



# **Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court**

## **Questions and Answers**

March 25, 2009

### **Background**

The Commission of Inquiry on Post-Election Violence (Waki Commission) was set up by the Kenyan coalition government of national unity as part of the peace and reconciliation mediation process that brought the violence of early 2008 under control. The commission reported in October, recommending a series of reforms and establishment of a special tribunal of international and Kenyan judges to investigate and prosecute those most responsible for the violence. The Waki report contained a strict timeline for setting up the tribunal and putting it to work, which, if breached, would require the mediator—Kofi Annan—to pass a sealed envelope with the names of chief suspects to the International Criminal Court (ICC).

On February 12, the Kenyan parliament voted against a constitutional amendment bill establishing the proposed tribunal made up of Kenyan and international judges. The Waki Commission had set a deadline of January 30 to pass the legislation but on February 24, Annan granted the government of Kenya more time to re-introduce the bills. Some within Kenyan civil society, however, have called for Annan to hand over the sealed envelope to the ICC now, or for a treaty between Kenya and the United Nations (UN) establishing a tribunal modeled on the Special Court for Sierra Leone.

- 1. The prosecutor at the International Criminal Court has recently confirmed that the situation in Kenya is being monitored by his office. What does this mean?**

Kenya became a member of the ICC in 2005. This means that without any further action on the part of Kenyan authorities or any international actor, the ICC prosecutor may choose to seek to open an investigation into genocide, crimes against humanity, and/or war crimes that have been committed in Kenya or by Kenyan nationals. In order to determine whether to seek to open an investigation, however, the ICC prosecutor must first carry out an analysis of whether alleged crimes fall within the court's jurisdiction and whether any case based on these crimes would be admissible. See below for discussion of the factors that the prosecutor will take into account in his analysis. This analysis or

active monitoring, thus, precedes any decision to investigate, and may in fact lead to a decision not to investigate.

In addition to Kenya, the ICC prosecutor is currently analyzing a number of situations around the world, including in Afghanistan, Colombia, and Georgia. The ICC prosecutor is also analyzing situations in Cote d'Ivoire and the Occupied Palestinian Territories (OPT), two non-states parties to the ICC that have asked the prosecutor to accept jurisdiction. In respect of the OPT, the request has come from the Hamas-led authority in Ramallah. As part of his analysis of the situation in Kenya, the prosecutor has requested information from various parties in Kenya and has also received a number of communications from individuals and nongovernmental organizations (NGOs).

- 2. If Kofi Annan hands over the Waki Commission envelope containing the names of those suspected of being primarily responsible for Kenya's post-election violence, will the ICC prosecutor begin an investigation?**

Not necessarily. The ICC prosecutor must first make an independent determination to proceed with an investigation and must seek authorization to initiate an investigation from a chamber of ICC judges. The suspects' names contained in the envelope prepared by the Waki Commission would be further information—information in addition to that which the prosecutor has already received from the Kenyan National Human Rights Commission, individuals, and NGOs—on which to base his decision as to whether or not to seek to open an investigation. If the ICC prosecutor determines that there is no reasonable basis to proceed with an investigation under the ICC's statute, he is not required to seek to open an investigation. He may always reconsider this decision on the basis of new facts of information.

- 3. What is the ICC prosecutor taking into consideration in determining whether or not to begin an investigation?**

The ICC prosecutor's decision to initiate an investigation is guided by requirements set out in the ICC treaty. First, there must be a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed. ICC crimes include genocide, crimes against humanity, and war crimes. Second, even where an ICC crime or crimes have been committed, the ICC prosecutor must determine whether they would be admissible. Admissibility has two components: gravity and complementarity.

*Gravity:* The ICC's jurisdiction is limited to only the most serious crimes of concern to the international community. To assess whether the crimes alleged have the requisite gravity, the ICC prosecutor considers the scale, nature, and manner of commission of crimes, as well as the impact of crimes.

*Complementarity:* The ICC's jurisdiction is also limited to cases where national authorities are unwilling or unable to act to investigate the crimes in question for purposes of prosecution. This is known as "complementarity" and makes the ICC's international jurisdiction secondary to that of national authorities.

