

Kenya and the International Criminal Court

Questions and Answers

The subversion of democracy in the December 2007 presidential election has triggered serious political and civil strife in Kenya. Following these events, Kenya has witnessed a wave of violence and serious human rights violations. The types of violence are as follows:

- Uprisings of mobs protesting the flaws in the presidential elections. These mobs looted, raped and burnt down buildings in an anarchical manner.
- Organized violence by militia in the Rift Valley that was aimed at perceived political opponents. The initial militia action attracted retributive, largely organized counter-violence especially in Nakuru, Naivasha areas of the Rift Valley, and Nairobi.
- Disproportionate and excessive use of force by the Police against unarmed protesters mainly in opposition strongholds including Kisumu, Kakamega, Migori, and the low income settlements of Nairobi. Policing was uneven in its implementation. In some strong opposition areas, the police were shooting to kill, while when confronted with some militia, they opted to negotiate with the groups. However, in the Eldoret area, the Police were bystanders as perceived opponents of the opposition were killed and their houses burnt.
- Local militia in pro-government areas, on receiving internally displaced persons (IDPs) from the Rift Valley, mobilized in sympathy and turned on perceived opposition supporters, killing them, and burning their houses.

The violence claimed over 1000 lives and displaced over 600,000 Kenyans, some across the Kenyan borders.

1. Why is there a need to fight against impunity of the most serious crimes committed during 2007/2008 post-election violence in Kenya?

Kenya has faced serious human rights violations in the past, notably at the time of electoral processes. Numerous Kenyan official Commissions' reports¹ as well as International Non-Governmental Organizations' (NGO) and Kenyan NGOs² reports have denounced the politically instigated ethnic clashes that occurred at the occasion of the 1992 and 1997 presidential elections. Despite State knowledge of such violations, no one was prosecuted for the massive crimes committed in Kenya. This culture of impunity is undoubtedly one reason for the recurrence of such human rights violations, notably those committed at the occasion of the December 2007 presidential elections. The fight against impunity of the most serious crimes is an important way of preventing further violations. Along this line, State Parties to the International Criminal Court (ICC) Statute have announced that they are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" (Preamble of the ICC Statute). Additionally, since the 2007/2008 post-election violence, Kenya initiated special committees, like the Waki

1 See for instance the report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31 July 1999.

2 See for instance FIDH/KHRC report n°471/2, April 2007 : "Massive internal displacements in Kenya due to politically instigated ethnic clashes".

See also KHRC report : Killing the Vote – State Sponsored Violence and Flawed Elections in Kenya, 1998

Commission (officially the Commission of Inquiry on Post-Election Violence established by the Government in February 2008), to investigate the clashes in Kenya and the factors influencing human rights situations. The reports distinctly request national authorities to take every measure to fight against impunity of the most serious crimes. The Waki Commission released its report in October 2008 with the recommendation that a Special Tribunal for Kenya be formed, failure to which the International Criminal Court (the ICC) would take over the case. However, so far the State has not been able to concretely address this issue showing a lack of commitment to putting end impunity.

Next presidential elections will take place in 2012. Tensions are already perceived between communities, notably in the Rift Valley. Sanction against perpetrators of the most serious crimes committed at the time of the 2007 elections should serve as a deterrence.

2. What are the different options to fight against impunity for the 2007/2008 post-election violence?

Under International Law (including the ICC Statute to which Kenya is a party since March 2005), Kenya has an obligation to try international crimes committed on its territory or by its nationals. According to the Preamble of the ICC Statute, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

This means that, in principle and according to Kenyan law, Kenya's ordinary tribunals should investigate and prosecute international crimes committed locally, or abroad by a Kenyan, or committed in any place against a Kenyan. They have specific jurisdiction to do so since December 12, 2008, with the adoption by the Parliament of the International Crimes Bill that domesticates the ICC Statute which defines and incorporates the crime of genocide, war crimes and crimes against humanity into the Kenyan law³. It is noteworthy that the Act gives immunity to the President from prosecution for international crimes. And it is unclear whether the Kenyan ordinary tribunals could exercise their jurisdiction over crimes committed prior to the entry into force of the International Crimes Act even if international human rights provisions which binds Kenya should allow such retro-activity of the law.

Another option available to Kenya regarding the specificity of the crimes is the establishment of a Special Tribunal, with a mandate limited to try crimes committed following the last elections (as opposed to ordinary tribunals which deal with various and different cases). This option could be used as a way to overcome obstacles for prosecution before ordinary tribunals, such as the existence of immunities for top officials. It could also be a way to take into consideration other crimes than those defined in the ICC Statute. This requires the adoption of a Bill on the establishment of a Special Tribunal specifying its mandate.

