

The International Criminal Court and Kenya



Frequently Asked Questions

1

What is the International Court?

The ICC is an international permanent court of justice established to try perpetrators of the most serious crimes of international concern. It has been in operation since July 1, 2002 and has its seat in The Hague, The Netherlands. The ICC has jurisdiction over the following crimes: crimes against humanity, war crimes and genocide. It can only investigate crimes committed after 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. Kenya ratified the ICC statute in March 2005, and therefore, the ICC has jurisdiction for the crimes committed in the country since 1 June 2005.

2

What is the Principle of Complementarity?

The International Criminal Court (ICC) is a court of last resort. This means that the ICC can only investigate and prosecute core international crimes when national jurisdictions are unable or unwilling to do so genuinely. A State is considered 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.

3

How many people will be prosecuted and tried at the Court?

ICC investigations focus on those bearing the greatest responsibility for the crimes that were committed, regardless of who they may be. Those persons will be identified following an investigation. It is important to note that the ICC Prosecutor is not bound by the list of perpetrators established by the Waki Commission. Normally the ICC tries a very small number of people. Therefore, other perpetrators whether high or low level perpetrators must be prosecuted by national mechanisms, such as a Special Tribunal.

4

What are the next steps after an investigation has been authorised?

After the opening of an investigation, the Office of the Prosecutor will identify the most serious incidents falling under ICC jurisdiction, and secondly, the most responsible persons for such incidents. A request for arrest warrants would follow and once the person or persons are arrested the ICC trial would commence. It is also possible that, after a thorough investigation, the Prosecutor comes to the conclusion that crimes committed in Kenya are not of sufficient gravity to warrant ICC intervention, and thus may decide to close the case without prosecution. In this scenario, victims of the crimes would have legal remedy against such a decision through an appeal mechanism.

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5 Who can be prosecuted by the ICC?

The ICC only tries individuals. The ICC does not prosecute persons who were under the age of 18 at the time the crime was allegedly committed. The ICC will not try everybody that commits these crimes. It is the policy of the Prosecutor to focus on those who are the most responsible for crimes committed in any situation he is investigating. There are no provisions for amnesties, and even acting heads of state may be indicted.

6 Why does the Court only target Africa?

Many commentators have argued that the Court is a Court that only targets African countries, especially as all five situation countries have been in Africa, including The Central African Republic, The Democratic Republic of Congo, Darfur in Sudan, Northern Uganda and now Kenya. However it is important to note that in three of these five instances, the three States have themselves referred the situations to the ICC. In the case of Darfur, the situation was referred to the Court by the UN Security Council, given the grave atrocities that had been committed in Darfur. Furthermore, the Prosecutor has stated that cases or potential cases are not selected on the basis of attaining a regional balance.¹

7 Can victims participate in ICC proceedings?

According to the ICC Statute, victims of 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 and to make their own representations with a view to establish the truth of what happened.

8 What provisions are there for reparations?

Victims also have a right to receive reparations and to participate in proceedings related to reparations award. It is likely that many of the reparations awarded to victims of crimes under ICC investigation will be collective; some might also be symbolic. However, important to bear in mind is that reparations will only be given out once the accused is found guilty of the charges laid against him/her.

9 Does the ICC have its own police force?

As an ICC State party, Kenya is obliged to cooperate fully with the Court in its investigation and prosecutorial functions. Cooperation is particularly important in the case of arrest and surrender of persons as 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 an 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 Kenya Parliament on December 2008.

¹OTP, "Annex to the Three Year Report on the Prosecutorial Strategy," <http://www.icc-cpi.int/library/organs/otp>



10 What are Kenya's responsibilities as a member of the ICC?

Kenya as been a party to the ICC Statute since March 2005, thus Kenya's obligations under International Law are such that it has a duty to exercise its criminal jurisdiction over those responsible for international crimes. If Kenya is unable to carry out domestic prosecutions and investigations, then, according to the principle of complementarity, under which the ICC operates, the ICC may then intervene.

11 Is a Local Tribunal for Kenya still necessary?

The investigation by the ICC will be limited in scope; the operation of the Court is such that it targets those who bear the greatest responsibility for the crimes that are committed. Thus, the Prosecutor will only bring cases against a few individuals who are most responsible for the crimes that were committed on the territory of Kenya. As a result there are hundreds of victims who will be unable to obtain redress for the crimes committed against them, therefore it is still very important for the Kenyan government to establish a Special Tribunal for Kenya in order to bring to bridge the impunity gap as it relates to small- to mid- level perpetrators of violence.

12 What types of crimes will the Court focus on in relation to Kenya?

According to the Prosecutor of the ICC, and the judgement of Pre-Trial Chamber II, crimes against humanity were committed during the 2007 -2008 post-election violence. 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.

13 Can the Security Council defer the International Criminal Court investigation if Kenya establishes domestic courts to try cases related to crimes committed in during the post election violence?

In accordance with the Article 16 of the Rome Statute, the UN Security Council can adopt under Chapter VII of the Charter of the United Nations a resolution to defer an ICC

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investigation or prosecution for a renewable period of 12 months.

The SC can defer the investigation in order 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."

The Security Council has the power to approve such a deferral if it decides that prosecution of the cases could threaten international peace and security.

According to article 27 of the UN Charter, a decision to defer an ICC investigation or prosecution under article 16 requires an affirmative vote of nine members of the 15-member SC, including the concurring votes or abstention of permanent members of the Council.

