



Kenya and the International Criminal Court

Questions and Answers

January 2011

On December 15, 2010, the International Criminal Court (ICC) prosecutor announced that he is seeking summonses for six people in the court's Kenya investigation. The investigation—the ICC's fifth—was opened in March 2010 after the prosecutor received authorization from a majority of three judges sitting as an ICC pre-trial chamber. Kenya ratified the Rome Statute, which created the court, in 2005. The prosecutor's investigations have focused on the violence that followed what was widely perceived as a rigged presidential election in favor of the incumbent president, Mwai Kibaki, in December 2007.

Human Rights Watch has consistently emphasized the importance of accountability for crimes committed during the violence that followed the election. Our researchers documented several patterns of violence, 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 over 1,100 lives and forced nearly 400,000 people from their homes.

The ICC investigation is the first serious effort to bring to account those responsible for the post-election violence. Perpetrators of past episodes of post-election violence—in 1992 and 1997—went unpunished, and Kenya's leaders have not made good on promises to bring those responsible for the 2007-2008 violence to account in national trials.

1. What are the cases about? What crimes is the prosecutor alleging these individuals committed?

The prosecutor is seeking to bring charges of crimes against humanity against the six people, in two separate cases. The applications for the summonses are heavily redacted, however, meaning that only limited information is available to the public. The court has indicated that

the ICC prosecutor submitted several thousands of pages of documents to support the applications.

In one case, the prosecutor alleges that William Samoei Ruto, Henry Kiprono Kosgey, and Joshua arap Sang committed the crimes against humanity of murder, deportation or forcible transfer, torture, and persecution on the basis of political affiliation when they carried out a plan to attack perceived supporters of Kibaki's Party of National Unity (PNU). The goals of the plan, the prosecutor alleges, were to gain power in the Rift Valley—one of Kenya's eight provinces—and, in turn, in Kenya, and to punish and expel from the Rift Valley those perceived to support the PNU.

Ruto and Kosgey are senior members of the Orange Democratic Movement (ODM), then the opposition party. The ODM and the PNU are now members of a coalition government, formed through a power-sharing deal in February 2008. Ruto is a member of parliament from Eldoret in the Rift Valley and, until his recent suspension in connection with corruption charges, the minister for higher education; Kosgey is also a member of parliament and until recently when he stepped aside, also in connection with corruption charges, the minister of industrialization.

The prosecutor's application alleges that these men worked for up to a year before the election to create a network to carry out the plan, and this network was activated when the election results in favor of President Kibaki were announced. The prosecutor alleges that Sang—at the time, a radio host on the Eldoret-based KASS FM—helped coordinate attacks by disseminating coded messages through his broadcasts. According to the prosecutor's application, the attacks that form its basis occurred primarily between December 30, 2007 and the first week of January 2008 and within a 25 kilometer radius of a house owned by Ruto in Sugoi, Uasin Gishu district.

In the other case, the prosecutor alleges that Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali committed the crimes against humanity of murder, deportation or forcible transfer, rape and other forms of sexual violence, other inhumane acts causing serious injury, and persecution based on political affiliation when they carried out a plan to attack perceived ODM supporters in order to keep the PNU in power. According to the prosecutor's application, this plan was formed in response to the planned attacks on PNU supporters in the Rift Valley and to deal with ODM-organized protests.

The prosecutor alleges that there were essentially two components of the plan.

First, the prosecutor alleges that Muthaura—then and now the head of the public service and secretary to the cabinet—and Ali—then the Kenyan police commissioner—instructed the police to target perceived ODM supporters and to suppress their protests in Kisumu, a city in Nyanza province and a traditional stronghold of Raila Odinga, the ODM presidential candidate, and Kibera, an informal settlement in Nairobi, in between the end of December 2007 and the middle of January 2008.

Second, the prosecutor alleges that Muthaura and Kenyatta—now the deputy prime minister and minister for finance—directed leaders of the Mungiki, a Kenyan criminal organization, to attack perceived opposition supporters. Attacks by Mungiki members and other pro-PNU youth were then carried out in Nakuru and Naivasha—two cities in the Southern Rift Valley—in late January 2008. Muthaura and Ali instructed the police not to interfere with these attacks.

2. What happens next?

The pre-trial chamber’s three judges will consider the prosecutor’s applications. Where it finds that there are “reasonable grounds” to believe that an individual named in the requests committed the crimes alleged and that a summons is sufficient to ensure that individual’s appearance before the ICC, the pre-trial chamber may issue a summons to appear. There is no time limit for ruling on the applications. The court has indicated that the chamber will act expeditiously, taking into account the number of documents to be analyzed.