So far, Kenya has failed to establish such a Special Tribunal despite public announcements from the Government of Unity and the President to do so. Members of Parliament have failed to reach an agreement on the content of its Statute in March and July 2009. Kenyan authorities have also failed to present any step forward in its establishment before 30 September 30, 2009, which was the deadline agreed upon with the ICC Prosecutor, Luis Moreno Ocampo, to express the willingness of the national authorities to try the perpetrators of the most serious crimes committed during post-election violence.

It is important to note that, should Kenya establish such a Special Tribunal, the tribunal and the rules applicable to it would have to respect international human rights standards, as established by treaties Kenya has become a party to (see question 17).

If Kenya fails to address crimes through its domestic Judiciary, then the ICC could intervene. According to the ICC Statute, the Court is complementary to national jurisdictions. This means that it only intervenes when the relevant State is either unable or unwilling to carry out investigations and prosecutions. ICC investigations focus on those who bear the greatest responsibility for the most serious crimes.

All options can be used separately or in association. For example, if Kenya's ordinary tribunals or a Special Tribunal investigate and try low-level perpetrators, but are unable to pursue the leaders who ordered the crimes, then the ICC can take care of the latter.

In this regard, the Prosecutor announced in a recent press release that a combination of various elements was possible, namely: the ICC trying those most responsible for the crimes, a national Special Tribunal trying lower-level perpetrators, and a Truth and Reconciliation Commission shedding light on past atrocities and

³ The International Crimes Act was gazetted on June 5, 2009. In the 'Kenya Gazette' notice, the Act commenced operation on January 1.

suggesting adoption of measures to prevent future crimes (for a discussion on Truth and Reconciliation Commissions, see question 13)⁴.

3. What is the International Criminal Court?

The ICC is an international permanent court of justice established to try perpetrators of the most serious crimes of concern to the international community as a whole. It has been in place since 1 July 2002 and it seats in the city of The Hague, in The Netherlands.

The ICC has jurisdiction over the following crimes: crimes against humanity, war crimes and genocide (for an explanation of what this means, see question 4)⁵. It can only investigate crimes committed after the entry into force of its Statute with respect to the relevant country. It has jurisdiction over crimes committed in the territory or by nationals of a State Party, i.e. a State which has ratified or acceded to its Statute.

Kenya ratified the ICC Statute in March 2005. Therefore, the ICC has jurisdiction for crimes committed in the country since 1 June 2005⁶.

4. What kind of crimes fall within the jurisdiction of the ICC? Were such crimes were committed during the post-election violence in Kenya?

Crimes against humanity are acts such as murder, torture, gender-based crimes, among others, committed as part of a widespread and systematic attack against the civilian population. The widespread or systematic character of an attack implies that crimes against humanity are not committed in isolation but in the context of numerous criminal acts and normally correspond to a plan or policy designed to attack the civilian population. Crimes against humanity can be committed during an armed conflict as well as in times of peace.

War crimes are serious violations of the laws and customs applicable to armed conflicts. According to international law, even in the context of a war, certain acts are unacceptable, for example: directing attacks intentionally to civilians. War crimes are committed when such rules are breached in the context of an armed conflict of an international or a non-international character. Contrary to crimes against humanity, war crimes can be committed in isolation and are only committed in times of war. It is important to note that the rules applicable to armed conflicts are not relevant to situations of internal disturbances and tensions.

Sometimes an act can qualify at the same time as a crime against humanity and a war crime. For example: murders and rapes committed against the civilian population during an attack in times of war, bearing a systematic or widespread nature.

Finally, *genocide* is the commission of certain acts (killings, serious bodily injuries, etc) carried out with the specific intent to destroy, in whole or in part, of a national, ethnic, racial or religious group, as such (Article 6 of the ICC Statute).

According to the Waki Report, international crimes were committed during post-election violence. It is up to a judicial body, like the ICC, to qualify the crimes committed in Kenya.

5. What is the current status of the situation of Kenya before the ICC?

During and after the commission of crimes in the context of the post-election violence, numerous organizations and individuals informed the ICC Prosecutor of the nature and seriousness of the acts that were or had been perpetrated in Kenya. The Prosecutor then opened a "preliminary analysis" into the situation in Kenya.

