

## **Setback for Kenya's Special Court**

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Crisis within judiciary holds up plans for international crimes unit.

Plans to establish a Kenyan court with powers to try war crimes have suffered a setback after President Uhuru Kenyatta suspended six members of the judiciary.

The International Crimes Division (ICD), a new component of Kenya's High Court, was expected to start operating in early 2014, but a delay now looks inevitable.

Kenyatta suspended six members of the Judicial Service Commission after the lower house of parliament requested an investigation into allegations of misconduct and misappropriation of funds. A subsequent ruling in the High Court reinstated the six pending the outcome of their legal challenge against the investigation.

The allegations are unconnected with the ICD, but the furore they have caused has effectively put it on hold. A meeting meant to take place on December 6 to discuss planning for the ICD's start-up had to be cancelled.

"It is clear that the JSC [Judicial Service Commission] seems to be too busy fighting the immediate fire... to focus properly on the ICD," said Njonjo Mue, a lawyer and expert on transitional justice.

The Reverend Samuel Kobia, who chairs the taskforce set up to establish the ICD, is one of the six who were temporarily suspended and who continue to fight plans for an inquiry.

"We had set everything in motion for the ICD, but this crisis could be a setback in what we were to do," Kobia told IWPR.

The ICD is being set up in order to try international crimes such as crimes against humanity, war crimes and genocide. It will also prosecute transnational crimes including terrorism, drug trafficking and money-laundering. (See also **Kenya's Special Court Faces Uphill Task.**)

Advocates of justice in Kenya have been pushing for the division's remit to extend to crimes that occurred during post-electoral violence six years ago. The judiciary firmed up plans for the ICD in November 2012, but it has remained unclear whether the division will tackle criminal cases dating from the 2007-08 unrest.

More than 1,100 people were killed and 650,000 others displaced from their homes when conflict broke out following a disputed presidential poll in December 2007.

Kenyatta, Deputy President William Ruto, and a third suspect, Joshua Arap Sang, are facing trial at the International Criminal Court (ICC) in The Hague on charges of orchestrating the bloodshed.

A relatively small number of prosecutions have been conducted in Kenya, and no one has been charged with international-scale crimes by a domestic court.

Kenyan police were accused of shooting dead more than 400 people during the violence, but six years on, no officers have been held accountable.

In early 2012, the Director of Public Prosecutions (DPP), Keriako Tobiko, set up a task-force to assess more than 5,000 criminal cases stemming from the violence. These cases involve alleged mid- and lower-level perpetrators. But poor investigations and lack of evidence meant that only 1,000 cases ever came to court.

Tobiko says these trials have resulted in around 500 convictions. But last week, he indicated to IWPR that up to 1,500 of the remaining files might be brought before the ICD.

"As we speak now, we are busy constituting a specialised team within my office, a special division, just to coordinate with the ICD and look at the files afresh," Tobiko said.

Some legal experts remain sceptical about whether the ICD will be used for this purpose.

Before the ICC in The Hague began its investigations in Kenya, the country's parliament twice rejected a proposal to set up a national tribunal to try suspects.

Mue argues that even now, the government does not seem seriously committed to the ICD.

"It looks like we will take time before we get the ICD in place," he said. "Since the time of the post-election

violence, the government has been dragging its feet on the formation of the division. With the latest crisis in the judiciary, we just have to wait and see.”

Mue has criticised plans for the ICD which he believes have been rushed through. In particular, he argues that the division should only try crimes against humanity and war crimes, and not offenses like piracy and terrorism that can already be dealt with by existing courts.

“We didn’t have adequate consultations on this matter,” he said. “Some of us had suggestions that the ICD should only handle international crimes and not transnational crimes, which can be handled by other courts as has [to date] been the case.”

Human rights activist Ken Wafula also finds it hard to believe that six years down the line, the ICD will prosecute crimes relating to the post-election violence.

Wafula told IWPR that the length of time it had taken to set up the special court had reduced the chances of successful prosecutions.

“The delay to have an ICD has further eroded the evidence that would have been available for some of the pending poll violence cases,” Wafula said. “The judiciary is in a crisis now, and the ICD is a stalled project at the moment.”

Efforts to establish the ICD are being supported by the German foreign ministry. In one of the first steps towards building the ICD’s capacity, a group of Kenyan investigators travelled to Nuremberg for training last month. Speaking at the recent meeting of states that are party to the ICC in The Hague, Pascal Hector, the head of the German delegation, said the assistance was part of his country’s efforts to help Kenya build a more robust court system to try international crimes.

“In this international criminal investigations training, we had highly recognised international investigators and prosecutors and also professors of law who shared their experiences with six Kenyan investigators and prosecutors,” Hector said.

Justice experts have largely welcomed the support provided by Germany. But Alex Whiting, a law professor at Harvard University, says it is up to the Kenyan government to make the ICD come into being.

“The first thing is the political will – there has to be political will to bring forward the cases and to make a commitment to [the ICD] within Kenya,” Whiting said.

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