#### **4. Why is the ICC's jurisdiction complementary? What are the advantages of national trials?**

National authorities, including those in Kenya, have the primary responsibility to bring those responsible for international crimes to account. Providing judicial remedies to victims and administering criminal justice fairly are core aspects of good governance and help to build respect for the rule of law and to deter future crimes. The ICC's authority to act only where national authorities are unable or unwilling, thus, respects the role of national courts and encourages the development of credible and independent judicial systems within national jurisdictions.

National trials have several distinct advantages in practical terms. Trials by the ICC are most likely to be carried out at the seat of the court in The Hague. Although the ICC is attempting to develop robust outreach and public information programs, proceedings in Kenya are likely to be more accessible, including by those communities directly affected by the crimes tried. National trials would also strengthen Kenya's judicial system and would add to the experience and expertise of national authorities in the investigation and prosecution of international crimes, particularly through taking on board lessons from the tribunal's proposed mix of national and international staff. Moreover, this mix will enable international staff to perform their functions more competently. It is likely that such investigations and prosecutions could also be conducted more quickly than those of the ICC, which will need to develop specialized expertise on Kenya. The ICC's indispensable role is in closing the impunity gap for serious international crimes where credible national investigation and prosecution are not possible.

#### **5. How long would it take for the ICC prosecutor to decide whether or not to open an investigation in Kenya?**

It is difficult to predict. The ICC is currently conducting investigations in four situations: northern Uganda, the Democratic Republic of Congo (DRC), Central African Republic (CAR), and Darfur, Sudan. The situations in Uganda, DRC, and CAR were referred to the prosecutor by the governments of those countries, while the situation in Darfur, Sudan was referred to the prosecutor by the UN Security Council. For situations in Uganda, DRC, and Darfur, investigations were opened within two to six months of referrals. For the Central African Republic, however, more than two years passed between the referral and the ICC prosecutor's decision to initiate an investigation.

## **6. How long has it taken for cases at the ICC to come to trial?**

The ICC's first trial—that of Thomas Lubanga in the DRC situation—began in January 2009, nearly five years after the DRC situation was referred to the ICC prosecutor and three years since Lubanga was transferred to the ICC's custody. While the start of Lubanga's trial was delayed for reasons that are unlikely to reoccur, the ICC's unique pre-trial proceedings—which include a procedure to confirm charges—and the complicated nature of those cases tried by the court mean that proceedings lasting between two to three years from arrest to verdict are likely. The court's investigations have lasted between 10 and 20 months before first arrest warrants have been issued, and, because the ICC does not have its own police force and must rely on governments and the United Nations to carry out arrests, some of its warrants have been outstanding for nearly four years.

## **7. If the ICC prosecutor opens an investigation in Kenya, how many people will be charged?**

It is the policy of the ICC prosecutor to target only those persons bearing the greatest responsibility for the gravest crimes. While Human Rights Watch has advocated that the ICC prosecutor apply this standard flexibly, it is unlikely that more than a handful of persons would be charged were the ICC to open an investigation and proceed with prosecutions in Kenya. The prosecutor's case in Uganda yielded five arrest warrants, while the two cases in the DRC have yielded two arrest warrants each. The prosecutor has sought a total of six arrest warrants in the Darfur situation, and just one in the Central African Republic.

Therefore, even if the ICC acts with regard to the situation in Kenya, it will most likely prosecute at most a handful of individuals. To bring full accountability and, moreover, to break long-standing cycles of impunity, Kenyan authorities will need to pursue national investigations and prosecutions. Indeed, it is legally obliged to do so under national and international law. As the UN special rapporteur for extra-judicial executions, Philip Alston, concluded in his recent report, the Waki Commission-recommended special tribunal “is absolutely indispensable if justice is to be done and if the appropriate lessons are to be learned before the next elections. An international tribunal cannot possibly achieve justice on a broad scale in this regard.”

The UN special rapporteur also suggested that he saw powerful reasons for the ICC's involvement to try those most responsible. The complementary nature of the ICC's jurisdiction means, however, that it should only intervene if Kenya's authorities demonstrate that they are unable or unwilling to prosecute these individuals, and if the ICC's other jurisdictional pre-requisites are met.