Kenya is thus today under "preliminary analysis" by the ICC Prosecutor. This means that his office is reviewing information in order to establish whether the Prosecutor should open an investigation into those crimes. Within this context, the Office of the Prosecutor analyses all relevant information to determine whether the conditions to open an investigation are met: this is information about the crimes committed but

4 ICC Press Release, ICC Supports Three-Pronged Approach to Justice in Kenya, 30 September 2009, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr456>

5 The fourth one is the Crime of Aggression which are yet to be defined by the ICC Statute.

6 Article 126.2 of the ICC Statute

also about how accountability for those crimes is being handled by the domestic judicial system (see questions 10-12). No decision has yet been taken in this regard.

6. What are the status of the files of the Waki Commission and the list of names transferred to the ICC Prosecutor?

The files of the Waki Commission, including an envelop containing the names of those who allegedly committed violations during the post-election violence, were transferred to the ICC in July 2009.

These documents are part of information sent to the Prosecutor which serve his analysis in considering whether or not he will open an investigation into the situation in Kenya.

The content of the envelop remains confidential. Should an investigation be opened, the ICC Prosecutor will carry on his own investigations to determine who are the persons who bear the greatest responsibility for the crimes. The boxes of evidence, however, are being reviewed by the Prosecutor's team and will be used in the determination as to whether an investigation should be opened.

7. Can the Prosecutor only open an investigation into Kenyan situation after a State referral? What would happen if Kenya refers the situation to the ICC? What can happen if it does not?

No. Under the ICC Statute, an ICC investigation could be opened under the request of a State Party or the Security Council, or by the Prosecutor on his own initiative.

So far, the UN Security Council only used once its capacity to request the ICC Prosecutor to open an investigation regarding the situation in Darfur, Sudan.

The three other investigations led by Luis Moreno Ocampo were opened following State referrals from Central African Republic, Democratic Republic of Congo and Uganda.

The Prosecutor has not yet used his power to open an investigation on his own initiative. Such a decision requires approval by the ICC judges.

If Kenya refers the situation implying crimes committed during the 2007/2008 post-election violence to the ICC Prosecutor, that would not immediately trigger the opening of an investigation. This means that the Prosecutor would hold discretion to decide whether such an investigation must be opened or not. However, such a referral would

imply acknowledgement that national jurisdictions cannot try the most responsible perpetrators of international crimes and shows the ICC the willingness of the State to cooperate with the Court to fight against impunity of the most serious crimes committed in its territory or by one of its national.

And if the Prosecutor then decides that an investigation should be opened following the State referral, he would have to move forward without an authorization from the judges.

So far, Kenya did not make any referral to the ICC requesting it to investigate and try the perpetrators of the crimes committed during the post-election violence (it is important to note that the transmission of the Waki Commission files does not equate to a referral as it the act did not come from the Kenyan government or the UN Security Council). This situation does not prevent the ICC Prosecutor to decide to open an investigation *proprio motu* if, according to his preliminary analysis, he considers that an investigation should be opened (for more information on the conditions to open an investigation, see question 8). However, in such a case, he will need to request the judges' authorization. Kenya would be able to challenge such a decision at any time, by providing evidence that it is investigating and prosecuting those most responsible for the most serious crimes.

8. What are the requirements for the ICC to open an investigation into the crimes committed in Kenya?

At the request of the State Party or on its own initiative, the Prosecutor must be satisfied of the following elements in order to open an investigation:

- a) The crimes committed are within the jurisdiction of the Court (see question 4).
 There is no problem concerning the temporal jurisdiction of the ICC over post-election violence in Kenya. Indeed, as discussed above, the ICC has jurisdiction to investigate international crimes committed in Kenyan territory or by Kenyan nationals as of June 2005.
 The Prosecutor will have to prove beyond reasonable doubt after his investigation that international crimes were committed during post-election violence in Kenya, that is to say crimes of genocide, and/or crimes against humanity and/or war crimes.
- b) The case is of sufficient gravity to justify action by the Court and that the principle of complementarity is satisfied (see questions 9 and 10).
- c) An ICC investigation would serve the interest of justice.

9. How does the Prosecutor assess the gravity of crimes?

Several factors are taken into consideration to assess the gravity of crimes, namely: the scale of the crimes (number of victims but also geographic and chronological spread of the crimes); the nature of the crimes (crimes resulting in deliberate death and crimes of sexual violence are considered the gravest); the manner of commission of the crimes (whether crimes follow from a systematic, organized or planned course of action; elements of particular cruelty; crimes against particularly vulnerable victims; etc); and the impact of the crimes (impact of crimes on the community and on regional peace and security, including longer term social, economic and environmental damage)⁷.

10. What is the principle of complementarity and what does it imply?

According to the ICC Statute, the Court can only intervene when the State having jurisdiction over the crimes, in this case Kenya, is “unwilling” or “unable” to genuinely investigate and prosecute the perpetrators⁸.

