



Kenya: Recent Developments on the International Criminal Court

Questions and Answers April 2013

On April 9, 2013, Uhuru Muigai Kenyatta was sworn in as Kenya's president, following a Supreme Court decision rejecting challenges to the March 2013 election. Kenyatta, along with the deputy president-elect, William Samoei Ruto, both face trial (in two separate cases) before the International Criminal Court (ICC) on charges of committing crimes against humanity during Kenya's 2007-2008 post-election violence.

The cases stem from investigations opened by the ICC prosecutor in 2010 after Kenya's national authorities [failed to bring those responsible](#) for crimes committed during the violence to justice. Human Rights Watch researchers [documented several patterns of violence in the 2007-2008 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 at least 650,000 people from their homes.

The trial of Ruto, along with his co-accused, the former radio host Joshua arap Sang, is scheduled to begin on May 28, 2013, while the start date for Kenyatta's trial is set for July 9. Both trials were originally scheduled to begin in April. Charges against Kenyatta's former co-accused, Francis Kirimi Muthaura, were withdrawn in March. The pre-trial chamber declined to confirm charges against two other people, Henry Kiprono Kosgey and Mohammad Hussein Ali.

The following questions and answers highlight recent developments in the cases as the trial dates have neared. A number of issues remain pending before the ICC judges. For additional information about the Kenya cases, please see "[Kenya: Q&A on Pre-Trial](#)

[Hearing in Second ICC Case](#)” (September 2011), [“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. How should the international community engage with Kenyatta and Ruto and their administration given the pending ICC cases?

Kenyatta and Ruto are subject to summonses to appear, rather than arrest warrants, because the ICC pre-trial chamber determined that arrest was not necessary to secure their presence for trial. Like an arrest warrant, an ICC summons to appear contains the crimes a person is alleged to have committed and triggers proceedings that may ultimately bring a case to trial. But unlike an arrest warrant, the summons imposes only an obligation on the individual to appear before the court; it does not impose any obligation on the Kenyan authorities or the authorities of any other ICC state party to arrest the person.

Kenyatta and Ruto voluntarily responded to the ICC’s summonses and have attended court proceedings. They have pledged their continued cooperation with the court. This distinguishes their case from that of President Omar al-Bashir of Sudan, who has evaded arrest in spite of two ICC warrants issued against him.

Given their voluntary appearance before the ICC, Human Rights Watch does not oppose diplomatic contacts with Kenyatta and Ruto. However, representatives of the international community should weigh carefully whether any particular official interaction with these ICC accused could undermine support for the ICC proceedings or call into question the court’s independent judicial nature. Those contacts should be avoided.

Contacts that do take place should be used to signal support for the ICC process and to press the new administration to ensure the government’s full cooperation with the ICC, particularly in light of the limited assistance provided by the previous Kenyan government to the ICC prosecutor’s investigations (see question 3 below). Publicized and high-level contacts should be accompanied by public statements expressing support for the ICC.

Kenya’s international partners have a key role to play in maintaining consistent support for the ICC and should continue to make Kenyatta and Ruto’s personal cooperation, on the

one hand, and the cooperation of the Kenyan government, on the other hand, clear priorities in their engagement with the new administration.

2. Is Kenya required to cooperate with the ICC and why? What is meant by cooperation?

All states parties to the Rome Statute, the ICC treaty, are obligated to cooperate fully with the ICC's investigations and prosecutions. Kenya, which joined the ICC in 2005, has codified its cooperation obligations into national law through the International Crimes Act. Cooperation can take a variety of forms and includes responding to requests for assistance to provide evidence, serve documents, execute searches, protect witnesses, freeze assets, and arrest and surrender people subject to ICC arrest warrants. Failure to cooperate can subject a government to a finding of non-cooperation by the ICC judges and referral to the Assembly of States Parties, the court's oversight body, which consists of representatives of all states parties.

3. Has Kenya cooperated with the ICC's investigations and prosecutions?

The Kenyan government signed a memorandum of understanding with the court in 2010 and has facilitated some court activities in Kenya. But the ICC prosecutor has indicated that Kenya has stalled or failed to assist its evidence collection, including access to government records. The prosecution also reports that the previous government has not acted, in spite of repeated requests, to resolve domestic litigation challenging the prosecution's ability to take evidence from a number of senior Kenyan police officials. Limited assistance by the government in the ICC's investigations was one factor cited by the prosecutor in withdrawing charges against Muthaura.

