



30 January 2012 #113 ICC Weekly Update



Situation in Kenya

On 31 March 2010, Pre-Trial Chamber II granted the Prosecutor's request to open an investigation proprio motu in the situation in Kenya, State Party since 2005. Following summonses to appear issued on 8 March 2011, six Kenyan citizens voluntarily appeared before Pre-Trial Chamber II on 7 and 8 April 2011. The confirmation of charges hearing in the case *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* took place from 1 to 9 September 2011. The confirmation of charges hearing in the case *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* took place from 21 September to 5 October 2011. On 23 January 2012, the Judges declined to confirm the charges against Mr Kosgey and Mr Ali. Pre-Trial Chamber II confirmed the charges against Mr Ruto, Mr Sang, Mr Muthaura and Mr Kenyatta and committed them to trial.

Summary of decision in the two Kenya cases

Court Officer, please, call the two cases in the Kenya situation.

Thank you, Court Officer.

Good morning, to everyone who is joining us from in and around the Court and also to those joining us from the Republic of Kenya via the internet or otherwise.

Pre-Trial Chamber II of the International Criminal Court composed of Judges Hans-Peter Kaul to my right, Cuno Tarfusser to my left and I – Ekaterina Trendafilova – the Presiding Judge of this Chamber, has decided to appear in Court this morning in order to present an oral summary of its decisions concerning the charges of the Prosecutor against:

- William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang in Case 1 and
- Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali in Case 2.

Before presenting a summary of the Chamber's findings, I would like to clarify that this is not a hearing or a Court session. The Prosecutor and the Defence teams are not present, the Legal Representatives of victims are also not in attendance, the Registrar and her colleagues are not here, and the Chamber's legal officers are also absent from the courtroom.

Rather, the Chamber is alive to its role in ensuring that both the public at large and interested Kenyans, are duly informed of the Chamber's decisions regarding charges emanating from the violence, which engulfed the Republic of Kenya, after the announcement, on 30 December 2007, of the results of the presidential elections.

In Case 1, the Prosecutor presented 6 counts charging the 3 Suspects with crimes against humanity of murder, deportation or forcible transfer of population and persecution.

In Case 2, the Prosecutor presented 10 counts charging the other 3 Suspects with crimes against humanity of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts and persecution.

The Chamber is mindful of concerns regarding the precarious security situation in parts of the country. It is also attentive of its responsibility to maintain stability in Kenya, and to fulfill its duty vis-à-vis the protection of victims and witnesses.

Thus, the Chamber considered it necessary to issue the two decisions on the charges of the Prosecutor on the same day and did so today before this appearance. The parties and participants were notified accordingly of the decisions.

Now I will turn to the decisions of the Chamber issued today.

After having thoroughly examined and analyzed individually and collectively all the evidence presented, the Chamber, by majority, decided to confirm the charges against four of the six suspects, as will be explained later in more detail.

Judge Kaul appended a dissenting opinion in both cases. He maintains that the ICC is not competent because the crimes committed on the territory of the Republic of Kenya during the post-election violence of 2007-2008 in his view were serious common crimes under Kenyan criminal law, but not crimes against humanity as codified in Article 7 of the Rome Statute.

Before turning to the task at hand, namely the summary of the Chamber's decisions, I would like to briefly recall some of the important procedural developments of the two cases. This will give a better idea of the work of the Court, of the parties and participants in the cases.

Since 8 March 2011, when the Chamber issued its decisions on the summonses to appear, in the two cases, the Chamber has been continuously seized with a multitude of issues. Throughout the proceedings, the Chamber placed at the centre of its activities its duty to ensure the fair, expeditious and independent conduct of the entire process. The Chamber also gave substantial consideration to the protection of victims and witnesses and the various rights of the defence.

On 7 and 8 April 2011, in Case 1 and Case 2, respectively, the initial appearance hearings took place, during which the Chamber set the dates of the confirmation of charges hearing.

This stage was followed by a series of judicial activities. In particular, the Chamber facilitated the participation of victims by issuing a number of decisions in this regard.

In the first case, the Chamber received 394 victims applications for participation, amounting to 4,246 pages and admitted 327 victims as participants in the proceedings.

In the second case, we received 249 applications for participation with the total of 2,864 pages and admitted 233 victims to participate.

Moreover, for the purposes of ensuring the security of the victims and witnesses, the Chamber also took decisions on the Prosecutor's proposals for redactions, which amounted to around 12,000 pages.

Apart from that, the Chamber also issued two decisions on the Government of Kenya's challenges to the admissibility of the cases, in which it ultimately found the cases to be admissible. The Chamber's decisions were upheld on appeal.

