

Kenya's Special Court Faces Uphill Task

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Proposals for an international division of Kenyan high court are widely welcomed, though experts say securing justice for past election violence remains a challenge.

Experts on international justice and victims of the 2007-08 violence in Kenya have welcomed plans to set up an international crimes division of the country's high court.

However, they point to obstacles to pursuing effective prosecutions for the atrocities that followed the 2007 presidential election, which left over 1,100 people dead.

Kenya's Chief Justice Willy Mutunga announced plans to set up an International Crimes Division, ICD, of the High Court in November. His office says the new institution will try cases stemming from the 2007-08 bloodshed, as well as other crimes under international law. (See **Kenyan Chief Justice Announces Special Court.**)

Attorney General Githu Muigai says it will take two years to get the court up and running.

Experts say staff in the Kenyan judiciary will need legal and investigative training, while questions remain about how far the government will support prosecutions and witness protection.

Four senior suspects accused of orchestrating the violence have been charged by the International Criminal Court, ICC, and will go on trial in The Hague this April, but very few prosecutions have been brought by the Kenyan authorities themselves.

The new division will put into operation the International Crimes Act, a domestic version of the Rome Statute, the ICC's founding treaty. Kenya incorporated the law into national legislation in 2009 after the ICC launched its investigation into the electoral violence.

Observers say further steps are need to establish an institution capable of prosecuting international-scale crimes that have previously only been investigated by the ICC.

In 2010, Justice James Ogoola was behind the creation of the similar War Crimes Division of the High Court in neighbouring Uganda. The retired judge says legal professionals across all departments will need to be given advanced training before such an institution can begin operating in Kenya.

"[Training] is absolutely necessary for the judges, prosecution and even counselors," Ogoola said at an event hosted by IWPR and the Wayamo Foundation in Nairobi late last year. "That is the only way to achieve an effective and strong court that meets the global standards."

For those who suffered themselves or lost relatives in the post-election violence in Kenya, the ICD offers hope that they will see justice done for crimes committed during the unrest.

But sustained domestic political opposition to prosecuting perpetrators of the violence over the last five years means survivors are under no illusions that the process will run smoothly.

"It [the ICD] must be better than the local courts," said Jackson Mwangi, whose house in Nairobi's Kibera slum district was burnt down in early 2008. "We must see judges and lawyers and prosecutors like the ones we saw [at the ICC] in The Hague. We don't want it to operate like the local courts, which can be easily compromised."

One crucial part of making the ICD work effectively involves creating robust mechanisms to protect the witnesses who will give evidence during trials.

Although the Kenyan government set up a witness protection unit in the wake of the ICC investigation, there are widespread concerns that it is not doing enough to ensure that adequate safeguards are in place. Rights groups in Kenya recently accused the government of failing to protect the witnesses who are due to testify against the four suspects charged at the ICC.

Visiting Kenya in October, ICC Prosecutor Fatou Bensouda described the situation as "worrying" and discussed witness protection issues with the Kenyan government. She also raised the matter with ICC judges in a November 2012 filing, in which she identified "an objectively justifiable risk to the witnesses' safety arising from the disclosure of their identities to the accused", and asked for special measures for protected prosecution witnesses.

In Uganda, the War Crimes Division ran into problems when it began hearing its first case without having

adequate protection measures in place.

“Kenya must address issues of witness and victims’ protection for it to succeed in setting up the court,” said Nicholas Opiyo, a human rights lawyer in Uganda.

Another challenge the ICD will face is that successful prosecutions will require better investigations than has hitherto been the case. A task force chaired by the Director of Public Prosecutions recently threw out hundreds of cases relating to the 2007-08 violence because police had failed to gather enough evidence to merit sending them to trial.

Elizabeth Evenson of the New York-based advocacy group Human Rights Watch describes Kenya’s record of prosecuting alleged perpetrators of the violence as “dismal”.

“[There have been] very few individuals convicted of serious crimes, no convictions of police officers for shootings or rapes during the post-election violence, and little demonstrated effort to investigate those responsible for organising the violence,” she said.

Kenya’s Deputy Director of Public Prosecutions, Dorcas Oduor, has acknowledged the need for improvement.

“Police must have to carry out thorough investigations to be able to prosecute these cases,” Oduor said.

At the same time, Oduor pointed out reasons why it was hard to gather evidence.

“It is still very difficult because some of the rape cases were reported much, much later after they were committed, while people who claim to have lost property – either stolen or burnt – some of them cannot even quantify them,” she said.

Even when cases reach court, they sometimes fail to result in convictions for lack of evidence. In one recent case in Nairobi, a police officer charged with shooting dead a protester in the western town of Kisumu was acquitted because of conflicting evidence about the gun that was used.

According to Evenson, Kenyan police investigators do not currently have the expertise to handle the kind of cases that the ICD would deal with, while the country’s prosecutors are overburdened.

“It will not be enough to have good, knowledgeable independent judges doing their work,” she said. “There also need to be good, knowledgeable, independent and expert investigators and prosecutors to gather evidence and present cases. The police must be trained and remunerated well to ensure they do their work well; they must not be exposed to any form of compromise.”

Evenson said a special prosecutor and a team including international experts should work independently of government to prioritise cases and develop sound investigative practices.

Reverend Samuel Kobia, a member of Kenya’s Judicial Service Commission who led the five-member committee that looked into the viability of creating the ICD, said his committee had already made recommendations for “a well-facilitated, independent prosecution unit focused on international crimes [and] headed by a special prosecutor”.

Kobia said the Kenyans were borrowing certain elements from the analogous court in Uganda.

“We studied the Ugandan process of setting up the court, and we have learnt a lot from them,” he said.

Kobia acknowledged the need for international assistance in setting up the court and called on donors to help out. But others say that given Kenya’s poor track-record of prosecuting the crimes of 2007-08, it could be difficult to attract this kind of international support.

Crucially, it is also unclear how much genuine political support the ICD has in government, particularly if sets about prosecuting alleged perpetrators of the post-election violence.

While insisting there was “total government commitment” to creating the ICD, Attorney General Muigai reflected the continuing caution in government about prosecuting cases dating from 2007-08 by suggesting that this was not in fact the institution’s primary purpose.

“It is at the discretion of the Director of Public Prosecutions,” he said. “But this [the post-election violence] is not the primary reason why the ICD is being set up. This is a court set up to deal with cross-border crimes like piracy, human trafficking drug trafficking among others, but if the DPP has other cases he feels are of international magnitude they will definitely be tried here as well.”

Kenya has made several attempts to challenge or delay the ICC proceedings. There are concerns that officials might try to use the ICD to counter the Hague process.

“Donors may easily think the government is out to circumvent justice in The Hague because of the political

connections associated with most of the cases it wants to try,” Opiyo said. “Kenya must demonstrate clearly that it is committed to justice and it is not a political process.”

Muigai told IWPR that establishing the ICD was not about challenging the ICC cases, and that Kenya would not seek to have the Hague proceedings against the four suspects replaced by trials in a national court.

“It was made clear from the onset that this special court was not intended for the cases pending in The Hague, so such fears should not arise at all,” he said.

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