



The ICC Trial of Kenya's Deputy President

Questions and Answers

September 2013

1. What is the case against Ruto and Sang about? What crimes are they charged with?

William Ruto and Joshua arap Sang are [charged](#) with the crimes against humanity of murder, forcible transfer of population or deportation, and persecution, stemming from their alleged involvement in an attack on perceived supporters of former President Mwai Kibaki's Party of National Unity (PNU).

According to the [International Criminal Court](#) (ICC) prosecution, perpetrators destroyed houses and businesses identified as belonging to members of Kikuyu, Kamba, and Kisii ethnic groups thought to be PNU supporters, killing over two hundred people and injuring over a thousand more and forcing hundreds of thousands to flee. Five specific incidents occurring between late December 2007 and mid-January 2008 in [Kenya](#)'s Rift Valley form the basis for the charges.

The prosecutor contends that Ruto along with others, and supported by Sang, worked for up to a year before the election to create a network to carry out the plan, and that this network was activated when the election results in favor of Kibaki were announced. The goals of the plan, the prosecutor alleges, were to punish and expel from the Rift Valley people perceived to support the PNU, and to gain power in the province.

Ruto at the time was a member of parliament and a senior member of the Orange Democratic Movement (ODM), the party of Kibaki's principal challenger, Raila Odinga. Sang was a radio host on the Eldoret-based Kass FM. The prosecutor will seek to prove at trial that Ruto created and supervised the network's implementation of attacks, while Sang incited and then helped coordinate attacks by disseminating coded messages through his broadcasts.

The defendants are not required to set out their case in advance of trial. The Ruto defense has indicated that it intends to prove that prosecution witnesses colluded with one another and with the support of "international and domestic Kenyan organizations" to fabricate evidence.

The ICC prosecutor had initially sought charges against a third suspect in this case – Henry Kiprono Kosgey, then also a senior ODM member of parliament – but a [pre-trial chamber found insufficient evidence](#) to send the case against him to trial.

2. What is the case against Kenyatta about? What crimes have been charged against him?

Uhuru Kenyatta is [charged](#) with committing the crimes against humanity of murder, forcible transfer of population or deportation, rape, other inhumane acts, and persecution. The prosecutor will seek to show that Kenyatta enlisted the Mungiki, a criminal gang, to carry out attacks on perceived ODM supporters in and around Nakuru and Naivasha towns during the last week of January 2008. During these attacks, allegedly organized in response to attacks on PNU supporters in other areas of the Rift Valley, the prosecutor alleges that Mungiki and other pro-PNU youth – some transported to the Rift Valley from other parts of Kenya – killed, raped, and injured (including through forced circumcision and penile amputation). They also allegedly looted and destroyed properties and displaced thousands of people.

3. Why aren't any of the accused facing arrest warrants?

All three defendants in the ICC's Kenya cases are subject to voluntary summonses to appear.

These may be issued at the ICC in the place of arrest warrants, where the judges consider that a warrant is not necessary to ensure the person's appearance before the court.

Like an arrest warrant, an ICC summons to appear contains the crimes an individual is alleged to have committed and triggers proceedings that may bring a case to trial. But unlike an arrest warrant, the summons imposes only an obligation on the individual to appear before the court in The Hague; a summons does not impose any obligation on the authorities in Kenya or any other ICC state party to arrest the person. If the accused fails to appear or does not comply with any conditions listed in a summons, the pre-trial chamber may decide to issue an arrest warrant. All the accused have complied with their summons to date.

4. Will Ruto be required to attend the trial in person?

Yes, for the time being. In June 2013, [the trial chamber](#) excused Ruto from personally appearing before the court for considerable portions of the trial. The trial chamber by a 2-1 majority found that although ICC defendants have a duty to appear in person, the need to accommodate Ruto's responsibilities as deputy Kenyan president justified an exception to this rule. The chamber required Ruto to attend certain hearings including the trial's opening, closing, if victims present their views in person, and the delivery of the judgment.