A State is considered to be “unwilling” to carry out investigations or prosecutions when national proceedings are undertaken with the purpose of shielding the persons concerned from criminal responsibility, or when there is an unjustified delay in the proceedings which is inconsistent with the intent to bring the person concerned to justice, or when the proceedings are not conducted independently or impartially.

In order to determine “inability”, the Court considers the capacity of the national judiciary to apprehend the accused or to obtain the necessary evidence and testimony, as well as any other element otherwise making the relevant State unable to carry out proceedings. In some countries, it can be particularly difficult for the domestic judicial system to launch prosecutions against the highest leaders of an attack, i.e. those who planned or orchestrated the crimes, or those in a position of power.

11. Would the establishment of a Special Tribunal imply that the ICC will no longer take an interest in post-election violence in Kenya?

It depends on the scope and proceedings undertaken by the Special Tribunal. If the Special Tribunal focuses on cases the ICC could potentially bring, then the ICC will not take further action. Should the Special Tribunal fail in those cases (either because the cases are later dropped or because standards like independence and impartiality are not respected), the ICC could resume action and carry out investigations and prosecutions.

But it is also possible that the two options co-exist. A Special Tribunal could focus on low-level perpetrators, while the ICC could focus on those bearing the greatest responsibility for the crimes. According to a recent declaration made by Luis Moreno-Ocampo, Chief Prosecutor at the ICC, this combination is being seriously considered⁹.

12. Should the ICC open an investigation, would that mean that Kenya can no longer create a local tribunal to try the same crimes?

No. Kenya can try the crimes under ICC jurisdiction at any time. If Kenya starts carrying out genuine investigations and prosecutions for those crimes, then the ICC can decide to defer to them. If those

⁷ ICC Office of the Prosecutor, Prosecutorial Strategy for 2006-2009, and Draft Policy Paper on Selection Criteria.

⁸ Article 17 of the Rome Statute.

⁹ *Supra* note 5.

proceedings fail (see question 11), then the ICC can resume action.

13. Would the work of the Truth, Justice and Reconciliation Commission avoid ICC action?

A Truth, Justice and Reconciliation Commission (TJRC) has been set up in Kenya according to the TJRC Act No. 6 of 2008. The nine Commissioners were appointed in July 2009. Some of the appointments were contested by civil society organizations because of the Commissioners' close ties with current and past presidents and, therefore, their lack of independence. The TJRC is expected to investigate gross violations and abuses of human rights committed in Kenya between 12 December 1963 and 28 February 2008, and to make appropriate recommendations for interventions. The exercise will cover a wide range of issues (including post-election violence; land issues; regional imbalances and negative ethnicity, among others) and is intended to promote peace, justice, national unity, healing and reconciliation, as part of Agenda Four of the National Dialogue and Reconciliation Accord.

A Truth and Reconciliation Commission is not a judiciary institution. Commissions have been established in a number of countries around the world (like in South Africa, Togo, Morocco and Sierra Leone) usually after a period of democratic instability or an armed conflict. Truth and Reconciliation Commissions normally put in place mechanisms to hear perpetrators and victims, and make other inquiries to establish the truth about the criminal facts. They also make recommendations on reparations and on institutional reform in order to avoid repetition of crimes. Truth and Reconciliation Commissions do not prosecute perpetrators; however, they can only recommend to political and judicial authorities means to fight against impunity of the perpetrators of most serious crimes. Even though, the word "justice" is mentioned in its title, this is also the case for the Kenyan TJRC.

Thus, a Truth and Reconciliation Commission can co-exist with either national tribunals or the ICC, or both. The Commission would focus on truth, reparations and reforms, while the courts of law focus on criminal accountability¹⁰.

14. Should the ICC open an investigation, what would be the next steps?

After the opening of an investigation, the Office of the Prosecutor would identify, firstly, the most serious incidents falling under ICC jurisdiction, and, secondly, the most responsible persons for such incidents (those who orchestrated them or under whose orders others carried out criminal acts). A request for arrest warrants would follow and once the person or persons are arrested, an ICC trial would start. I

It is also possible that, after a thorough investigation, the Prosecutor comes to the final conclusion that the crimes committed in Kenya are not of sufficient gravity to warrant ICC intervention, and thus decides to close the case without prosecution. Should that happen, victims of the crimes would be a legal remedy against such decision (see question 19).

15. Who/how many people would be prosecuted and tried before the ICC?

ICC investigations focus on those bearing the greatest responsibility for the crimes, whoever they are. Those persons will be identified following an investigation. It should be reminded that the ICC Prosecutor is not bound by the list of perpetrators established by the Waki Commission.