Furthermore, in readiness of the confirmation of charges hearings, the Chamber issued a number of decisions organizing and facilitating the disclosure of evidence between the Prosecutor and Defence. Together, the six Defence teams and the Prosecutor in both cases disclosed approximately 30,000 pages of evidence, for the purpose of the Chambers' determination on the charges presented.

On 1 September 2011, the confirmation of charges hearing in Case 1 commenced, as decided during the initial appearance, and lasted for 7 days.

Similarly, as determined during the initial appearance of the Suspects in the second case, the confirmation of charges hearing in Case 2 started on 21 September 2011, lasting for 12 days.

Thus, since the start of the cases, the Chamber has received 4,905 filings, including their annexes, from the Prosecutor, the Defence teams, Victims representatives, amici curiae and the Registry. Including today's decisions, the Chamber has issued 252 decisions, in both cases.

This concludes the procedural background of the two cases to date.

At this point and on behalf of the Chamber, I must explain that we are not passing judgment on the guilt or innocence of the individuals. The Chamber is tasked by law only to evaluate the strength of the Prosecutor's case at this pre-trial stage - that is to determine whether the Prosecutor presented enough evidence before the Chamber to confirm the charges. The standard required by the law, is that there are "substantial grounds to believe" that the crimes charged were committed, and that the Suspects were responsible for them.

Summary of Decision in Case 1

I will now turn to the merits of Case 1, the *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*. It concerns crimes committed in Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills from on or about 30 December 2007 until the end of January 2008. I would like to underline the following:

As mentioned at the start, the Prosecutor charged Mr. Ruto, Mr. Kosgey and Mr. Sang, for crimes against humanity of murder, deportation or forcible transfer and persecution.

Mr. Ruto and Mr. Kosgey were charged as indirect co-perpetrators, while Mr. Sang was charged as having contributed to the said crimes against humanity.

I will first summarise the findings of the Chamber on the crimes, and then the findings as to the criminal responsibility.

With respect to the crimes charged and based on the evidence placed before it, the Chamber found that the Prosecutor has established substantial grounds to believe that the crimes against humanity of murder, deportation or forcible transfer and persecution were committed. These crimes resulted in the death of hundreds, and the displacement of thousands of civilians from Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills.

The Chamber also found that these crimes were committed as part of an attack directed against particular groups, namely, Kikuyu, Kamba and Kisii, due to their perceived political affiliation to the Party of National Unity.

As to the criminal responsibility of Mr. Ruto and Mr. Sang, the Chamber found, on the basis of the evidence presented, that they are responsible for the charges levied against them.

In particular, Pre-Trial Chamber II confirmed the charges against Mr. Ruto as an indirect co-perpetrator with others, pursuant to article 25(3)(a) of the Rome Statute, while it found that Mr. Sang contributed to the commission of said crimes against humanity, pursuant to article 25(3)(d)(i), to the extent specified in the written decision.

However, in relation to Mr. Kosgey, the Chamber found that the Prosecutor's evidence failed to satisfy the evidentiary threshold required. The Chamber was not persuaded by the evidence presented by the Prosecutor of Mr. Kosgey's alleged role within the organization.

In particular, the Prosecutor relied on one anonymous and insufficiently corroborated witness. Moreover, the Chamber determined that Mr. Kosgey suffered prejudice due to the redaction of certain dates related to a number of meetings that he allegedly attended, which proved to be essential for his defence and for the finding on his criminal responsibility.

In light of these facts and the entire body of evidence relating to Mr. Kosgey's criminal responsibility, the Chamber declined to confirm the charges against Mr. Kosgey.

Summary of Decision in Case 2

Turning now to Case 2, the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.

As mentioned earlier, the Prosecutor charged Mr. Muthaura, Mr. Kenyatta and Mr. Ali with crimes against humanity of murder, deportation or forcible transfer, rape and other forms of sexual violence, other inhumane acts and persecution.

Mr. Muthaura and Mr. Kenyatta were charged as indirect co-perpetrators, while Mr. Ali was charged as having contributed to the said alleged crimes against humanity.

As to the crimes, the Chamber found, on the basis of a thorough review of the evidence individually and collectively, substantial grounds to believe that between 24 and 28 January 2008 there was an attack against the civilian residents of Nakuru and Naivasha perceived as supporters of the Orange Democratic Movement, in particular those belonging to the Luo, Luhya and Kalenjin ethnic groups.

The Chamber also found that the attack resulted in a large number of killings, displacement of thousands of people, rape, severe physical injuries and mental suffering.