The decision is not final, however. The trial chamber, by a different majority, [granted the prosecution leave to appeal](#) and a decision is still pending from the ICC's appeals chamber. The appeals chamber [decided](#) in August 2013 that Ruto will be required to attend all sessions of the trial until it renders a final decision on the appeal.

5. What did Human Rights Watch's research show about the Kenyan post-election violence?

In January and February 2008, Human Rights Watch researchers were on the ground documenting the post-election violence as it unfolded. Human Rights Watch conducted more than 200 interviews with victims, witnesses, perpetrators, police, magistrates, diplomats, Kenyan and international nongovernmental organization staff, journalists, lawyers, businesspeople, local government officials, and members of parliament across the country, from all major ethnic groups.

Human Rights Watch [documented](#) essentially three patterns of violence. First, members of the Kenyan police forces responded to demonstrations and riots with excessive force in some areas. They fired on unarmed demonstrators and bystanders to break up riots, and to keep people away from demonstrations. In other areas, the police did nothing as mobs committed acts of brutality. The Commission of Inquiry into Post-Election Violence (CIPEV), also known as the Waki Commission, [found](#) that of the more than 1,100 people killed during the violence, 405 were shot fatally by police. An additional 557 individuals were injured by police gunfire.

Second, mobilized opposition supporters – especially in the Rift Valley and the informal settlements of Nairobi – attacked those they assumed had voted for Kibaki and his PNU. The victims were predominantly Kikuyu, Kenya's largest ethnic group, reflecting an ethnic dimension to the violence. Around Eldoret, local ODM mobilizers and other prominent individuals called meetings during the election campaign to urge violence in the event of a Kibaki victory. In the days that followed, attacks were often meticulously organized by local leaders.

Third, Kikuyu militia carried out reprisal attacks on members of ethnic groups seen to be associated with the ODM. In Naivasha and Nakuru in the southern Rift Valley, PNU mobilizers and local businesspeople called meetings, raised funds, and directed youth in their attacks on non-Kikuyus and their homes.

Human Rights Watch has consistently called for those behind the attacks to be held to account, and for investigations to determine the extent of links between the attackers and the national leaderships of the opposition and ruling parties. Human Rights Watch's research suggested some leaders may have been at least aware of what was happening and done little to stop it. Some may have been more directly involved.

6. Will Kenyan victims be able to participate in the trial?

Yes, although few, if any, will appear in person before the ICC.

Under an innovative system at the ICC, some victims may participate in the case against Ruto and Sang. These are individuals who suffered harm in the specific incidents underlying the charges in the case and they are participating in their own right, rather than exclusively as witnesses called by the prosecution or defense. The victims in the case have a court-appointed lawyer, Wilfred Nderitu, a member of the Kenyan bar, serving as their common legal representative and supported by staff of the ICC's Office of Public Counsel for Victims.

According to a decision of the trial chamber, apart from key moments in the trial like the opening statements, staff of the Office of Public Counsel for Victims will appear in court on behalf of Nderitu. On behalf of his clients, he may seek permission to question witnesses and introduce evidence. At the request of a victim, via the common legal representative, the judges may also give a victim permission to present his or her views directly to the court, either in person or via video-link.

The court said 327 victims participated in proceedings before the pre-trial chamber. The trial chamber ordered a new system to register victims so they are not required to submit individual applications, as has been the practice of other trial chambers. It is uncertain how many victims will participate in the trial. In June 2013, a letter was sent to the court, purportedly on behalf of 93 victims, seeking to withdraw their participation in light of a loss of confidence in the process. The circumstances under which the letter was sent have not been publicly verified.

7. Why did the ICC get involved in Kenya?

Kenya joined the ICC in 2005. The ICC is a court of last resort, stepping in only where national authorities are unable or unwilling to genuinely prosecute crimes within the court's jurisdiction. It was on the basis of inaction by the Kenyan authorities to hold those responsible that the ICC opened cases in Kenya.

