

Perceptions and Realities: Kenya and the International Criminal Court

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Perception: The United Nations (UN) Security Council should act under article 16 of the International Criminal Court (ICC) treaty to defer the Kenya cases for 12 months.

Reality: 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 the Security Council has never deferred an ICC investigation or prosecution.

There are no facts on the table to suggest the exceptional circumstances that would justify use of article 16 in the Kenya cases.

The horrifying attack on Nairobi’s Westgate shopping center has thrown the threat of terrorism into sharp relief, but it is, regrettably, not a new development in Kenya or the region. President Uhuru Kenyatta and Deputy President William Ruto campaigned on pledges to cooperate with the ICC and maintained at the time that this cooperation would not pose a problem for their governance of the country. No case has been made that by deferring the ICC’s proceedings, the Kenyan government would be in a materially better position to combat terrorism.

Indeed, it is impunity that has fuelled cycles of political violence in Kenya stretching back to the early 1990s. The 2013 elections were not marked by the scale of violence witnessed in 2007-2008; Kenyatta and Ruto face charges of crimes against humanity before the ICC for their alleged roles in that violence. But they were preceded by inter-communal clashes in parts of Kenya, which claimed more than 477 lives and displaced another 118,000 people. In advance of the election, victims of the 2007-2008 violence also told Human Rights Watch researchers that an absence of justice had contributed to existing underlying tensions in the Rift Valley.

Kenya's impunity crisis is a source of instability, and the ICC represents the only available avenue for justice. Deferral under these circumstances would set a damaging precedent for other ICC cases. It would also mean delay at best, but given the vulnerability of witnesses in the Kenya cases, it is likely ultimately to mean the denial of justice. The Westgate attack has created new victims in Kenya, but this should not be used as an excuse to deprive victims of Kenya's post-election violence of the accountability they have sought for more than five years.

Perception: The ICC process isn't needed because the Kenyan judicial system can deliver justice for the 2007-2008 post-election violence.

Reality: In the more than five years since the post-election violence, Kenya's authorities have failed to deliver justice in the vast majority of cases stemming from the period. Human Rights Watch has been able to confirm only a handful of convictions for serious crimes committed during the violence.

A 2012 review of thousands of pending cases by Kenya's Directorate of Public Prosecutions indicated there were difficulties in obtaining evidence in most cases. There has been impunity for police officials implicated in crimes. In many cases of shootings by police, surviving victims or family members who sought to file criminal complaints were turned away. Nor did the government at the time of the violence show a serious commitment to ensuring fair, transparent and effective investigations of those who organized and financed the violence.

The failure to hold those responsible for the election violence to account continues a cycle of impunity in Kenya. Those responsible for political violence in 1992 and 1997 also escaped justice.

There is, of course, a need for additional cases in Kenyan courts to bring full accountability beyond what the ICC process may yield. This will only be possible if Kenya's authorities have the political will to move forward with genuine investigations.

In early September, Kenya's parliament passed motions aimed at withdrawing Kenya from the Rome Statute and repealing the International Crimes Act, which enables Kenya to carry out its responsibilities under the treaty and provides a basis for the prosecution of ICC crimes—genocide, crimes against humanity, and war crimes—in Kenya. Repeal of the law thus would remove an important tool for the domestic prosecution of international crimes. Any further action toward repeal would be a worrying sign that Kenya lacks the political will for domestic trials.

Perception: Kenya has cooperated in the cases before the ICC, including the voluntary appearance by the defendants in court proceedings. The ICC should take steps, therefore, to accommodate the need for President Kenyatta and Deputy President Ruto, two of the three defendants, to carry out their responsibilities.

Reality: 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 the ICC with collecting evidence, including access to government records, although the prosecutor has not sought a formal finding of non-cooperation against Kenya. In addition to assistance in investigations, however, the ICC depends on the public support of its member countries and other interested parties to create a climate conducive to its work. Efforts by Kenyan government officials to lobby other governments to support referral elsewhere or termination of the ICC's cases have the opposite effect.