If the pre-trial chamber does not find “reasonable grounds,” it cannot approve the applications. In that case, and if the prosecutor obtains new evidence, he may re-apply.

Where summonses are issued, the chamber will set a date for the initial appearance before the ICC of those named. Those named will be considered innocent until proven guilty, and they will be entitled to examine and challenge the evidence and witnesses presented. Before a case can move forward to trial, the judges must conduct a pre-trial proceeding known as a “confirmation of charges” to determine whether the prosecutor has sufficient evidence to proceed. The Rome Statute provides a number of rights to defendants, including the right to counsel and legal assistance.

3. What is a summons to appear? How does it differ from an arrest warrant?

Like an arrest warrant, an ICC summons to appear contains the charges against an individual 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 in The Hague; a summons does not impose any obligation on the Kenyan authorities or the authorities of any other ICC state party to arrest the person.

Although a summons does not lead to detention of the accused person, the pre-trial chamber may, in some circumstances, impose conditions short of detention to restrict the accused's liberty. These conditions could include: travel restrictions; prohibitions on contacting victims or witnesses; posting a sum of money; or depositing identity documents with the court. If the accused fails to appear or does not comply with these conditions, the pre-trial chamber may decide to issue an arrest warrant.

The prosecutor has requested six conditions for those named in the Kenya applications: to update the court frequently on personal contact details and whereabouts; not to make any personal contact with any of the other suspects, unless through their legal counsel to prepare their defense; not to approach any perceived victims or witnesses of crimes; not to attempt to influence or interfere with witness testimony; not to tamper with evidence or hinder the investigation; and not to commit new crimes. The pre-trial chamber, however, will make the ultimate determination whether to impose conditions and, if so, which ones.

4. Could the judges decide to issue arrest warrants instead of summonses?

Yes. Under the Rome Statute, the pre-trial chamber should do so where it has found reasonable grounds to believe that the individual named committed the crimes alleged, but that a summons is not sufficient to ensure the individual's appearance before the court.

An ICC pre-trial chamber previously refused to issue summonses against two government officials in the Darfur, Sudan situation, issuing arrest warrants instead. The two—Ahmad Harun and Ali Kosheib—remain at large. Three other people issued summonses for allegedly carrying out rebel attacks on an AU peacekeeping mission in Darfur have voluntarily appeared in The Hague, although the case was subsequently dropped against one of them for lack of evidence.

5. Following the prosecutor's request for summonses, President Kibaki announced in his New Year's speech that the government would seek to establish a local judicial process to prosecute perpetrators of the post-election violence. But didn't the Kenyan government already promise to establish a special tribunal?

In December 2008, Kibaki and Odinga, who became prime minister in the coalition government, agreed to establish a so-called "special tribunal" to prosecute perpetrators of the post-election violence. The Commission of Inquiry on Post-Election Violence (CIPEV), headed by Justice Philip Waki, had recommended establishment of a special tribunal, with a mix of national and international judges and other legal professionals to ensure its independence. As an alternative, the CIPEV recommended that the matter should be referred to the ICC and that former UN Secretary-General Kofi Annan, the chair of the African Union-appointed mediation team that led to the current coalition government, should hand over a sealed list of the chief perpetrators to the ICC prosecutor.

But Kibaki and Odinga failed to exercise sufficient leadership to marshal support for the tribunal, and a bill that would have paved the way to establish it was defeated in parliament in February 2009. In early July 2009, a Kenyan delegation to The Hague promised the ICC prosecutor that either Kenya would hold national trials or that it would trigger the ICC's jurisdiction by referring the situation to the prosecutor for investigation and prosecution. Within a matter of weeks, however, the Kenyan cabinet had abandoned plans for a special tribunal and yet took no steps to refer the case to the ICC. No action was taken on a private member's bill on a special tribunal introduced in parliament in November 2009. Annan had meanwhile handed over the sealed list to the ICC prosecutor in July 2009.

The government has not taken any other substantial steps to ensure the prosecution of serious offenses committed during the post-election violence. Few cases have been brought by the government; at least two ended in acquittals. A case against a prominent Eldoret leader, Jackson Kibor, for inciting violence was ended by a decision not to proceed (known as a "nolle prosequi") entered by the attorney general.

It was on the basis of this inaction that the ICC prosecutor announced in November 2009 that he would seek authorization from the pre-trial chamber to open an investigation. In authorizing the prosecutor's investigation, the pre-trial chamber found that there were no relevant national proceedings regarding the types of offenses and high-level individuals likely to be targeted in the ICC investigation. The chamber also noted that the information it

had before it demonstrated “inadequacies or reluctance” on the part of the Kenyan government to address the post-election violence as a general matter.