In 2008, mediators appointed by the African Union, called the Panel of Eminent African Personalities and led by former UN Secretary-General Kofi Annan, helped negotiate an end to the violence. An agreement by the parties put in place the Commission of Inquiry into Post-Election Violence or Waki Commission. The commission found that serious crimes had taken place and recommended establishment of a special tribunal in Kenya to hold those most responsible to account in national trials. Its [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.

In December 2008, Kibaki and Odinga, who became prime minister in the coalition government, agreed to establish a special tribunal to prosecute perpetrators of the post-election violence. Kibaki and Odinga, however, failed to follow through, and did not marshal necessary support in parliament for the tribunal. In what now seems a clear attempt to stall domestic justice efforts, Ruto, among other members of parliament, purported to support the ICC under the rallying cry “Don’t be vague! Let’s go to The Hague!” Legislative efforts to establish the tribunal went nowhere over the course of 2009.

In the absence of national steps toward accountability, and after Annan had handed over the envelope from the Waki Commission in July 2009, the ICC prosecutor announced in November 2009 that he would seek authorization from the pre-trial chamber to open an investigation. In authorizing the prosecutor’s investigation in March 2010, the pre-trial chamber [found](#) that there were no relevant national proceedings regarding the types of offenses and high-level individuals likely to be targeted in the ICC investigation.

8. Apart from the ICC process, have victims and their families had access to justice in Kenya for crimes committed during the post-election violence?

No. According to Human Rights Watch’s [research](#), although tremendous pressure from the Kenyan population stirred initial efforts in the aftermath of the violence to bring accountability, slapdash investigations and prosecutions were so hurried that they resulted in acquittals.

Following initial failures, the criminal justice apparatus appeared to lose momentum. Out of thousands of potential cases, Human Rights Watch has confirmed only a handful of convictions for serious crimes related to the 2007-2008 post-election violence, and convictions in only three murder cases. This is in spite of the adoption of a new constitution in 2010 and reforms to the judiciary. The previous government did not show a serious commitment to ensuring fair, transparent and effective investigations of those who organized and financed the violence.

In 2012, the Kenyan Director of Public Prosecutions (DPP) announced that his office would review at least 5,000 cases with a view to prosecuting them ahead of the 2013 elections, but a committee appointed to review the cases said in August 2012 that it was finding it difficult to obtain evidence in most cases. The DPP recently indicated that his office obtained an additional 54 convictions for crimes of sexual violence committed during the post-election violence.

Police officials implicated in crimes have enjoyed impunity, with an acquittal in one case of murder brought against a police officer. This was in spite of the fact that the police officer was caught in footage broadcast on national television shooting two protesters who appeared to be unarmed. Both protesters died.

In many police shooting cases, surviving victims or family members sought to file criminal complaints, but were turned away. The father of two children shot by police, one an 11-year-old girl, [told Human Rights Watch](#):

I went to the police and said “The police killed my child.” They said, “The police don’t kill people.” They refused to write a statement. When I insisted, they said, “If you continue to play around, you could be shot, too.”

The government has refused to pay compensation in successful civil suits brought by victims of police shootings. Victims of police shootings and of sexual violence committed during the post-election violence have filed two constitutional cases in the Kenyan high court seeking to compel the government to address these crimes.

The failure to hold to account those responsible for the 2007-2008 election violence continues a cycle of impunity in Kenya. Perpetrators of political violence in 1992 and 1997 also escaped justice. As a Kalenjin elder [told](#) a Human Rights Watch researcher:

We are very good at saying we don’t leave a single stone unturned, but we don’t turn a single stone. Maybe we turn pebbles....Small stones are turned. The big ones, no one dares.

9. Does the fact that the Kenyan people elected Kenyatta and Ruto as president and deputy president in March 2013 mean they don’t support the ICC process and it should end?

The ICC treaty does not recognize immunity from prosecution for officials, and Kenya’s constitution expressly provides that the president is not immune from prosecution for crimes under a treaty to which the country is a party, and which, like the Rome Statute, prohibits such immunity. Cases have been brought in international tribunals against sitting heads of state, including Omar al-Bashir of Sudan, Charles Taylor of Liberia, and Slobodan Milosevic of the former Yugoslavia.

