



Kenya: Pre-Trial Hearing in Second ICC Case

Questions and Answers

September 2011

On September 21, 2011, a “confirmation of charges” hearing will begin before an International Criminal Court (ICC) pre-trial chamber in The Hague. It will determine whether the second case in the Kenya situation at the ICC should be sent to trial.

In this case, the ICC prosecutor has accused three people – Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammad Hussein Ali – of crimes against humanity committed during Kenya’s 2007-2008 post-election violence. A confirmation of charges hearing in the first Kenya case – that of William Samoei Ruto, Henry Kiprono Kosgey, and Joshua arap Sang on charges also related to the post-election violence – was held between September 1 and 8.

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 more than 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 hearing in the second case and other current developments in the cases. For additional information about the Kenya cases, please see [“Kenya: Q&A on Pre-Trial Hearing in First](#)

[ICC Case](#)” (August 2011); [“ICC: First Appearance of Kenya Suspects”](#) (April 2011), and [“Kenya: Q&A on Kenya and the International Criminal Court”](#) (January 2011).

1. What is this case about? What crimes is the prosecutor alleging that Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammad Hussein Ali committed?

Muthaura, Kenyatta, and Ali are accused of committing the crimes against humanity of murder, deportation or forcible transfer, rape and other forms of sexual violence, other inhumane acts, and persecution by their involvement in a plan to attack perceived supporters of the Orange Democratic Movement (ODM), the then-opposition party. The policy behind the plan, alleges the prosecutor, was to keep President Mwai Kibaki’s Party of National Unity (PNU) in power. The other Kenya case concerns crimes allegedly committed by those affiliated with the ODM against perceived PNU supporters.

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.

The prosecutor alleges that in response to attacks against perceived PNU supporters in the Rift Valley, Muthaura and Kenyatta devised the plan and held several preparatory meetings. The plan had two components.

First, Muthaura and Kenyatta enlisted the Mungiki, a criminal gang, to carry out retaliatory attacks against perceived ODM supporters in and around Nakuru and Naivasha towns during the last week of January 2008. During these attacks, the prosecutor alleges that Mungiki and other pro-PNU youth—some transported to the Rift Valley from other parts of Kenya—killed, raped, and injured (including through forced circumcision and penile amputation) perceived ODM supporters. They also allegedly looted and destroyed properties and displaced thousands of people .

Second, Muthaura and Ali ensured that the Kenya police did not intervene to stop the attacks or to punish those who carried them out. As evidence of the plan’s existence, the prosecutor alleges that under Ali’s leadership the Kenya police later killed Mungiki leaders who had been involved in planning meetings, although these killings do not form the basis for charges before the ICC.

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

The charges of rape and other sexual violence now sought by the prosecutor differ from those listed in the summonses issued by the pre-trial chamber in March. At that time, the pre-trial chamber did not find, as the prosecution had requested, reasonable grounds to believe that rape had been committed in Naivasha. (“Reasonable grounds to believe” is the standard applicable to the issuance of a summons.) It also found that forced circumcision was more properly characterized as an “other inhumane act,” rather than as an act of sexual violence. The prosecution has now sought to reintroduce its original charges for rape in Naivasha and to characterize forced circumcision as sexual violence. In response to defense challenges, the pre-trial chamber clarified that under the Rome Statute, the prosecutor may seek different or additional charges to those in the summonses, provided there is sufficient evidence to support the charges.

2. Didn't the prosecutor also originally seek charges against these individuals for crimes in Kibera and Kisumu? What happened to these allegations?

In its December 2010 request for summonses, the prosecutor had sought counts against Muthaura, Kenyatta, and Ali 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.

The pre-trial chamber did not find reasonable grounds to support these charges. 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, and considered them separately. 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 later clarified that it had found the latter decisive.

The prosecutor has not sought to reintroduce these charges at this stage of the proceedings. As a result the case does not encompass police use of excessive force,

although, as discussed above, the prosecutor does allege a deliberate police failure to intervene to stop attacks and to punish those responsible.

A significant number of killings during the 2007-2008 post-election violence are alleged to have been committed by the police. According to the Commission of Inquiry into the Post-Election Violence (also known as the Waki Commission after its chair, Justice Philip Waki), the police killed 405 out of a total of 1,133 persons killed during the violence and injured an additional 557.

Given the high number of victims of police shootings, Human Rights Watch urges the Office of the Prosecutor to continue its investigations of police violence, and, evidence permitting, to reintroduce relevant charges. This is no easy task. The pre-trial chamber's decision on the summonses showed the difficulty of linking individual acts of excessive force to policy and attributing responsibility. But if the prosecutor ultimately concludes that there is insufficient evidence to charge the police's excessive use of force as crimes against humanity, the prosecutor should nonetheless state clearly that the Kenyan authorities have a responsibility to investigate allegations of unlawful police killings and bring to account those responsible in national proceedings.

3. 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 Muthaura, Kenyatta, or Ali, 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.

4. How long is the hearing expected to last?

The pre-trial chamber has indicated that the hearing will begin on September 21 and will end no later than October 5.

5. 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. Muthaura and Ali have indicated that they each intend to call two witnesses. Kenyatta will take the stand to testify on his own behalf, and will also call one witness. 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.

6. 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 233 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. In the first case against Ruto, Kosgey, and Sang, the court accepted 327 people to participate in the confirmation of charges hearing, and appointed a single, common legal representative to represent them.

7. 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.

8. 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 according to article 19(4), in exceptional circumstances, the court can grant leave for a second challenge to be brought.

9. 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, it lacks funding, and it 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.

10. Could Muthaura, Kenyatta, and Ali still challenge the admissibility of the case?

Yes. The defendants themselves may still seek to challenge the admissibility of the cases. Under ordinary circumstances, they may do so only once up to or at the commencement of trial. Kenyatta and Ali have both indicated that they intend to make admissibility challenges.

In addition, the defendants may also challenge the jurisdiction of the court. This means they can argue that the case should not be heard by the ICC because it falls outside the time period or geographic area within the court's reach, or because it does not relate to any crimes or persons that can come before the court. All three defendants have indicated they will make jurisdictional challenges.

The defendants in the other Kenya case—Ruto, Kosgey, and Sang—made jurisdictional challenges in advance of their confirmation of charges hearing. A key argument they advanced is that the ICC does not have jurisdiction over Kenya's post-election violence because even if serious crimes were committed, these crimes were not crimes against humanity. Under the Rome Statute, crimes against humanity are any of a number of acts (like murder, torture, or rape) committed as part of a widespread or systematic attack on a civilian population, pursuant to a state or organizational policy.

11. 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. ICC states parties should ensure the court has sufficient resources to carry out these essential outreach and communication activities.

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.