

Presentation for 23 January 2012 in Case 1 and Case 2

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.