6. Media reports now suggest that some government officials are lobbying the African Union to support a United Nations Security Council deferral of the Kenya investigation under article 16 of the Rome Statute, citing plans to try the cases in Kenya. What is article 16?

Article 16 allows the UN Security Council to pass a resolution under its Chapter VII authority to defer an ICC investigation or prosecution for a renewable period of 12 months.

Article 16 states in full: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions.”

Chapter VII of the UN Charter empowers the Security Council to take measures to “maintain or restore international peace and security” if it has determined “the existence of any threat to the peace, breach of peace or act of aggression.” Article 16 was not intended for use in other than exceptional circumstances, and, to date, the Security Council has never deferred an ICC investigation or prosecution.

There is no indication that the ICC investigation in Kenya is detrimental to international peace and security. Indeed, impunity for past episodes of post-election violence is widely believed to have contributed to the violence that followed the 2007 election.

7. Are national trials a basis for an article 16 deferral?

According to media reports, government officials arguing for an article 16 deferral are citing the need for time to carry out national prosecutions. Kenya’s record of broken promises to bring those responsible to account casts some doubt, though, on whether new promises of national trials are genuine or an effort to derail the ICC process.

Even if the Kenyan government did take steps to prosecute those named in the prosecutor’s request for summonses, this would not be a basis for an article 16 deferral. Kenya could challenge the admissibility of a case before the ICC under article 19 of the Rome Statute on the grounds that it is genuinely willing and able to prosecute cases domestically. However,

an admissibility challenge under article 19 is distinct from deferral under article 16 and is made to the court, not to the Security Council.

Under article 19, the ICC judges may decide that a case is inadmissible because of national prosecutions. The ICC is a court of last resort, and the Rome Statute clearly recognizes that the ICC may only act where national authorities are unable or unwilling to do so.

It could be difficult to win an admissibility challenge, however. It is not enough to establish a special tribunal in Kenya or to undertake other reforms that would make it more likely for prosecutions to be brought in the future. For a case to be found inadmissible on this ground, under the ICC's existing case law, there must be genuine national proceedings encompassing both the person and the conduct that is the subject of the case before the ICC.

8. Isn't it a positive sign that President Kibaki has made a new commitment to hold national trials?

Credible national trials are necessary and long overdue. Even if the ICC judges issue summonses against the six people named in the prosecutor's request and the cases go to trial, additional proceedings in Kenya against low and mid-level perpetrators will be needed to complement the ICC process and bring full accountability.

But the timing of President Kibaki's announcement and efforts to seek a deferral of the ICC investigation strongly suggest that a new commitment to national trials has less to do with bringing accountability and more to do with stopping the ICC process. Ultimately it would be up to the ICC judges to determine whether any national proceedings exist that would cut off the court's ability to hear a case.

In addition, reforms are required to equip the Kenyan judicial system to carry out credible and independent national trials. Human Rights Watch strongly supported the creation of a [special tribunal](#) in Kenya with a mix of Kenyan and international staff to help address questions of independence and insulate the tribunal's work from political interference. It remains to be seen whether reforms to the judicial system required under Kenya's new constitution—promulgated in August 2010—could address some concerns, but, in any event, these reforms will take time.

The need to protect witnesses and victims has been another persistent concern in Kenya, and providing effective witness protection will be key to successful national prosecutions of

the post-election violence. Some steps have been taken to improve Kenya's witness protection capacity, including setting up a new witness protection agency. But the new agency will require experience before it is capable of protecting witnesses in high-profile cases.

The Kenyan government and parliament should be encouraged to undertake every effort to make possible credible national prosecutions of alleged perpetrators of post-election violence. As indicated above, national trials of alleged perpetrators of post-election violence will be necessary to achieve full accountability, given the violence's scope and scale. But delaying the ICC's work is likely to only lead to even further delay in justice for Kenya's victims.

9. After the prosecutor's announcement, the Kenyan parliament passed a motion calling on the government to withdraw from the ICC's founding treaty, the Rome Statute. Does this mean the Kenyan government has decided to leave the ICC?

On December 22, 2010, the Kenyan parliament passed a motion calling on the Kenyan government to withdraw from the Rome Statute and to repeal the International Crimes Act, the Kenyan legislation implementing the Rome Statute into national law. The motion is not binding and the Kenyan government has not made any decision with regard to withdrawal. Media reports indicate that some members of parliament may be preparing to introduce a new bill that would seek to compel the government to withdraw.