The ICC's cases were well-advanced at the time of Kenyatta and Ruto's election. The management of court proceedings should be left to the independent exercise of the ICC's judges. An attempt to insert political solutions into a judicial process will only undermine the court's independence and credibility, and its ability to deliver on its mandate to afford fair justice. The latter is in the interest of both victims and defendants.

Perception: Subjecting democratically elected leaders to prosecution defies the will of the Kenyan people.

Reality: Kenyatta and Ruto campaigned for elected office on pledges to continue their cooperation with the ICC.

Article 143(4) of the Kenyan constitution, adopted in 2010, specifically prohibits the president's immunity from criminal prosecution for "crime[s] for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity." The Rome Statute is such a treaty and Kenya remains a state party.

The election outcomes should have no bearing on the issue before the ICC, which is the determination of the individual criminal responsibility of the defendants in the cases.

Perception: Kenyans elected Kenyatta and Ruto and this means they just want to "move on." Kenyans no longer support the ICC.

Reality: Although Kenyatta and Ruto campaigned on pledges to continue their cooperation with the ICC, their campaign rhetoric also painted the ICC as a tool of Western imperialism. Since taking office the Kenyatta government has actively courted the support of other African leaders to undermine the ICC. It has also ignored threats against human rights defenders and

journalists that appear to be linked to their perceived association with the ICC. Authorities in some areas have pressed people to “move on.”

In this context and with the passage of time since crimes were committed it is not surprising that views about the ICC process have become increasingly polarized among Kenyans and that polls have shown a drop in support for the ICC. The ICC process itself has suffered setbacks. Some witnesses have become unwilling to testify, including some who have cited security concerns, which may have undermined confidence that the ICC cases can produce justice for the post-election violence.

However, serious crimes were committed in 2007-2008 and, in the vast majority of cases, those responsible have yet to be held to account. As one Kikuyu elder told Human Rights Watch in advance of the March 2013 elections:

I see people who killed my relatives, raped my cousin, destroyed my property. They have not been arrested and tried. They have not apologized for what they did. How do you expect me to just accept that and move on?

Perception: There was no violence around the 2013 elections. This shows justice isn't important to peace in Kenya.

Reality: Justice is an important right and an end in and of itself. But Kenya's own history suggests that the failure to deal head-on with past crimes may only encourage future violence.

While the 2013 elections were not marked by the scale of violence witnessed in 2007-2008, they were preceded by inter-communal clashes in parts of Kenya, which, as of February 2013, had claimed more than 477 lives and displaced another 118,000 people.

In advance of the election, victims of the 2007-2008 violence told Human Rights Watch researchers that an absence of justice had contributed to tensions in the Rift Valley, where most of the 2007-2008 crimes were committed.

Looking further back, it is clear that Kenya's impunity crisis is profound and has led to cycles of violence. Those responsible for political assassinations under President Jomo Kenyatta's post-independence government and the use of torture against political opponents and excessive use of force by the security services under President Daniel arap Moi were not prosecuted.

The violent episodes around the 1992 and 1997 elections were treated with similar impunity. Government commissions named names, including prominent politicians, but no one was prosecuted. It is widely thought that this entrenched impunity encouraged politicians to believe in 2007 that they could get away with virtually anything to achieve their political ends.

Perception: The ICC is targeting certain communities in Kenya and favoring others because it summoned suspects from just two tribes. The cases are damaging to national reconciliation.

Reality: Ruto, Kenyatta and Joshua arap Sang, the third ICC defendant in the Kenya cases, are charged as individuals, and, in the case of Ruto and Kenyatta, not in their capacity as government officials. The cases before the ICC will determine only their individual criminal responsibility. One of the benefits of a criminal justice process is that it determines individual responsibility for specific crimes. This can help to break away from assigning blame to the totality of an ethnic or political group.