



The African Union, Kenya and the International Criminal Court

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The African Union (AU) held an extraordinary summit on 11-12 October 2013 in Addis Ababa, Ethiopia. At the summit, African heads of state and government discussed Africa's relationship with the International Criminal Court (ICC). They agreed that Kenya should send a letter to the UN Security Council [requesting the deferral](#) of the ICC's ongoing proceedings against the President and Deputy President of Kenya, Uhuru Kenyatta and William Ruto, both of whom have been charged with crimes against humanity in the context of the post-election violence during 2007-08; further, the letter should be endorsed by all 34 African States Parties to the ICC. The leaders also called for proceedings against Sudanese President Omar al-Bashir to be deferred. More broadly, a 'Contact Group' is to be established to engage in discussions with the Security Council about the AU's concerns.

At the same time, the heads of state and government affirmed their view that, under national and international customary law, sitting heads of state and government and other senior state officials are immune from prosecution while they are in office. They decided that: "No charges shall be commenced or continued before any international court or tribunal against any serving head of state or government or anybody acting in such capacity during his/her term of office". However, the AU summit held back from agreeing that African States Parties should all withdraw from the ICC, which some press reports had suggested might happen.

The stance taken at the summit reflects growing tensions between the AU and the ICC, with leaders increasingly critical of the Court's alleged bias against Africa. The ICC's proceedings against Kenyatta and Ruto have brought these tensions to a head. [Ruto's trial](#) began in The Hague in September. [Kenyatta's trial](#) is due to start on 12 November. The two men have waged a long rearguard action, beginning well before their election victory in March 2013, to try and get the charges against them dropped.

The AU's call for a deferral of proceedings has been made under [Article 16](#) of the Rome Statute, which established the ICC. Article 16 allows the UN Security Council to agree a renewable 12 month deferral of ICC proceedings against individuals under Chapter VII of the UN Charter – that is, where doing so in the interests of maintaining or restoring peace and security.

If granted, Kenya could theoretically then use the deferral period(s) to carry out investigations and – potentially – prosecutions through its national court system. This might open the way for it to challenge before ICC judges the admissibility of the Court's own investigations and prosecutions, invoking [Article 19](#) of the Rome Statute. The decisions taken at the summit

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follow the failure of an earlier AU appeal to the ICC in May 2013 for the Kenyatta and Ruto cases simply to be referred back to Kenya. The ICC position is that Kenya has had plenty of time to undertake credible investigations into the allegations against Kenyatta and Ruto but has not done so. [International and local civil society groups](#) have voiced strong support for the ICC and criticised the AU, as have African elder statesmen [Desmond Tutu](#) and [Kofi Annan](#).

The summit may have stopped short of calling for an African ‘walk-out’ from the ICC but it remains possible that Kenya could soon begin a process of withdrawal. In September 2013 the Kenyan parliament voted in favour of the country’s [withdrawal](#) and a Bill to this effect may be tabled soon. Until now, Kenya has avoided a stance of outright non-cooperation with the ICC. In the absence of a UN Security Council deferral of the case against Kenyatta before his trial is due to start on 12 November, this may change.

Western governments face an acute dilemma. Until now, they have been strong supporters of the ICC’s work in Kenya. However, in recent years, Kenya has become an active regional player in combating Islamist terrorism. It has forces in southern Somalia that are part of the African Union Mission in Somalia (AMISOM). The attack on the [Westgate shopping mall](#) in Nairobi by al-Shabaab militants in September has heightened Western solidarity with Kenya. Set against this are several years of defending the ICC against hostile Kenyan politicians, which a policy shift on the proceedings under way against Kenyatta and Ruto would arguably undercut. But any African ‘walk-outs’ would damage the Court too.

If the UN Security Council were to defer the proceedings, this would be the first time that this has happened since the Court’s inception. The procedure is intended to be used only in exceptional circumstances and the US (not a member of the ICC), UK and France would come in for heavy criticism from local and international human rights groups for harming the Court and the struggle against impunity. However, several unconfirmed press reports claim that the UK and France may currently be preparing the ground for a [Security Council resolution](#) to defer ICC proceedings against Kenyatta. It is unclear whether Ruto would also be covered by such a resolution.

Further reading

[“Africa to request deferment of indictments against Kenyan president and vice-president”](#), AU press release, 12 October 2013

[“Extraordinary session of the Assembly of the African Union”](#), AU press release, 12 October 2013

[“AU summit call for immunity of senior government officials is deplorable”](#), Amnesty International press release, 13 October 2013

[“Perceptions and realities: Kenya and the International Criminal Court”](#), Human Rights Watch, October 2013

[“The International Criminal Court \(Kenya\)”](#), Westminster Hall debate, Hansard, 9 October 2013, c61-79WH

[“International Criminal Court strategy paper”](#), UK Government, 17 July 2013

[In brief: Kenya after the March 2013 elections](#), SN06658, June 2013

The full text of President Kenyatta’s 12 October 2013 speech to the AU summit is available from the author on request.