Thus, the evidence established substantial grounds to believe that the crimes of murder, deportation or forcible transfer, rape, other inhumane acts and persecution were committed.

With respect to the criminal responsibility of Mr. Muthaura and Mr. Kenyatta, the Chamber was satisfied that the evidence also established substantial grounds to believe that they are criminally responsible for the alleged crimes, as indirect co-perpetrators, pursuant to article 25(3)(a) of the Rome Statute, having gained control over the Mungiki and directed them to commit the crimes.

However, in relation to Mr. Ali, the Chamber found that the evidence presented does not provide substantial grounds to believe that the Kenya Police participated in the attack in or around Nakuru and Naivasha. Since Mr. Ali was charged with contributing to the crimes through the Kenya Police, the Chamber declined to confirm the charges against him.

The Chamber will now outline the impact of its decisions on: (1) those against whom the charges have been confirmed; (2) on those against whom the charges have not been confirmed (namely, Mr. Kosgey and Mr. Ali); (3) as well as on the victims.

As a result of the decisions issued today, Mr. Ruto, Mr. Sang, Mr. Muthaura and Mr. Kenyatta are committed to trial. They will be tried before a different Chamber for the charges confirmed. To this end, one or more Trial Chambers will be established by the Presidency of the ICC.

In this regard, the Chamber wishes to highlight that victims, who are already represented before this Chamber, may participate in the trial. Other victims will have the right and opportunity to apply to participate during the trial stage. Victims will have also the right to request reparations, should the accused persons be found guilty.

The Chamber wishes to be unequivocal and state that Mr. Ruto, Mr. Sang, Mr. Muthaura and Mr. Kenyatta are merely accused before this Court. The Chamber would like to emphasise, for the purposes of clarity, that the presumption of innocence remains fully intact.

At trial, the Prosecutor will have the burden of proving the guilt of the accused beyond a reasonable doubt, pursuant to article 66 of the Statute. Furthermore, the decisions issued today by this Chamber do not affect the liberty of the accused, which remains undisturbed.

This, however, absolutely depends on the accused's adherence to the conditions contained in the summonses to appear, which continue to remain in full force. At this point, the Chamber recalls its previous warning to the Suspects that their continued liberty is subject to their non-engagement in incitement of violence or hate speech.

As to Mr. Kosgey and Mr. Ali, the Chamber wishes to clarify that they are no longer Suspects before the Court. However, the Chamber recalls article 61(8) of the Rome Statute, according to which the Prosecutor may present additional evidence requesting confirmation of charges against Mr. Kosgey and Mr. Ali.

We have now concluded the summary of the Chamber's decisions in Case 1 and Case 2. At this juncture, the Chamber would like to express a few sentiments.

Today and indeed throughout the proceedings in these cases, we have appeared in our official capacities as Judges of the International Criminal Court. Offices which task us with the sole purpose of achieving justice - justice for all - for victims but equally, justice for those who appeared before the Court. This is not rhetoric but a tangible goal we all genuinely strive for.

In reaching our decisions we have reviewed all the evidence individually and collectively, regardless of its source, firmly guided by the provisions of the Court's statutory documents. In the fulfillment of our judicial mandate, we have looked through impartial and independent lenses, in order to ascertain whether the requisite threshold in article 61 of the Statute, for confirmation of the charges has been reached.

It is our utmost desire that the decisions issued by this Chamber today, bring peace to the people of the Republic of Kenya and prevent any sort of hostility. The decisions are the result of intensive and committed judicial work of the Chamber, conducted impartially, independently and conscientiously in the interests and in the service of justice.

That concludes Pre-Trial Chamber II's appearance this morning. Before we leave the courtroom, on behalf of the Chamber, I would like to thank everyone who has been following this public appearance and especially the people of the Republic of Kenya.

Source: Pre-Trial Chamber II

Statement by the Prosecutor of the International Criminal Court on Kenya ruling

24 January 2012

Yesterday's ruling is critically important in many dimensions. Yesterday's decision is establishing individual responsibility for the post electoral violence but also for a peaceful Kenya.

We appreciate that the judges explained the decision in a public session and that there have been no reports of violence as a result.

Judges confirmed that the first acts of violence in 2007/08 were planned and organised by members of the ODM a year in advance. This generated retaliatory attacks against ODM supporters. The International Criminal Court has identified those who have to face justice. There are substantial grounds to believe they committed the crimes they are charged with but they are still presumed innocent.

Another significance of the ruling is that it defined what crimes against humanity are. It goes back to Nuremberg and makes clear that no country has sovereignty to attack civilians.