Any decision on deferral under Article 16 is exclusively in the competence of the UNSC and the ICC has no influence whatsoever on that decision.

Kenya can challenge the admissibility of the cases under article 19 of the Rome Statute on 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.

14

Can the Kenyan Government challenge the admissibility of the case?

In accordance to Article 19 of the Rome Statute, if and when the Judges of the Pre Trial Chamber decide to issue summons to appear or warrants of arrest against six named individuals, the Government and/or an individual/s for whom a warrant of arrest or summons to appear has been issued can challenge the admissibility of a case. That challenge can take place at the earliest opportunity before the Pre Trial Chamber.

If the Kenyan Government challenges the admissibility of a case based on the existence of the national proceedings, national proceedings must encompass both the person and the conduct that is the subject of the case before the ICC.

If the Kenyan Government succeeds in challenging the admissibility, the Prosecutor may submit a request for review of the Chamber's decision. This is only possible when the Prosecutor is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17. So, when a case has been determined inadmissible, the Pre-Trial Chamber may review its previous ruling if new facts demonstrate that actually Kenya is not genuinely prosecuting those persons (article 19, paragraph 10, of the Statute).

Issuance of Warrant of Arrest or Summons to Appear

Q When and how does the Prosecutor apply for a warrant of arrest or a summons to appear?

According to Article 58 of the Rome Statute, once the Prosecutor has initiated an investigation, he may submit an application to the Pre Trial Chamber requesting the issuance of a warrant of arrest or a summons to appear before the Court for the person(s) who have allegedly committed crimes within the jurisdiction of the Court.

Q Who can issue a warrant of arrest or a summons to appear?

Only the Pre-Trial Chamber has the authority to warrants of arrest or summonses to appear before the Court at the request of the Prosecutor.

Q When shall the Pre-Trial Chamber issue a warrant of arrest or a summons to appear?

The Pre-Trial Chamber shall issue a warrant of arrest or a summons to appear if it determines that the evidence presented by the Prosecutor establishes "reasonable grounds to believe" that the person has committed the crimes alleged in the request.

Q How long does it take for the Judges to issue a warrant of arrest or a summons to appear upon the request of the Prosecutor?

This depends on the amount of evidence and material submitted by the Prosecutor and the specificities of each case. For example, in the first Uganda case, the applications were made on 6 May 2005, and the Pre-Trial Chamber issued the five warrants of arrest under seal on 8 July 2005. In the first DRC case, the Prosecutor made his application on 12 January 2006, and the Pre-Trial Chamber issued the warrant of arrest under seal on 10 February 2006, after having requested further information from the Prosecutor.

Q What is a summons to appear?

A summons to appear is an order issued by a Pre-Trial Chamber for a person to appear before the Chamber on a specified date. After reviewing the application for a summons to appear and the evidence or other information submitted by the Prosecutor, the Pre-Trial Chamber issues a summons to appear if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that a summons is sufficient to ensure the person's appearance.

As provided by article 58 of the Rome Statute, the summons has to contain:

- The name of the person and any other relevant identifying information;
- The specified date on which the person is to appear;

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- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and,
- (d) A concise statement of the facts which are alleged to constitute the crime.

A summons to appear is to be served on the person.



What is the difference between an arrest warrant and a summons to appear?

Article 58 of the Rome Statute allows a Pre-Trial Chamber to issue either a warrant of arrest or a summons to appear for persons against whom there are reasonable grounds to believe that they have committed a crime within the jurisdiction of the Court. To issue a summons to appear, the Pre-Trial Chamber must be satisfied that the suspect will appear *voluntarily* before the Court.

A warrant of arrest is issued when there are reasonable grounds to believe that a suspect will not appear voluntarily before the Court and that his or her arrest appears necessary: a) to ensure the person's appearance before the Court, or b) to ensure that he or she will not obstruct or endanger the investigation or proceedings, or c) to prevent the further commission of the crime or related crime within the jurisdiction of the Court with which the suspect is charged.



What will happen if a suspect does not appear before the Court in accordance with a summons to appear?

If a suspect does not appear before the Court or fails to comply with the Pre-Trial Chamber's orders, the Chamber may review its determination and decide to issue a warrant of arrest.



What happens after the issuance of a warrant of arrest?

The States Parties to the Rome Statute have an obligation to arrest and surrender to the Court the person against whom a warrant of arrest has been issued by the Pre-Trial Chamber. Upon the surrender of the person to the Court, he or she will promptly appear before the Pre-Trial Chamber. From this moment the person enjoys all the rights of the accused in accordance with article 67 of the Rome Statute, including the right to have adequate time and facilities for the preparation of his or her defence and to have the assistance of a counsel, without payment if the person lacks sufficient means to pay for it.

After the first appearance, the Pre-Trial Chamber will be engaged in the process leading to the hearing on the confirmation of the charges in accordance with article 61 of the Rome Statute. This process usually takes several months.

If the charges are confirmed, the Pre-Trial Chamber will commit the person to a Trial Chamber for trial on the charges as confirmed by the Pre-Trial Chamber.



KENYANS FOR PEACE WITH TRUTH & JUSTICE, (KPTJ) a coalition of citizens and organizations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 presidential election and the violence that followed it. Members include: Africa Centre for Open Governance(AfriCOG), Bunge la Mwananchi, Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle-the Children's Foundation, Constitution and Reform Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay And Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

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