8. **Kofi Annan has indicated that he will delay handing over the envelope to the ICC for a short period in order to permit renewed efforts on the special tribunal, and President Kibaki has ended the most recent parliamentary session early so that legislation establishing the tribunal can be tabled in a new session. What steps should be taken to ensure a more credible process this time around?**

Efforts to pass legislation establishing the special tribunal were marred by a failure of leadership. President Kibaki and Prime Minister Odinga made little effort to marshal support for the bills and to impress upon lawmakers their collective responsibility to establish the tribunal as a means to provide accountability. Severe limits were placed on the consultation process leading up to the tabling of the special tribunal legislation. Calls by civil society for further amendments to ensure the tribunal's credibility and independence were repeatedly rebuffed; as a result, the special tribunal bill and the constitutional amendment bill were poorly drafted. This allowed, in the words of the UN special rapporteur on extra-judicial executions, "opportunistic efforts by politicians with a clear vested interest in promoting impunity to undermine the steps required to create the Special Tribunal."

Every effort must now be made to avoid a repeat of this same outcome. The Kenyan government should hold consultations with civil society and legal experts to incorporate the many criticisms of the special tribunal and constitutional amendment bills as currently published, and parliament should involve itself in these consultations to guarantee that the concerns of members of parliament are addressed before the bills are introduced. Criticism of the bills and the process may be justified. It is important to note, however, that even if the special tribunal is established, the ICC will retain jurisdiction and can step in as needed. Thus, any member of parliament who argues that the special tribunal should be rejected out of hand in favor of the ICC option may not understand that the two are not mutually exclusive.

The African Union and the United Nations should be asked to provide technical assistance to the Kenyan government in the drafting of the bill to ensure that the special tribunal is provided with a sound basis, consistent with international fair trial standards and international criminal law (see Human Rights Watch's recommendations, <http://www.hrw.org/node/78950>). The re-drafting of the bills should be completed and re-introduced in parliament within a reasonable time to avoid further delay in the tribunal's establishment.

International partners also have a role to play in ensuring a successful outcome. Foreign governments should impress upon Kenyan authorities that the establishment of the special tribunal is the key test of the commitment of the coalition government and the 10<sup>th</sup> parliament to the reform agenda brokered by Kofi Annan. Foreign governments could also pledge their financial support to the special tribunal, if it is established in a credible process. The International Criminal Court should continue its monitoring and analysis of the process.

**9. If the special tribunal is established, but does not act independently and impartially, does this mean that the perpetrators of the post-election violence will not be brought to book?**

Even if a special tribunal is established, the ICC retains its jurisdiction over the situation in Kenya. Regardless of whether Kofi Annan transmits the Waki Commission envelope to the ICC prosecutor, the prosecutor could decide at any point to seek to initiate an investigation and to bring prosecutions if he considers that the crimes alleged are sufficiently grave and that national proceedings are not being conducted credibly or have not been conducted with regard to particular individuals or incidents. Proceedings conducted in Kenya in a manner designed to shield those responsible from criminal responsibility or which suffer from unjustifiable delays or are not independent or impartial would not act as a barrier to the ICC's subsequent jurisdiction.

**10. Would the establishment of a tribunal through treaty between the UN and Kenya, as was the case in Sierra Leone, be a better alternative to both the special tribunal and the ICC?**

The Special Court for Sierra Leone was agreed to by the government of Sierra Leone and the United Nations in early 2002 before the ICC treaty came into effect. It seems that some may favor this approach because it would circumvent the role of parliament and would eliminate constitutional considerations. Successful negotiation of a treaty between the UN and Kenya would be a lengthy process, could unnecessarily delay the establishment of a tribunal, and would likely still require ratification by the Kenyan parliament. Even if parliament could be circumvented, this would represent a failure of Kenya's leadership to marshal support for carrying out its responsibilities to provide accountability for serious crimes. This would do little to curb the reigning culture of impunity.

Any such tribunal would be heavily dependent on donor support, and this would be unlikely to be provided now that the ICC has been established. Donor resources would, in any event, be better invested in a Kenyan special tribunal that can contribute more directly to the strengthening of the national judicial system. Unlike Sierra Leone, where civil war had devastated its national institutions, Kenya has institutions which, with the proper legislation and scrutiny from international and national civil society, can and should be made to work.