Talking about legal definitions, contrary to the Prosecution's allegations, the Chamber finds that acts of forcible circumcision do not constitute other forms of sexual violence but other inhumane acts (since not every act of violence targeted against a body part commonly associated with sexuality is sexual in nature.)

As any other court the ICC is making factual and legal decisions, but ICC intervention is helping Kenya move to a more peaceful future with no costs. In 2008, Kofi Annan helped establish peace in Kenya but what would be the cost of another post election violence in Kenya? More lives lost, more people displaced and not to mention millions in money.

We also appreciate the fact that the accused appeared voluntarily before the court. This goes to show Kenya is managing its transition to a less violent future. President Kibaki yesterday committed to solve the problems of victims of violence still displaced. Victims do not have to wait for a conviction before they receive any help. The government of Kenya has a responsibility to help its citizens. And to protect them. The Office is concerned about allegations of attacks against victims of the crimes.

Let me look to the future now.

We will keep investigating Kosgey and the activities of the police as well as crimes allegedly committed in Kibera and Kisumu. We will not appeal the decision.

Some of the accused have stated that they will appeal the decision. President Kibaki said Kenyan legal teams are studying the ruling. This is a legal right for the accused. The prosecution is preparing for trial but if the judges accept the appeal, this will delay the beginning of the trial. This further delay may be frustrating for victims but this is the legal process and we have to respect it.

It is in the hands of Kenyans themselves to solve the problems in Kenya. Kenya must decide on the candidates for the upcoming election and seize the opportunity to discuss the way forward and invest in the future.

Thank you.

Source: Office of the Prosecutor

Decisions taken between 23 - 27 January 2012

Ruto, Kosgey and Sang case

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute

Issued by Pre-Trial Chamber II on 23 January 2012

Muthaura, Kenyatta and Ali case

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute

Issued by Pre-Trial Chamber II on 23 January 2012

Situation in the Democratic Republic of the Congo

In this situation, four cases have been brought before the relevant Chambers: *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*; and *The Prosecutor v. Callixte Mbarushimana*. The accused Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui are currently in the custody of the ICC. The suspect Bosco Ntaganda remains at large. The trial in the case *The Prosecutor v. Thomas Lubanga Dyilo* started on 26 January 2009. The trial in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* started on 24 November 2009. On 16 December 2011, Pre-Trial Chamber I declined to confirm the charges against Mr Mbarushimana. He was released on 23 December 2011.

ICC judges in case against Katanga and Ngudjolo Chui visit Ituri

From 16 to 20 January 2012, the judges of Trial Chamber II of the International Criminal Court (ICC) visited Ituri, in the east of the Democratic Republic of the Congo. The Chamber, which is trying the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, travelled to Bogoro, Aveba, Zombe and Kambusto, visiting the scenes of the alleged crimes in this case and the home villages of the two accused and of a number of witnesses.

The Chamber decided it was necessary to visit these locations, together with the Prosecutor, the Defence and the Legal Representatives of the victims, in order to make its own findings and verify various witness accounts. This judicial site visit by Judges Bruno Cotte (Presiding Judge), Fatoumata Dembele Diarra (ICC Vice-President) and Christine Van Den Wyngaert also provided a further opportunity to show that, though headquartered in The Hague, the Court is keen to increase its visibility amongst local communities.

Logistical support provided by MONUSCO forces and the services of the Registry of the Court ensured that the visit ran smoothly and was respectful of the communities involved. The Outreach Unit had met with community chiefs and elders prior to the visit in order to explain its judicial nature and context.

Photos from the visit are available [here](#).

Decisions taken between 23 - 27 January 2012

Lubanga Dyilo Case

Order on the Reclassification of Documents

Issued by the Appeals Chamber on 27 January 2012

Order on the applications by victims to participate and for reparations

Issued by Trial Chamber I on 27 January 2012

Katanga and Ngudjolo Chui Case

Décision relative au déplacement de la Chambre en République démocratique du Congo

Issued by Trial Chamber II on 18 November 2011

Décision relative au transport de la Chambre en République démocratique du Congo

Issued by Trial Chamber II on 1 December 2011

Ordonnance déterminant les modalités de présentation des conclusions écrites et orales (norme 54 du Règlement de la Cour)

Issued by Trial Chamber II on 15 December 2011

Mbarushimana Case

Reasons for "Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation" of 20 December 2011

Issued by the Appeals Chamber on 24 January 2012

Situation in the Central African Republic

The situation was referred to the Court by the Government of the Central African Republic in December 2004. The Prosecutor opened an investigation in May 2007. In the only case in this situation, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II confirmed, on 15 June 2009, two charges of crimes against humanity and three charges of war crimes, and committed the accused to trial before Trial Chamber III. The trial started on 22 November 2010.

