

# Kenyatta decision turns spotlight on ICC investigation

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In March 2013, the Office of the Prosecutor at the ICC announced it was withdrawing charges against Francis Muthaura, Kenya's former cabinet secretary. Muthaura had been accused alongside Kenya's new president, Uhuru Kenyatta, of committing crimes against humanity during the country's 2007-8 post-election violence.

It is the first time the ICC Prosecutor has sought to withdraw charges against an accused. However it is not the Prosecutor's first setback in relation to insufficient evidence to back up cases. The Pre-trial Chamber has declined to send cases against 4 out of 14 defendants to trial. Although the prosecution secured its first conviction -against Thomas Lubanga, a rebel leader in the Democratic Republic of Congo- another former Congolese militia leader, Matthieu Ngudjolo Chui was acquitted on 18 November 2012.

To be sure, these setbacks should be put in a broader context. Proceedings are ongoing in seven other cases. The Trial Chamber recently turned down Kenyatta's request to have the charges against him dropped or reconsidered. Constraints in cooperation, security of staff and witnesses, and resources pose real difficulties for the court, affecting the prosecution and defense teams.

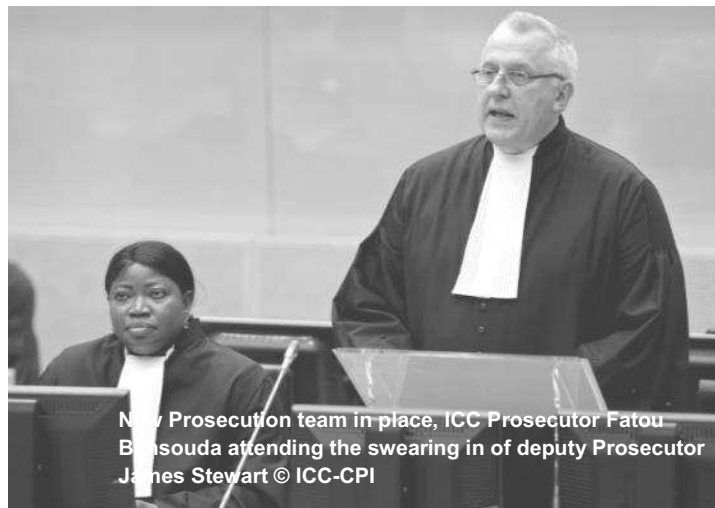
At the same time, the ICC's new chief prosecutor, Fatou Bensouda, has made an important public commitment to improving her office's investigations. Dropping the charges against Muthaura reflects a willingness to take a hard look at the prosecution's ability to prove its cases. Effective investigations and prosecutions are central to the realization of the ICC's mandate to bring fair, credible, and meaningful justice.

A comprehensive look at the challenges faced by the prosecution in its investigations is beyond the scope of this article, but a recent decision in the *Kenyatta* case highlights a possible area for review: should the prosecutor's investigations be more advanced by the "confirmation of charges hearing", a pre-trial step at the ICC which determines whether there is sufficient evidence to send the case to trial?<sup>1</sup>

In turning down Kenyatta's petition to drop or reconsider his case, two judges agreed that although the Rome Statute does not preclude continuing investigations, they should be complete as a general rule by the confirmation of charges hearing. They cited language in an ICC appeals chamber decision in the *Callixte Mbarushimana* case.<sup>2</sup> The trial chamber's third judge disagreed, citing an earlier Appeals Chamber decision in the *Lubanga* case that spoke only of the desirability of investigations being complete by the time of the confirmation hearing. In addition, in his view, any such rule would invite litigation over the prosecution's conduct of its investigations, without clear standards - and possibly without sufficient information given the confidentiality of investigations - to resolve disputes.<sup>3</sup>

The judge's concurring opinion can be read to caution against micromanagement of the prosecutor's investigations. ICC judges in this decision and in a related one have credited, at least in part, difficulties experienced by the prosecution that may have prevented more substantial investigations of the Kenya cases prior to confirmation.<sup>4</sup> Nonetheless, there are good reasons to complete investigations as early as possible.

First, most fundamentally, reconstructing complicated crimes is often made only more difficult with the passage of time.



New Prosecution team in place, ICC Prosecutor Fatou Bensouda attending the swearing in of deputy Prosecutor James Stewart © ICC-CPI

Second, in the Kenya cases, the trial dates have been postponed to give the defense more time to prepare, in light of the volume of evidence recently disclosed as a result of the prosecution's continued investigations. Earlier investigations could mean earlier disclosure and fewer delays, consistent with the right to be tried without undue delay.

Third, as another commentator has already noted, the scope of the Kenya cases has narrowed considerably over the course of pre-trial proceedings, with real impact on the rights of victims before the court. The pre-trial chamber found insufficient evidence to retain charges related to crimes committed in certain areas and later restricted the time period for some of the incidents. Some victims initially granted the right to participate will now find themselves outside the scope of the charges.<sup>5</sup>

It is likely that no one size will fit all of the prosecutor's investigations. Moving quickly to secure arrest or, when crimes are ongoing, to prevent new crimes may mean that investigations will be less advanced at the earliest stages. When the investigation concerns past crimes, however, there may be fewer reasons to move forward before an investigation is more fully complete, even if the prosecutor still needs to be able to pursue leads as they arise. In seeking to strengthen her office's investigations, Bensouda should consider what factors have limited investigations at earlier stages and identify whether strategies could be put in place to overcome these obstacles. States Parties should be ready to support necessary changes - whether with increased cooperation or more resources. •

<sup>1</sup> The War Crimes Research Office at American University's Washington College of Law's recently published study also highlights this issue among several others in its broader assessment of the Office's investigations and makes a number of recommendations. See War Crimes Research Office, American University Washington College of Law, "Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor," October 2012, <http://www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf>.

<sup>2</sup> Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, April 26, 2013, paras. 117-128.

<sup>3</sup> Prosecutor v. Kenyatta, ICC-01/09-02/11, Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, May 2, 2013, paras. 86-100.

<sup>4</sup> Prosecutor v. Kenyatta, Decision on defense application pursuant to Article 64(4) and related requests, para. 124; Prosecutor v. Kenyatta, ICC-01/09-02/11, Corrigendum to "Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute,'" March 23, 2013, para. 38.

<sup>5</sup> Mariana Pena, "What about the victims of the post-election violence?," post to "The International Criminal Court Kenya Monitor: A Project of Open Society Justice Initiative" (blog), March 25, 2013, <http://www.icckkenya.org/2013/03/what-about-the-victims-of-the-post-election-violence/>