

Public Appearance

(Open Session)

ICC-01/09-02/11

ICC-01/09-01/11

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom 1
3 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and Judge Cuno
4 Tarfusser
5 Situation in the Republic of Kenya - In the case of The Prosecutor v. Francis Kirimi
6 Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali - ICC-01/09-02/11
7 Situation in the Republic of Kenya - In the case of The Prosecutor v. William Samoei Ruto,
8 Henry Kiprono Kosgey and Joshua Arap Sang - ICC-01/09-01/11;
9 Public appearance by the Judges of Pre-Trial Chamber II
10 Monday, 23 January 2012
11 (The public appearance starts in open session at 11.30 a.m.)
12 THE COURT OFFICER: All rise.
13 PRESIDING JUDGE TRENDAFILOVA: Please be seated.
14 Court officer, please would you kindly call the two cases in the Kenya situation.
15 THE COURT OFFICER: Yes, Madam President. Situation in the Republic of Kenya, in
16 the case of The Prosecutor versus William Samoei Ruto, Henry Kiprono Kosgey, and
17 Joshua Arap Sang, case ICC-01/09-01/11; and situation in the Republic of Kenya, in the
18 case of The Prosecutor versus Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and
19 Mohammed Hussein Ali, case number ICC-01/09-02/11.
20 PRESIDING JUDGE TRENDAFILOVA: Thank you, court officer.
21 Good morning to everyone who is joining us from in or around the Court and also to
22 those joining us from the Republic of Kenya via the internet or otherwise.
23 Pre-Trial Chamber II of the International Criminal Court, composed of Judges Hans-Peter
24 Kaul to my right, Cuno Tarfusser to my left and I, Ekaterina Trendafilova, the Presiding
25 Judge of the Chamber, has decided to appear in Court this morning in

Public Appearance

(Open Session)

ICC-01/09-02/11

ICC-01/09-01/11

1 order to present an oral summary of its decisions concerning the charges of The
2 Prosecutor against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang in
3 Case 1, and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein
4 Ali in Case 2.

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

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

14 In Case 1, the Prosecutor presented six counts charging the three suspects with crimes
15 against humanity of murder, deportation or forcible transfer of population and
16 persecution.

17 In Case 2, the Prosecutor presented ten counts charging the other three suspects with
18 crimes against humanity of murder, deportation or forcible transfer of population, rape
19 and other forms of sexual violence, other inhumane acts and persecution.

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

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

Public Appearance

(Open Session)

ICC-01/09-02/11

ICC-01/09-01/11

1 Now I will turn to the decisions of the Chamber issued today.
2 After having thoroughly examined and analysed individually and collectively all the
3 evidence presented, the Chamber by majority decided to confirm the charges against four
4 of the six suspects, as will be explained later in more detail.
5 Judge Kaul appended a dissenting opinion in both cases. He maintains that the
6 International Criminal Court is not competent because the crimes committed on the
7 territory of the Republic of Kenya during the post-election violence of 2007/2008 in his
8 view were serious common crimes under Kenyan criminal law, but not crimes against
9 humanity as codified in Article 7 of the Rome Statute.
10 Before turning to the task at hand, namely the summary of the Chamber's decisions, I
11 would like to briefly recall some of the important procedural developments of the two
12 cases. This will give a better idea of the work of the Court, of the parties and of the
13 participants in the cases.
14 Since 8 March 2011, when the Chamber issued its decisions on the summonses to appear
15 in the two cases, the Chamber has been continuously seized with a multitude of issues.
16 Throughout the proceedings, the Chamber placed at the centre of its activities its duty to
17 ensure the fair, expeditious and independent conduct of the entire process. The Chamber
18 also gave substantial consideration to the protection of victims and witnesses and the
19 various rights of the Defence.
20 On 7 and 8 April 2011, in Case 1 and Case 2 respectively, the initial appearance hearings
21 took place during which the Chamber set the dates of the confirmation of charges hearing.
22 This stage was followed by a series of judicial activities. In particular, the Chamber
23 facilitated the participation of victims by issuing a number of decisions in this regard.
24 In the first case the Chamber received 394 victims' applications for participation,
25 amounting to 4,246 pages, and admitted 327 victims as participants in the proceedings.