Decisions taken between 23 - 27 January 2012

Bemba Case

Order on the filing of a response by Mr Jean-Pierre Bemba Gombo and the Prosecutor to "Demande du Représentant légal de victimes, Maître Zarambaud Assingambi à participer à la procédure d'appel suite à l'acte d'appel de la Défense du 9 janvier 2012 et à l'addendum du 10 janvier 2012"

Issued by the Appeals Chamber on 23 January 2012

Decision on court sitting hours for the testimony of Witness 45

Issued by Trial Chamber III on 27 January 2012

Situation in Darfur, Sudan

There are four cases in the situation in Darfur, Sudan: *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*; *The Prosecutor v. Bahar Idriss Abu Garda*; and *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*. Four warrants of arrest have been issued by Pre-Trial Chamber I for Messrs Harun, Kushayb and Al Bashir. The three suspects remain at large. A summons to appear was issued for Mr Abu Garda who appeared voluntarily before the Chamber on 18 May 2009. After the hearing of confirmation of charges, on February 2010, Pre-Trial Chamber I declined to confirm the charges. Mr Abu Garda is not in the custody of the ICC. Two other summonses to appear were issued against Mr Banda and Mr Jerbo who appeared voluntarily on 17 June 2010; the confirmation of charges hearing took place on 8 December 2010. On 7 March 2011, Pre-Trial Chamber I unanimously decided to confirm the charges of war crimes brought by the ICC's Prosecutor against Mr Banda and Mr Jerbo, and committed them to trial. On 16 March 2011, the ICC Presidency constituted Trial Chamber IV and referred the case to it.

Decisions taken between 23 - 27 January 2012

Decision requesting supporting materials for the "Prosecutor's Application under Article 58"

Issued by Pre-Trial Chamber I on 27 January 2012

Situation in Libya

On 26 February 2011, the United Nations Security Council decided unanimously to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the ICC Prosecutor. On 3 March 2011, the ICC Prosecutor announced his decision to open an investigation in the situation in Libya, which was assigned by the Presidency to Pre-Trial Chamber I. On 27 June 2011, Pre-Trial Chamber I issued three warrants of arrest respectively for *Muammar Mohammed Abu Minyar Gaddafi*, *Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi* for crimes against humanity (murder and persecution) allegedly committed across Libya from 15 until at least 28 February 2011, through the State apparatus and Security Forces. On 22 November 2011, Pre-Trial Chamber I formally terminated the case against Muammar Gaddafi due to his death.

Decisions taken between 23 - 27 January 2012

Decision on Victim's Participation in Proceedings Related to the Situation in Libya

Issued by Pre-Trial Chamber I on 24 January 2012

Gaddafi and Al-Senussi Case

Order Requesting Observations Regarding the "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi"

Issued by Pre-Trial Chamber I on 24 January 2012

Situation in Côte d'Ivoire

Côte d'Ivoire, which is not party to the Rome Statute, **had accepted the jurisdiction** of the ICC on 18 April 2003; more recently, and on both 14 December 2010 and 3 May 2011, the Presidency of Côte d'Ivoire **reconfirmed the country's acceptance** of this jurisdiction. On 3 October 2011, the Pre-Trial Chamber authorised the Prosecutor to open an investigation into the situation in Côte d'Ivoire since 28 November 2010. The hearing on the confirmation of charges in the case *The Prosecutor v. Laurent Gbagbo*, the only case currently heard before the Court in this situation, is scheduled to start on 18 June 2012.

Decisions taken between 23 - 27 January 2012

Gbagbo Case

Decision establishing a disclosure system and a calendar for disclosure

Issued by Pre-Trial Chamber III on 24 January 2012

Relevant Links

Courtroom proceedings can be followed on the ICC website: www.icc-cpi.int

You can also consult the **hearing schedule**

Video summaries can be found on our **YouTube channel** | The ICC's activities can also be followed through **Twitter**

Calendar

JANUARY 2012						
Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
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FEBRUARY 2012						
Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
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6	7	8	9	10	11	12
13	14	15	16	17	18	19
President, Deputy Prosecutor and Registrar of the Court to participate in the Conference "Justice for all? 10 year review of the ICC" and side events in Sydney, Australia*						
20	21	22	23	24	25	26

*The ICC gratefully acknowledges the financial support of the organisers for the Court's participation

The calendar is subject to last minute changes.