The prosecutor has not sought a formal finding of non-cooperation against Kenya and has indicated that she intends to continue to engage the government and seek its cooperation.

The ICC depends on the public support of its member countries and other interested parties to create a climate conducive to its work. Various initiatives by Kenyan government officials appear to be designed to have the opposite effect. Top Kenyan government officials and members of parliament have referred to bringing the cases "back to Kenya." They have campaigned for an African Union-endorsed deferral of the cases by the United

Nations Security Council. However, there have been [few prosecutions](#) of crimes during the post-election violence in the Kenyan courts.

4. Why was the Muthaura case dropped?

The ICC trial chamber terminated the case on March 18, 2013, after the ICC prosecutor filed a notice on March 11 that her office intended to withdraw the charges. The prosecutor identified a number of “severe challenges” her office had faced in its investigation of Muthaura. These included the fact that potential witnesses against Muthaura had died, while others were afraid to come forward; a lack of cooperation by the Kenyan government, including a failure to provide the office with requested evidence and to facilitate its access to witnesses; and the withdrawal of a key prosecution witness, identified as Witness 4.

5. Who is Witness 4?

In its January 2012 decision sending the Kenyatta and Muthaura case to trial, the pre-trial chamber relied on the testimony of a prosecution witness, known as Witness 4, to find substantial grounds to believe—the standard applicable to a decision to confirm charges—that Muthaura, along with Kenyatta, was at a January 3, 2008 meeting at which Kenyatta and Muthaura allegedly directed the Mungiki, a criminal gang, to carry out crimes. Witness 4 claimed to have been at the meeting and was the only direct witness against Muthaura. Muthaura’s defense challenged the credibility of Witness 4 but the pre-trial chamber found the testimony of Witness 4 reliable.

6. Why did the Office of the Prosecutor decide not to rely on Witness 4 at trial?

Following the confirmation of charges, Witness 4 stated in an interview with the prosecution that he had lied about parts of his testimony and had accepted money to withdraw his testimony. As a consequence, the Office of the Prosecutor decided not to call Witness 4 at trial.

It is now known that at the time of the pre-trial hearing the Office of the Prosecutor had access to Witness 4’s affidavit seeking asylum in another country in which he indicates that he had heard about the January 3, 2008 meeting from a third party. The Kenyatta defense contends that this shows that Witness 4 was not actually at the meeting, undercutting the value of the testimony. The prosecution admits that it erred in failing to disclose the affidavit. This disclosure failure—which the defense contends was the result

of systematic failures on the part of the office and the prosecution says was an oversight—forms a central part of an application by Kenyatta to have the charges dropped or reconsidered (see question 7 below).

7. Does the withdrawal of the charges against Muthaura or the withdrawal of Witness 4 have an impact on the pending case against Kenyatta?

This is one of the issues being argued before the trial chamber.

Kenyatta’s defense contends that his case, like Muthaura’s, should be dropped. Absent the testimony of Witness 4 as well as allegations regarding the participation of Muthaura in a “common plan,” the defense argues, the pre-trial chamber would not have found substantial grounds to confirm the charges as framed by the prosecutor against Kenyatta. The defense also contends that the prosecution’s disclosure failure undermines the validity of the confirmation of charges process and alleges errors in the pre-trial chamber’s assessment of the evidence. The defense has asked the trial chamber to terminate or stay the case or to send the case back through a pre-trial process to reconsider the validity of the underlying decision to send it to trial.

The ICC prosecutor has insisted that the withdrawal of the charges against Muthaura has no legal or factual impact on the case against Kenyatta. The prosecution contends that even if the pre-trial chamber had discredited the evidence of Witness 4 based on the asylum affidavit, it would still have found substantial grounds to confirm the charges against Kenyatta. If new pre-trial proceedings were ordered, the prosecution argues that it has additional evidence to support confirmation of the charges.