Kenyatta and Ruto campaigned on pledges to continue their cooperation with the ICC, and both restated this pledge following their election. At the same time, however, their campaign rhetoric sought to paint the ICC as a tool of Western imperialism. Since taking office the Kenyatta government has actively courted the support of other African leaders to undermine

the ICC (see below). It has also ignored threats against human rights defenders and journalists that seem linked to their perceived association with the ICC

In this context it is unsurprising that views about the ICC process have become increasingly polarized among Kenyans. According to a media report, an unpublished June 2013 poll by South Consulting showed significant continued support for the ICC process – 50 percent of respondents – but this marks a drop from the highest reported level of support in the same poll of 89 percent in June 2011. Another June 2013 survey shows that support for the ICC has dropped even further in Kenya to 39 percent, the first time that this poll, conducted regularly by Ipsos Synovate since October 2010, has recorded support below 50 percent. The ICC process itself has suffered setbacks like the withdrawal of the willingness of some witnesses to testify, including those who have cited security concerns (see below), which may have undermined confidence.

Serious crimes were committed in 2007-2008 and, in the vast majority of cases, those responsible have yet to be held to account. The ICC, while imperfect, is providing a measure of access to justice denied in Kenya.

10. The 2013 elections in Kenya were held without violence, even though trials had yet to take place. Doesn't this show that Kenyans have moved on?

While the 2013 elections were not marked by the scale of violence witnessed in 2007-2008, they were preceded by inter-communal clashes in parts of Kenya which claimed more than 477 lives and displaced another 118,000 people before the vote. Human Rights Watch research [demonstrates](#) that the underlying causes of the 2007-2008 post-election violence in the Rift Valley largely remain unaddressed, in spite of pressure from authorities in some areas to “move on”.

Victims of the 2007-2008 violence told Human Rights Watch that an absence of justice had contributed to tensions before the 2013 elections. One Kikuyu elder [said](#):

I see people who killed my relatives, raped my cousin, destroyed my property. They have not been arrested and tried. They have not apologized for what they did. How do you expect me to just accept that and move on?

Kenya's impunity crisis is profound. Those responsible for political assassinations under President Jomo Kenyatta's post-independence regime, and for the use of torture against political opponents and excessive use of force by the security services under President Daniel arap Moi, were not prosecuted. The 2007-2008 election violence was preceded by similar episodes around the 1992 and 1997 elections. Government commissions named names, including prominent politicians, but no one was prosecuted. This entrenched

impunity likely encouraged politicians to believe in 2007 that they could get away with virtually anything to achieve their political ends.

Civil society activists interviewed by Human Rights Watch in 2011 could not recall a single case in which a senior politician had been convicted of a serious crime in Kenya, despite an endless stream of allegations of criminal behavior.

Justice is an important right and end in and of itself, but Kenya's history suggests that the failure to deal head-on with past crimes may only encourage future violence.

11. At its May 2013 summit, the African Union called for the ICC's cases to be handled by a "national mechanism" in Kenya. What impact does this have?

No legal impact. The African Union (AU), a regional body, does not have standing to challenge the ICC's jurisdiction in favor of domestic proceedings once an ICC investigation is open. Under Article 19 of the Rome Statute, only the accused, a state that has jurisdiction over the case, or a state that must consent to the court's jurisdiction, may submit such an "admissibility challenge". In light of Kenya's track record on accountability, the AU's call lacks credibility. Kenya lost an admissibility challenge before the ICC in 2011, when judges could find no evidence that Kenyan authorities were actually investigating any of the six individuals then named in the ICC's cases.

The Kenyan government has sought to [keep up the appearance of cooperation](#) with the ICC despite the prosecutor's allegations that cooperation has been slow or lacking. But the AU's call resulted in part from concerted advocacy on the part of Kenyatta's government to use political bodies to undermine the ICC's cases. In the run-up to the AU summit, the Kenyan government had also called on the United Nations (UN) Security Council to "terminate" the ICC cases, a power the ICC treaty does not give to the council. Since the summit, the Kenyan government has asked ICC member countries, which meet annually, to convene a special session to consider the AU's call. This request has been turned down.

