

KENYA AND THE ICC

Expected Council Action

On 8 April, Council members expect to hold a meeting in consultations on Kenya's request to defer the application of the International Criminal Court (ICC) jurisdiction, under Article 16 of the Rome Statute.

Key Recent Developments

On 15 March 2005, Kenya deposited its instrument of ratification to the Rome Statute, and the Statute came into force for Kenya on 1 June 2005.

On 27 December 2007, presidential, parliamentary and local elections were held in Kenya, with strong competition between the Party of National Unity (PNU) of President Mwai Kibaki and the Orange Democratic Movement (ODM) of opposition leader and presidential contestant Raila Odinga. Following the elections, Kenya plunged into a political, security and humanitarian crisis and an estimated 600,000 people were displaced in weeks as numerous reports of abuses against civilians emerged, including arbitrary killings, rape and arson. (For more detail please see the Security Council Report March 2008 *Forecast* and the 29 May 2008 *Update Report*.)

On 5 November 2009, the prosecutor of the ICC notified the president of the Court of his intention to begin a process for an investigation into the situation in Kenya pursuant to article 15(3) of the Rome Statute, which allows the Prosecutor to commence an investigation on his or her own initiative.

On 31 March 2010, Pre-trial Chamber II of the Court issued its decision authorising the prosecutor to commence an investigation into the situation in Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 (the day on which Kenya became a party to the Rome Statute, following its ratification of the Rome Statute) and 26 November 2009 (the day the prosecutor's request was filed).

On 15 December 2010, the prosecutor submitted to Pre-trial Chamber two applications to summon six Kenyan nationals, all current or former high-ranking political figures, in relation to the post-election violence that erupted on 27 December 2007.

On 8 March, the Pre-trial Chamber decided to issue summons as requested for 7 and 8 April. The Chamber was satisfied that there were reasonable grounds to believe that the persons summoned committed the crimes alleged in the prosecutor's applications.

Since late 2010, Kenya has been pursuing a deferral of the ICC proceedings and seeking a decision from the Council in accordance with Article 16 of the Rome Statute, which allows the Council to pass a resolution under Chapter VII in situations relating to peace and security, deferring an ICC investigation or prosecution for 12 months.

On 31 January 2011, the Assembly of the AU decided to support and endorse Kenya's position, and requested the African members on the Security Council to place the issue on the Council's agenda (Assembly/AU/Dec.334(XVI)).

On 18 March Council members held an informal interactive dialogue with the permanent representative of Kenya to discuss the ICC proceedings against the six aforementioned Kenyans. AU representatives also attended the meeting.

During the interactive dialogue, Kenya argued that an Article 16 deferral would give it time to establish alternative domestic adjudicative mechanisms. Some Council members agreed that domestic adjudication was preferable under the complementarity principle of the Rome Statute, yet members were generally of the view that the situation in Kenya does not amount to a threat to international peace and security and that a preferable venue for Kenya's arguments was the ICC itself, where it can challenge the admissibility of the case against its nationals directly, under Article 19 of the Rome Statute. Members of the Council were also aware of a petition circulated by ODM, a party led by Prime Minister Raila Odinga and member of the coalition government, opposing the deferral of the cases from the ICC. At the end of the meeting, the AU representative expressed the hope that the Council would discuss the issue in informal consultations.

On 23 March, Kenya sent a letter to the president of the Security Council, requesting that the Council hold an open debate in order to consider Kenya's request for deferral. In the letter, Kenya also noted that the National Executive Council/parliamentary Group of the ODM adopted a decision on 22 March to support a deferral of the cases from the ICC. However, Council members have also received an additional letter from ODM Secretary-general Anyang Nyong'o, maintaining that the party's position opposing Kenya's request for a deferral has not changed. (Media reports suggest that factions and individuals within the ODM have recently voiced conflicting views on the ICC proceedings.)

On 31 March, Kenya filed an application before the ICC, challenging the admissibility of the cases against its nationals, pursuant to Article 19 of the Rome Statute. Kenya asserts that following the adoption of the new constitution and judicial reforms, it is capable investigating the alleged post-election crimes. Kenya also requested that the Court convene a conference to address the procedural aspects of the application and that Kenya be granted time to address the Pre-trial Chamber orally on the application during the hearings of 7 and 8 April.

On 4 April, the Pre-trial rejected Kenya's request to convene a conference or allocate time for Kenya's oral arguments, and decided that the prosecutor and defence Councils have until 28 April to file observations on Kenya's application.

Key Issues

The main issue for the Council is whether the situation in Kenya poses a threat to international peace and security, warranting a Council deferral of the situation in Kenya under Article 16.

A related issue which may be problematic for Kenya, is that if it were successful in persuading the Council that the situation in Kenya amounts to a threat to international peace and security, the Council would place the situation in Kenya on its agenda and, almost certainly, remain seized of the matter, thus engaging the Council in wider issues in Kenya.

Options

Options for the Council include:

- a statement expressing the views of Council members;
- approving a letter from the president of the Council to the permanent representative of Kenya in response to Kenya's 23 March request, informing that the Council held consultations and conveying the outcome, if any; or
- taking no action at this time.

Council Dynamics

Not much has changed among Council members views on the substance of the issue since the informal interactive dialogue held with the representatives of Kenya and the AU on 18 March. Though some members have a distinctly neutral position on this issue, those expressing their views during the informal interactive dialogue—including some African members on the Council—were of the view that the situation in Kenya has not really been shown to be a serious threat to international peace and security. Moreover, since it is essentially Kenya that has raised issues of complementarity, members therefore feel that the preferable venue for that issue to be determined is before the ICC itself, by way of an application under Article 19. Some members of the Council feel that Kenya's recent application before the ICC reinforces their stance that Council action is unwarranted at this time, all the more so since Kenya is subject to the jurisdiction of the Court by virtue of its own sovereign ratification and not by a decision of the Council.

Nevertheless, all Council members seem comfortable that consultations would be an appropriate response at this stage to discuss Kenya's letter to the Council.

UN Documents

Selected Presidential Statement
<ul style="list-style-type: none">S/PRST/2008/4 (6 February 2008) was on the Kenyan crisis.
Other
<ul style="list-style-type: none">S/2011/201 (23 March 2011) was the letter sent by Kenya to the president of the Security Council requesting an open debate.

Useful Additional Sources

- ICC Pre-trial Chamber II Decision on the Conduct of Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute
- Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute (ICC-01/09-01/11 and ICC-01/09-02/11) (31 March 2011)
- ICC Pre-trial Chamber II Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (8 March 2011)
- ICC Pre-trial Chamber II Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (8 March 2011)
- The Assembly of the AU decision endorsing the Kenyan initiative and requesting the African members on the Security Council to place the issue on the Council's agenda (31 January 2011)
- Letter of the Prosecutor to the President of the ICC on his intention to submit a request for the authorisation of an investigation into the situation in Kenya (5 November 2009)

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