Kenya's proposed withdrawal from the Rome Statute has been greeted with wide disapproval by Kenyan civil society. Groups are organizing demonstrations against withdrawal and seeking to collect a million signatures on a [petition](#) calling on the Kenyan government to remain in the ICC.

10. If Kenya does withdraw from the Rome Statute, what will be the impact on the ICC's Kenya investigation?

Under article 127 of the Rome Statute, withdrawal from the treaty would not suspend ongoing ICC investigations or judicial proceedings that began before the date of withdrawal. Kenya would also be required to cooperate with the ICC on obligations that arose while Kenya was an ICC state party.

11. What sets the Kenya investigation apart from the ICC's other investigations?

The Kenya investigation is the first by the ICC that deals with post-election violence; the ICC's other investigations—in Uganda, Democratic Republic of Congo (DRC), Central African Republic, and Darfur, Sudan—deal with genocide, war crimes and/or crimes against humanity committed in the context of international or internal armed conflict. In light of the violence that has followed other disputed elections, including most recently in Cote d'Ivoire, and upcoming elections in Kenya's neighboring country, Uganda, the ICC's Kenya investigation should serve as a warning to politicians that they can be held to account for turning elections into bloodbaths.

It is also the first *proprio motu* ICC investigation—the first investigation opened on the prosecutor's own initiative. Three of the four other ICC situations—Uganda, DRC, and Central African Republic—were referred to the ICC prosecutor by the governments of those countries (so-called “self-referrals”), while the fourth situation—Darfur—was referred by the United Nations Security Council. Before opening the Kenya investigation, the prosecutor had to seek authorization from an ICC pre-trial chamber. The pre-trial chamber—in a 2-1 opinion—gave the prosecutor permission to proceed in March 2010.

12. Is it significant that the prosecutor has brought two cases at the same time?

This is the first time the ICC prosecutor has brought two cases against rival groups simultaneously. He is seeking charges against individuals alleged to be responsible for crimes committed against both opposition and government supporters.

In other ICC situations, the prosecutor has “sequenced” investigations, investigating those responsible for crimes allegedly committed by one party or group at a time. Sequencing, though, has led to a perception of bias in the prosecutor's selection of cases, particularly where there has been a time lag between charges brought against leaders of one group and leaders of the rival group. In polarized societies, perceptions of bias can also fuel ethnic tensions. Human Rights Watch noted both effects in the ICC's sequenced investigations in the Ituri district of DRC.

Bringing cases against both parties at the same time demonstrates an effort by the ICC prosecutor to avoid these effects in Kenya and could help convey the ICC's independence and impartiality. The prosecutor has asked the pre-trial chamber to consider both cases and issue decisions at the same time.

13. What did Human Rights Watch’s research show about the Kenyan post-election violence?

In January and February 2008, Human Rights Watch researchers were on the ground documenting the post-election violence as it unfolded. Researchers conducted over 200 interviews with victims, witnesses, perpetrators, police, magistrates, diplomats, Kenyan and international nongovernmental organization staff, journalists, lawyers, businesspeople, local council members, and members of parliament across the country, from all major ethnic groups. Our findings are documented in our March 2008 report, [*Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance*](#).

We documented essentially three patterns of violence.

First, members of the Kenyan police forces responded to demonstrations and riots with excessive force in some areas. They fired on unarmed demonstrators and bystanders to break up riots, and to keep people away from demonstrations. In other areas, the police did nothing as mobs committed acts of brutality.

Second, mobilized opposition supporters—especially in the Rift Valley and the informal settlements of Nairobi—attacked those they assumed had voted for Kibaki and his PNU, in large part the Kikuyu, Kenya’s largest ethnic group. This assigned an ethnic dimension to the violence. Around Eldoret local ODM mobilizers and other prominent individuals called meetings during the election campaign to urge violence in the event of a Kibaki victory, arguing that if Kibaki was announced as the winner it must mean the election had been rigged and the reaction should be “war” against local Kikuyu residents. In the days that followed, attacks were often meticulously organized by local leaders.

Third, Kikuyu militia then attacked opposition supporters. In Naivasha and Nakuru in the Southern Rift Valley, PNU mobilizers and local businesspeople called meetings, raised funds, and directed youth in their attacks on non-Kikuyus and their homes.

Human Rights Watch has consistently called for accountability for those behind the attacks and for investigations to determine the extent of links between the national leaderships of the opposition and ruling parties and those who carried out the violence. The research circumstantially suggests leaders may well have been at least aware of what was happening and did little to stop it. Some may have been more directly involved. Human Rights Watch had also called for further investigation of what appeared to be the selective or partial police response to the violence.