The ICC depends on the public support of its member countries and other interested parties to create a climate conducive to its work. These initiatives by Kenyan government officials appear to be designed to have the opposite effect. Other ICC member countries should step up their efforts to insist on Kenya's full cooperation – in spirit and in letter – with the court.

12. Some African heads of state charge the ICC with targeting African leaders for prosecution. Is this true?

In the context of the May 2013 African Union summit, several African leaders made public criticisms of the ICC for targeting Africans. Some African leaders have previously made the claim that the ICC is targeting Africa, but the extent of comments around this summit reflects a qualitative increase, especially among leaders of ICC states parties. This is likely at least partly attributable to Kenya's significance in Africa and to "shuttle diplomacy" by Kenyan leaders to secure support at the summit.

While claims that the ICC is targeting African leaders have found traction, they are not factual. The ICC's cases are all from Africa, but the majority came before the ICC as a result of requests by the African governments of countries where the crimes were committed (Uganda, Democratic Republic of Congo, Central African Republic, Cote d'Ivoire, and Mali). Two other situations – Libya and Darfur, Sudan – were referred by the UN Security Council to the ICC, consistent with the council's authority to make referrals under article 13 of the Rome Statute. Only with regard to Kenya did the ICC prosecution act entirely on its own initiative, and, as discussed above, only after Kenya failed to take action on justice at home and Annan had handed over the sealed envelope from the Waki Commission.

Although claims that the ICC is targeting Africa are inaccurate, double standards are certainly at work in the operation of international justice. Governments are able to shield their citizens and the citizens of their allies from the ICC's authority by not joining the ICC or by using their veto power at the UN Security Council to block referrals of situations to the ICC. It is essential that those supportive of justice for serious crimes, including ICC member countries, work to press for accountability regardless of where crimes are committed and call out double standards when states seek to block access to justice.

13. The ICC prosecutor has alleged "unprecedented" levels of witness interference in the ICC's cases. What can be done to ensure that witnesses are protected from interference or intimidation?

The ICC prosecutor has characterized the scale of interference with witnesses in the Kenya cases as "unprecedented," referring to pressure on witnesses and their families. Victims participating in the ICC cases in Kenya have consistently highlighted their safety concerns in court through their legal representatives. In the two Kenya cases, publicly available court records suggest that some potential prosecution witnesses have either not confirmed their willingness to testify or have withdrawn their testimony citing security concerns.

The ability of all witnesses – whether for the prosecution or the defense – to appear before the court securely and without fear of reprisal is essential to fair and credible trials. The same is true with regard to the effective exercise of the rights of victims to participate in ICC proceedings. Interfering with witnesses can amount to a crime leading to prosecution under both the ICC treaty and Kenyan law.

The ICC has an obligation to take appropriate measures to protect the well-being and safety of witnesses, victims participating in the proceedings, and others at risk on account of testimony given by witnesses, including, for example, so-called intermediaries assisting the work of the court. Protective measures may range from steps like permitting witnesses to testify in a closed session to keep their identities hidden from the public to relocating witnesses away from security threats. Protective measures can be taken for both prosecution and defense witnesses.

Long delays in relocating ICC witnesses can expose them to risk and delay proceedings, given the need to ensure that protective measures are in place before witness identities are disclosed to other parties. ICC officials have repeatedly stressed the urgent need for additional countries to sign witness relocation agreements with the court. It is also critical that states respond positively to requests for assistance in relocation in order to meet protection needs. The ICC's new registrar, elected in March, has indicated that the protection, support, and relocation of witnesses will be among his first priorities.

