

## **Fresh Doubts About Mandate of Kenya's Special Court**

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Director of prosecutions rules out using new institution to deal with cases from 2007-08, even though that was why it was conceived.

Justice experts in Kenya are urging the authorities to reopen thousands of cases on crimes committed during the bloodshed that swept the country six years ago following a disputed election.

The demands follow the revelation by Kenya's Director of Public Prosecutions (DPP) Keriako Tobiko earlier this month that more than 4,000 criminal cases – including alleged acts of rape, murder and arson – will not be prosecuted.

More than 1,100 people were killed and 650,000 forced from their homes when violence erupted along ethnic lines following a presidential poll in December 2007. Three suspects, including the country's president, Uhuru Kenyatta, and his deputy, William Ruto, are facing trial at the International Criminal Court (ICC) in The Hague.

While the ICC investigated senior-level suspects, thousands of crimes attributed to mid- and lower-level perpetrators were reported to Kenyan police.

A multi-agency taskforce was set up in February 2012 to assess more than 5,000 such cases. The DPP says that around 1,000 of them have since gone to trial, with some 500 resulting in convictions.

Tobiko now maintains that there is not enough evidence to bring the rest of the cases to trial.

This casts a shadow over plans for a special section of the high court known as the International Crimes Division (ICD), which was originally envisaged as a way of dealing with the post-election violence. A domestic court, the ICD will be able to try "international-scale crimes", meaning war crimes, crimes against humanity and genocide, under the International Crimes Act of 2008. (See **Setback for Kenya's Special Court.**)

Tobiko made the announcement during a meeting in the town of Naivasha where he was discussing the mechanics of setting up the ICD with members of the judiciary.

"The sad and painful truth... is that at present there are no cases arising out of the 2007-08 post-election violence that can be prosecuted before the ICD," Tobiko told the meeting.

Njonjo Mue, a human rights lawyer and specialist on post-conflict justice, criticised this decision. He told IWPR that the move reflected a lack of political will rather than a lack of evidence, and urged the authorities to re-examine the cases.

"The DPP has the authority under the constitution to direct the inspector general of police to investigate cases that have not been properly investigated," Mue said. "He should tell us if he has done so and what is the outcome of that process. That's where we should start."

Police spokeswoman Gatiria Mboroki told IWPR that the DPP had not asked the force to conduct any fresh investigations.

Lilian Oduor, a representative of the DPP's office, told an IWPR event in Nairobi last week that it would be difficult to re-open the cases because crucial evidence was lacking and many of the witnesses were not willing to come forward.

She noted that victims of rape had failed to obtain the necessary medical evidence at the time of the incidents.

"Some victims of rape never even went to hospital for examination and therefore we can't get that medical evidence," she said. "It is not that we are refusing to prosecute."

"Can we still go back seven years down the line and collect more evidence? That is the question still out there," she continued. "Are these witnesses or the complainants or even victims willing to come forward and give evidence on these files? I am sure if there was evidence, we would be able to proceed with the cases."

However, Mue pointed out that international prosecutors rarely view the passage of time as a barrier to investigating a criminal case, noting that Nazi perpetrators of genocide are still being pursued, and the international tribunal in Cambodia are prosecuting crimes that occurred decades ago.

Mue said it was not too late to start new investigations or to follow up on cases that might not have been properly investigated first time around.

It was still possible to collect the evidence needed to prosecute the cases, “particularly when villagers are still saying they know who took their cows, who burnt their houses and who raped them”.

Despite the stance taken by the DPP’s office, an internal document from the Naivasha meeting on the establishment of the ICD, seen by IWPR, does not actually rule out prosecuting the post-election crimes.

“The ICD has jurisdiction to preside over the election-related violence crimes, and there needs to be justice for victims,” the document reads.

Nevertheless, Tobiko’s comments raise questions about what the point of the ICD project is, given that the court was originally conceived as a mechanism to prosecute cases from the 2007-08 violence.

Some are now questioning whether there is a need for the ICD at all.

“It’s dishonest to begin a conversation to address post-election violence, and then somewhere along the way we drop that issue and start addressing other issues like transnational crimes,” Mue said. “If we are to believe the DPP when he says the 4,000 cases cannot be prosecuted, then why are we setting up a system to address a problem that we’ve accepted that is unsolvable?”

The court can also try suspects in cases of piracy, terrorism, drug trafficking and other transnational crimes, although critics point out that Kenya already has courts empowered to try these crimes, and that using the ICD for this purpose would dilute the process of prosecuting the election violence crimes.

Samuel Kobia, a member of Kenya’s Judicial Service Commission who chairs the task force leading the process of setting up the ICD, has defended the plan to bring transnational crimes under the remit of the division. Speaking in The Hague late last year, he said there were too many such cases for the current court system to handle.

“After magistrates in Kenya said they were overwhelmed by the transnational cases, it was agreed the ICD will handle both,” he said.

George Kegoro, executive director of the Kenyan branch of the International Commission of Jurists, said the lack of political will made it doubtful that the ICD would address electoral crimes. He pointed out that in September last year, both houses of parliament voted to pull the country out of the international treaty – the Rome Statute – that gives Kenya the international legislation to try such crimes.

“The government that is pushing for creation of the court is the same government that is pushing for withdrawal of Kenya from the Rome Statute upon which the court is to be operationalised,” Kegoro said.

**Bernard Koech is a news editor for Kass FM in Nairobi. Judie Kaberia of Capital FM also contributed to this report.**

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