The ICC judges have indicated that they may consider, among other issues, the powers of the trial chamber to decide whether the disclosure failure affected the validity of the decision confirming the charges and whether, if the trial chamber does find errors in that decision, it can order the prosecution to amend or withdraw the charges. They have also indicated that they may consider whether Kenyatta can continue to be charged as an “indirect co-perpetrator” absent the charges against Muthaura, and the extent to which the prosecutor was permitted to conduct investigations following the decision to confirm the charges.

8. Have witnesses been bribed or intimidated?

The ICC prosecutor has characterized the scale of interference with witnesses in the Kenya cases as “unprecedented,” referring to pressure on witnesses and their families. The prosecutor stated that the fact that people who might have had evidence against Muthaura were afraid to come forward was one factor in her decision to drop his case. Victims participating in the ICC cases in Kenya have consistently highlighted their safety concerns in court through their legal representatives. The prosecution has alleged bribery attempts against its witnesses, including Witness 4, but has refuted media reports that as many as eight witnesses have recanted their evidence.

The Muthaura defense team alleged that the prosecution had exposed the identity of defense witnesses to prosecution witnesses, jeopardizing the defense witnesses’ security, a claim the prosecution rejected. Muthaura asked the trial chamber, among other measures, to order the Office of the Prosecutor to abide by its obligations to defense witnesses. The withdrawal of the Muthaura case rendered this request moot.

9. What can be done to ensure that witnesses are protected from interference and intimidation?

The ability of all witnesses—whether for the prosecution or the defense— to testify securely and without fear of reprisal is essential to fair and credible trials.

The ICC has an obligation to take appropriate measures to protect the well-being and safety of witnesses, victims participating in the proceedings, and others at risk on account of testimony given by witnesses, including, for example, so-called intermediaries assisting the work of the court. Protective measures may range from measures taken in court like permitting witnesses to testify in a closed session to keep their identities hidden from the public, to measures taken outside of court like relocating witnesses away from security threats. Protective measures can be taken for both prosecution and defense witnesses.

Long delays in relocating ICC witnesses can expose them to risk and delay proceedings, given the need to ensure that protective measures are in place before witness identities are disclosed to other parties. ICC officials have repeatedly stressed the urgent need for additional countries to sign witness relocation agreements with the court to respond adequately to protection needs. The ICC’s new registrar, elected in March, should review

protection programs administered by the court and identify areas where they should be strengthened.

While the ICC has specific obligations for its witnesses, victims, and intermediaries, the Kenyan government has a core responsibility to protect the safety of all those within its borders. This includes investigating harassment or threats amounting to violations of national law. Kenya's new government should make a public commitment to take steps to help ensure the security of those assisting justice processes and to continue strengthening its national Witness Protection Agency.

10. What does the withdrawal of the Muthaura case say about the ability of the ICC prosecutor to investigate effectively?

The ICC prosecutor's decision to withdraw charges against Muthaura reflects the full range of challenges confronting her office in its investigations. These include securing state cooperation and providing adequate protection to encourage witnesses to come forward—both particularly acute difficulties faced by the office in its Kenya investigations (see questions 3 and 8 above)—and collecting evidence linking the actions of high-level accused to crimes carried out by other people. With pressure from states parties to reduce the ICC budget and an increasing number of country situations before the court, the ICC has become increasingly overstretched in carrying out its difficult mandate.

Human Rights Watch is concerned that the Office of the Prosecutor's investigative methodologies may need strengthening to meet these challenges. The decision to withdraw charges against Muthaura was a first at the ICC, but the Office of the Prosecutor has faced other setbacks in its prosecutions. In December an ICC trial chamber acquitted a former Congolese warlord, which the prosecution is appealing. The prosecution has also been unable to bring forward sufficient evidence to send cases against four other defendants in its Darfur, Kenya, and Democratic Republic of Congo investigations to trial, including Kosgey and Ali, two of the original defendants in the Kenya cases.

The ICC prosecutor, who began her nine-year term in June, has indicated that improving the office's investigations and prosecutions is among her first priorities. Adapting the office's investigative practices to the court's operational challenges is no easy task, but it is essential to ensuring that the ICC can deliver effective and meaningful justice. Human

Rights Watch urges the prosecutor to identify any needed reforms and calls on states parties and other international partners to support the additional resources and cooperation—including in witness protection—which may be needed to improve the efficacy of the office’s investigations.