While the ICC has specific obligations for its witnesses, victims, and intermediaries, the Kenyan government has the primary responsibility to protect the safety of all those within its borders. This includes investigating harassment or threats amounting to violations of national law. Kenya's government should make a public commitment to take steps to help ensure the security of those assisting justice processes and to continue strengthening its national Witness Protection Agency.

14. Has the ICC prosecutor effectively investigated the case against Ruto and Sang?

It will be up to the judges to determine on the basis of the full record before them whether the prosecutor brings forward sufficient evidence to prove Ruto and Sang each guilty beyond a reasonable doubt. The defendants are entitled to the presumption of innocence and full protection of their fair trial rights. The Ruto defense has indicated that it intends to prove that prosecution witnesses colluded with one another and with the support of "international and domestic Kenyan organizations" to fabricate evidence. Again, it will be up to the judges to weigh these claims.

More generally, investigations at the ICC face a number of challenges, including securing state cooperation, providing adequate protection to encourage witnesses to come forward, and collecting evidence linking the actions of high-level accused to crimes carried out by other people. Securing state cooperation and witness protection have been two acute challenges in the Kenyan cases.

Human Rights Watch has been concerned that the Office of the Prosecutor's investigative methodologies may need strengthening to meet these challenges. There are clear signs that

the prosecution is taking steps toward this end, including requesting additional resources from ICC states parties for investigations. Adapting the office’s investigative practices to the court’s operational challenges is no easy task, but it is essential to ensuring that the ICC can deliver effective and meaningful justice. Human Rights Watch continues to urge the prosecutor to identify any needed reforms and calls on states parties and other international partners to support the additional resources and cooperation – including in witness protection – which may be needed to improve the efficacy of the office’s investigations.

15. Are the ICC cases alone enough to bring accountability for the post-election violence?

The ICC cases could make a key contribution to break Kenya’s cycle of impunity for political violence and to afford access to justice for some victims of the 2007-2008 violence. But given the limited number of cases the ICC prosecutor has brought in the Kenya situation, and that those cases relate to specific incidents, in specific locations, and on specific dates, there is a clear need to establish special judicial mechanisms in Kenya to investigate and prosecute additional cases in order to bring full accountability.

There is a pressing need, in particular, to address the role police may have played in the post-election violence. Although the ICC prosecutor had alleged that Kenyatta’s then co-defendants, the former head of public service Francis Muthaura and the former Kenyan police commissioner Mohammed Hussein Ali, had worked together to ensure that the Kenya police did not intervene to stop the attacks in Nakuru and Naivasha towns or to punish those who carried them out, an ICC pre-trial chamber did not find sufficient evidence that the police had participated in the attack. The case against Ali was dropped, and a year later, the ICC prosecutor [dropped all charges against Muthaura](#). The prosecutor continues to allege in the Kenyatta case that police uniforms were distributed to the Mungiki; that the police were instructed not to interfere with the transportation of youth into the Rift Valley to carry out attacks; that the police at times refused to intervene or were slow to respond; and that the police later targeted and killed several Mungiki leaders who had knowledge of the involvement of Kenyatta or other politicians in the planning of the violence.

The ICC prosecutor also initially sought to include in the case against Kenyatta, Ali, and Muthaura charges related to police use of excessive force in Kisumu, a city in the former Nyanza province, and Kibera, an informal settlement in Nairobi. But an ICC pre-trial chamber found that the prosecutor had not brought forward sufficient evidence of a link between the three defendants and police actions. Human Rights Watch [had urged](#) the Office of the Prosecutor to continue its investigations of police violence, and, evidence permitting, to reintroduce relevant charges.

Kenya’s judicial system faces a number of challenges in taking up additional cases related to the post-election violence. In November 2012 the Kenyan chief justice announced plans to establish an International Crimes Division in the Kenyan high court. The Kenyan government

should ensure broad public consultation on the establishment of the International Crimes Division and on other measures that will be necessary to overcome the systematic weaknesses and blockages that have prevented effective prosecution of the post-election violence. In addition to judges with specialized expertise, this includes prosecutors and investigators properly trained and insulated from political interference and the strengthening of Kenya's witness protection system.