted evidence.

Uhuru Kenyatta

Kenyatta, the current president of Kenya, is charged for his alleged indirect co-perpetration (having committed crimes through another person) of crimes against humanity during the post-election violence. The charges include murder, deportation or forcible transfer, rape, persecution, and other inhumane acts. During the period of post-election violence, he was a senior member of the PNU, allegedly presiding over the widespread persecution of members of the main opposition party. His trial is expected to start at the ICC in The Hague on November 12, 2013.

Francis Kirimi Muthaura

Muthaura was charged alongside Kenyatta for his alleged role in organizing the retaliatory campaign against ODM supporters. On March 11, 2013 the Office of the Prosecutor [announced](#) it was dropping all charges against Muthaura, saying it now had insufficient evidence to have a reasonable hope of a conviction. It cited in particular the loss of a key witness who had recanted testimony and claimed to have received bribes from defendants in the case, the deaths of other potential witnesses since 2007/8, and a lack of cooperation from the Kenyan government in gathering testimony. The prosecutor made it clear that the decision "applies only to Mr. Muthaura's case. It does not apply to any other case."

Henry Kiprono Kosgey

Kosgey is the current Chairman of the ODM, summoned alongside Ruto and Sang. During the post-election violence, he was a national legislator representing the volatile Rift Valley. The ICC prosecutor alleged that he was a "principal planner and organiser of crimes against PNU supporters." On January 23, 2013, it was announced that the charges were not confirmed, as the prosecution's evidence failed to reach the evidentiary threshold required under the Rome Statute.

Mohammed Hussein Ali

At the time of the post-election violence, Ali was the head of the Kenyan police, alleged by the prosecution to have authorized the use of excessive force against OMD supporters. On January 23, 2013, the ICC judges ruled that there was insufficient evidence to proceed to trial, and all charges were dropped.

National Prosecutions

In addition to the proceedings before the ICC, two constitutional reference cases are underway in Kenya's domestic court system. The first, *Coalition on Violence Against Women and Others v. the Attorney-General of Kenya and Others*, targets six Kenyan government officials for allegedly failing to investigate and prosecute the perpetrators of sexual violence during the post-election violence. It was filed February 20, 2013 in the Nairobi High Court by four Kenyan NGOs and eight victims of sexual and gender violence. More information on the case can be found [here](#).

The second constitutional reference case arising from the post-election violence deals with allegations of police shootings. In a petition filed in the High Court of Kenya, in the Constitutional and Human Rights Division, four Kenyan NGOs and 15 individuals are seeking to compel the Government of Kenya to address the police shootings that were part of the 2007/2008 post-election violence. The petitioners claim that the government failed to prevent the violence, on the one hand, and to investigate and prosecute the police perpetrators, on the other. Ultimately, the petitioners want the government to publicly acknowledge and apologize to the victims for their failure to protect the rights of Kenyans; to provide appropriate compensation to the victims; to investigate the shootings and prosecute those who are responsible; and to establish a special international team within the Department of Public Prosecutions to ensure that investigations and prosecutions are credible and independent. More information on the case can be found [here](#).

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.

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.

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

September 8, 2011 - Confirmation of charges hearing concluded for the first three defendants.

September 21, 2011 - Confirmation of charges hearing began for the second three defendants (Muthaura, Kenyatta, and Ali).

October 5, 2011 - Confirmation of charges hearing concluded for the second three defendants.

January 23, 2012 - Pre-Trial Chamber II confirms charges against Ruto, Sang, Muthaura, and Kenyatta. Charges against Ali and Kosgey are rejected.

January 26, 2012 - Uhuru Kenyatta resigns as Finance Minister, and Francis Muthaura resigns as Head of Civil Service. Kenyatta keeps his post as Deputy Prime Minister.

December 4, 2012 - Kenyatta and William Ruto, who formerly belonged to a competing political party, form an alliance in advance of the March 2013 presidential election. Kenyatta runs as the presidential candidate with Ruto as his running mate.

March 4, 2013 - The presidential election is held in Kenya.

March 11, 2013 - The Office of the Prosecutor drops all charges against Francis Muthaura after a key witness recanted his statements linking Muthaura to planning the 2007-2008 post-election violence.

March 30, 2013 - After receiving legal challenges to the poll results, the Supreme Court of Kenya validates the election of Kenyatta and Ruto as president and deputy president, respectively.

April 9, 2013 - Kenyatta and Ruto officially take office.

September 10, 2013 - The trial for Ruto and Sang will begin. The trial was initially scheduled to start April 10, 2013, and then on May 28, 2013, but was delayed after a defense request to postpone was granted in order to give them more time to prepare.

November 12, 2013 - The trial for Kenyatta is scheduled to begin. The trial was initially scheduled to start April 11, 2013 but was delayed after the trial chamber ordered a postponement to consider defense requests to refer issues back to the pre-trial chamber. After being rescheduled for July 9, 2013, it was again delayed in order to give the defense sufficient time to prepare.

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