Public Appearance

(Open Session)

ICC-01/09-02/11

ICC-01/09-01/11

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

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

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

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

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

16 Similarly, as determined during the initial appearance of the suspects in the second case,
17 the confirmation of charges hearing in Case 2 started on 21 September 2011, lasting for 12
18 days. Thus, since the start of the cases the Chamber has received 4,905 filings, including
19 their annexes, from the Prosecutor, the Defence teams, the victims' legal representatives,
20 amici curiae and the Registry. Including today's decisions, the Chamber has issued 252
21 decisions in both cases.

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

23 At this point, and on behalf of the Chamber, I must explain that we are not passing
24 judgment on the guilt or innocence of the individuals. The Chamber is tasked by law
25 only to evaluate the strength of the Prosecutor's case at this pre-trial stage; that is to

Public Appearance

(Open Session)

ICC-01/09-02/11

ICC-01/09-01/11

1 determine whether the Prosecutor presented enough evidence before the Chamber to
2 confirm the charges. The standard required by law is that there are "substantial grounds
3 to believe" that the crimes charged were committed and that the suspects were responsible
4 for them.

5 I will now turn to the merits of Case 1, The Prosecutor versus William Samoei Ruto,
6 Henry Kiprono Kosgey and Joshua Arap Sang. It concerns crimes committed in Turbo
7 town, the greater Eldoret area, Kapsabet town and Nandi Hills from on or about 30
8 December 2007 until the end of January 2008. I would like to underline the following:
9 As mentioned at the start, the Prosecutor charged Mr Ruto, Mr Kosgey and Mr Sang for
10 crimes against humanity of murder, deportation or forcible transfer and persecution.
11 Mr Ruto and Mr Kosgey were charged as indirect co-perpetrators, while Mr Sang was
12 charged as having contributed to the said crimes against humanity.

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

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

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

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

1 In particular, Pre-Trial Chamber II confirmed the charges against Mr Ruto as an indirect
2 co-perpetrator with others, while it found that Mr Sang contributed to the commission of
3 said crimes against humanity to the extent specified in the written decisions.

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

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

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

15 Turning now to Case 2, The Prosecutor versus Francis Kirimi Muthaura, Uhuru Muigai
16 Kenyatta and Mohammed Hussein Ali.

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

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

22 As to the crimes, the Chamber found, on the basis of a thorough review of the evidence
23 individually and collectively, substantial grounds to believe that between 24 and
24 28 January 2008 there was an attack against the civilian residence of Nakuru and Naivasha
25 perceived as supporters of the Orange Democratic Movement, in particular those

1 belonging to the Luo, Luhya and Kalenjin ethnic groups.

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

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

7 With respect to the criminal responsibility of Mr Muthaura and Mr Kenyatta, the
8 Chamber was satisfied that the evidence also established substantial grounds to believe
9 that they are criminally responsible for the alleged crimes as indirect co-perpetrators.

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

15 The Chamber will now outline the impact of its decisions on first those against whom the
16 charges have been confirmed; second on those against whom the charges have not been
17 confirmed, namely Mr Kosgey and Mr Ali; as well as on the victims.

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

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

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

5 At trial, the Prosecutor will have the burden of proving the guilt of the accused beyond a
6 reasonable doubt, as required by Article 66 of the Rome Statute.

7 Furthermore, the decisions issued today by this Chamber do not affect the liberty of the
8 accused, which remains undisturbed. This, however, absolutely depends on the
9 accused's adherence to the conditions contained in the summonses to appear, which
10 continue to remain in full force. At this point, the Chamber recalls its previous warning
11 to the suspects that their continued liberty is subject to their non-engagement in
12 incitement of violence or hate speech.

13 As to Mr Kosgey and Mr Ali, the Chamber wishes to clarify that that they are no longer
14 suspects before the International Criminal Court. However, the Chamber recalls
15 Article 61(8) of the Rome Statute, according to which the Prosecutor may present
16 additional evidence requesting confirmation of charges against Mr Kosgey and Mr Ali.

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

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

24 In reaching our decisions we have reviewed all the evidence individually and collectively,
25 regardless of its source, firmly guided by the provisions of the Court's statutory

Public Appearance

(Open Session)

ICC-01/09-02/11

ICC-01/09-01/11

1 documents. In the fulfilment of our judicial mandate, we have looked through impartial
2 and independent lenses in order to ascertain whether the requisite threshold in Article 61
3 of the Rome Statute for confirmation of the charges has been reached.

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

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

12 THE COURT OFFICER: All rise.

13 (The public appearance ends in open session at 11.59 a.m.)