Normally, the ICC only tries a very small number of people (generally one to five, although since the ICC is yet very new it is difficult to tell because there has been little practice).

The ICC will not focus on lower-level perpetrators. Their responsibility must be addressed by other (national) mechanisms.

16. Are immunities allowed in international criminal law? What about amnesties?

The ICC Statute is applicable to all persons equally, without any distinction based on official capacity. The capacity as head of state, in particular, cannot exempt a person from criminal responsibility. This means that no immunities are recognized before the ICC.

¹⁰ *Supra* note 5.

When Kenya joined the ICC Statute, it accepted such a principle, and re-committed itself to carry out investigations and prosecutions for the crimes which fall under ICC jurisdiction. Any domestic provisions granting immunities are not recognized at the international level. So, if Kenya cannot try perpetrators in national tribunals due to immunities provisions, the ICC will consider that Kenya is unwilling or unable to act, and will therefore take over the case.

Similarly, any domestic provisions on amnesties are irrelevant for the ICC. A national law granting amnesties to perpetrators can render Kenya unwilling to prosecute in the eyes of the ICC, and make the Court intervene.

In short, immunities and amnesties are neither allowed nor recognized by the ICC, because they are contrary to the reason for which the Court was created, which is the fight against impunity for the most serious crimes.

17. What are the international standards of justice?

The international standards of justice are common ground rules that a State must respect when administering justice. Most of them can be found in the International Covenant on Civil and Political Rights (ICCPR). The core principle is the right to a fair trial: the ICCPR provides in its article 14 a protection for the accused: "All persons shall be equal before the courts and tribunals". This protects individuals against arbitrary or discriminatory judgments". The accused "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The presumption of innocence, the right to remain silent, as well as the right to be represented in Court and to be tried without unjustified delay are inherent to the right to fair trial. Another very important principle is that of legality: no one shall be tried for an offense that did not exist at the time of the crime, and no higher sentence than the one provided by law can be applied to an accused.

18. Can victims participate to the ICC proceedings? Can they receive reparations for the harm suffered?

Yes. According to the ICC Statute, victims of the crimes under ICC investigation have a right to participate in judicial proceedings related to the harm they have suffered. Victim participation allows victims' to have an independent voice in the proceedings (different from the one of the Prosecution) and to make its own representations with a view to establish the truth of what happened and contribute to making justice. Victims who participate in ICC proceedings are normally represented by a lawyer and they do not need to go to The Hague in person.

Victims also have a right to receive reparations and to participate in proceedings related to reparations award. It is likely many of the reparations awarded to victims of crimes under ICC investigation will be collective; some might also be symbolic.

19. What are Kenya's obligations as a member of the ICC?

As an ICC State Party, Kenya is obliged to cooperate fully with the Court in its investigation and prosecutions. Cooperation can take several forms, including facilitating access to witnesses, providing documents, protecting victims and witnesses, and freeze the accused's assets on behalf of the Court, among other measures.

Cooperation by States is crucial in all cases. But it is particularly key when it comes to arrest and surrender of persons because the ICC does not have its own police force. Should the ICC issue an arrest warrant for a person present on Kenyan territory, Kenya will be under the obligation to arrest and surrender the person to the ICC. The principle and details of such cooperation were set up in the International Crimes Act adopted by Kenyan Parliament on December 2008.

20. Basis on the above three options, what are the possible scenarios for Kenya?

There are basically six possible scenarios could unfold in Kenya:

1. First, low possibilities for the establishment of a Special Tribunal which is independent and effective due to the vested political interests and legal dynamics at the national level.
2. Second, a total failure to establish a Special Tribunal for Kenya due to the above reasons.
3. Third, establishment of the Special Division of the High Court or Special Tribunal under the control of

the Attorney General and the Executive. This will aim at trying those involved both at the highest and the lowest, a very tall order for Kenya due to the situations above.

4. Fourth, the above three situations may then pave way for the ICC taking over the Kenyan case in order to preempt the travesty of justice to victims of post-election violence. As noted above, ICC trials would focus on the suspects bearing the highest criminal responsibility.
5. Fifth, situation 4 above may also lead to the creation of the Special Division in order to deal with the suspects with lower criminal responsibility, which may realize different gains and challenges due to the reasons explained above.
6. Finally, in all the above situations, the TJRC will proceed with its work although it is tricky to predict its outcomes for Kenyans, and citizens have divided opinions and expectations about its credibility, legitimacy and capacity to deliver its mandate.