

Kenya's 7-Step Formula for Impunity

On December 5 2014, the Prosecutor of the International Criminal Court (ICC) was forced to drop charges against Kenyan president Uhuru Kenyatta. This decision followed several actions by the Kenyan government to undermine efforts, including those by the ICC, to ensure accountability for victims of murder, rape, displacement and police brutality committed during the Post-Elections Violence that followed the country's 2007 elections. As explained in the seven points below, the actions by the Kenyan government were calculated, deliberately designed and implemented to see the ICC fail.

STEP 1: Play jurisdictional shell games

- When a peace accord calls for establishment of a special domestic tribunal, let the bill to establish one fail five times.ⁱ
- In furtherance of a), sing the praises of the ICC; proclaim "Don't be Vague, go for The Hague."ⁱⁱ
- When the ICC prosecutor reveals the names of six suspects and it becomes clear that the Court is daring to touch the untouchable, denounce the ICC as a neo-colonialist institution and loudly bemoan the plight of the real victims of the post-election violence of 2007/8: powerful politicians who now stand accused.ⁱⁱⁱ
- Talk up the Witness Protection Agency and press the judiciary to establish an International Crimes Division (ICD) to underscore that Kenya doesn't need the ICC.
- Quietly deny adequate funding to the Witness Protection Agency.^{iv}
- When the ICC cases struggle and its popularity at home has fallen, announce that the ICD is really being created to handle piracy and terrorism cases.^v
- Propose revoking the International Crimes Act of 2009, which provides the legal basis for domestic prosecutions of crimes against humanity.^{vi}

STEP 2: Block investigations and prosecutions

- Fail to prosecute a single case of sexual violence committed during the post-election violence.^{vii}
- Fail to prosecute a single mid- or senior-level perpetrator associated with the post-election violence.^{viii}
- Fail to produce documents requested by the OTP.^{ix}
- Make contradictory statements and publish reports periodically to declare that all PEV victims have been compensated, and then not, and then partially, with vastly differing magic numbers in different reports, with no details of the ghost cases in the alleged convictions, or the SGBV victims who have received assistance, the purpose being to hoodwink international partners at forums like the ASP 13 that Kenya cares deeply for its indigent PEV victims.^x
- Bribe, intimidate, or kill ICC witnesses, or people thought to be ICC witnesses.^{xi}
- When the ICC brings charges of witness tampering, refuse to hand over the individual.

STEP 3: Ignore victims

- Fail to provide sexual violence survivors of the post-election violence with immediate or ongoing medical assistance.^{xii}
- When Kenya's Truth, Justice, and Reconciliation Commission recommends the establishment of a reparations mechanism to benefit victims, including those in urgent need, leave the recommendation to collect dust, along with the rest of the report.^{xiii}

STEP 4: Disregard courts and established procedures

- When sexual violence victims file suit against the attorney general, director of public prosecutions, and other senior officials, disregard the two-week requirement to respond to the petition and orders of a High Court judge. Wait over a year to respond.^{xiv}
- Do the same when police shooting victims and their families file suit.
- Demand action from the ASP on alleged prosecutorial misconduct, rather than transmitting a complaint to the ICC Presidency, as provided for in Rule 26(2).^{xv}
- While ICC cases are sub judice, push for a discussion at the ASP on "the conduct of the Court and the Prosecutor."

Caveat: When the ICC makes requests for cooperation, demand indignantly that the ICC respect the strictest interpretation of Kenyan legal requirements. On Feb. 13 2014, Kenya Attorney General Githu Muigai told Trial Chamber V(b) that "where the Government of the Republic of Kenya was required to undertake a process in the Republic of Kenya... then there would be a necessity for the Prosecutor to have approached the court with an instrument that is to be affected under Kenyan law"^{xvi}

STEP 5: Rig the system

- Press to gut Article 27 of the Rome Statute and establish head-of-state immunity.
- Press to expand the jurisdiction of the African Court of Human Rights to cover Rome Statute crimes, successfully press for an amendment that provides immunity to state leaders, and then propose amending the Rome Statute in order to make the ICC complementarity to regional courts.^{xvii}

STEP 6: Harness the state apparatus to the cause

- a) Put ICC accused on the same national ticket and run your election campaign against the ICC.
- b) Send Kenyan officials and diplomats all over Africa to press for deferral of the ICC cases, and for changing the statute to recognize head-of-state immunity.
- c) Wave Red Card threatening mass withdrawal of African state parties from the Rome Statute every time Kenya fails to get what it wants from the ICC or ASP session. Repeat this every year, and get AU resolution and neighbouring states to do same.^{xviii}
- d) Request UN Security Council to defer Kenya cases with no substantiated basis for the request, and use the failure of a resolution as “West vs Africa” blackmail campaign to squeeze Rules amendments out of 12th session of the ASP.
- e) Task your UN ambassador with launching largely unsubstantiated and repeated attacks on the ICC in the hope this will deflect focus and discussion of Kenya’s non-cooperation at the 13th ASP session.^{xix}

- f) Send large delegations to the 12th and 13th sessions of the ASP to advance Steps 4 and 5, and ensure success of (d) and (e) above.

STEP 7: Silence the critics

- a) If Kenyan human rights organizations criticize any of the above, question their patriotism, bruise their reputations, accuse them of being foreign agents and propose laws to curtail their funding.^{xx}
- b) Exert control over key national media outlets.^{xxi}
- c) If foreign countries complain, offer to boost trade and remind them of Kenya’s critical role in the global war on terror.
- d) If that fails, issue grave warnings of encroaching neo-colonialism.
- e) Throughout, wave the flag vigorously and remind Kenyans of colonial abuses and injustice to distract from complaints about continuing injustice and state violence.

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- i *How Kenya handled local tribunal process*, Daily Nation, September 17, 2013, <http://mobile.nation.co.ke/News/How-Kenya-handled-local-tribunal-process--/1950946/1997172/-/format/xhtml/-/dwh96i/-/index.html>
 - ii “February 20, 2009: Agriculture minister William Ruto says the secret envelope containing names of the post-election violence suspects should be handed over to the International Criminal Court at The Hague so that proper investigations can start.” *How Kenya handled local tribunal process*, Daily Nation, September 17, 2013.
 - iii At an October 12 2013 Extra-Ordinary Summit of Africa Heads of State in Addis Ababa Ethiopia, Kenya President Uhuru Kenyatta launched a scathing attack on the ICC, telling other AU leaders that “Western powers are the key drivers of the ICC process. They have used prosecutions as ruses and bait to pressure Kenyan leadership into adopting, or renouncing various positions.” Uhuru Blasts US, UK in his Au Speech, New Vision Uganda, October 12 2013
 - iv For 2012/2013 the government granted the Witness Protection Agency only 15% of its budget request. A parliamentary committee noted that the shortfall meant the Agency would not be able to recruit necessary staff, and would only be able to protect the eight witnesses and their family members already in the program, with an inability to accept more. For 2013/2014 the Agency’s budget was cut by a further 16% (KSh 196.8m compared to a 2012/2013 budget of Ksh 235m). For 2012/13 numbers, see The Departmental Committee on Justice and Legal Affairs, *Report on the 2012/2013 Budget Estimates for Votes 117, 125, 126, 163, 134, 203, 201, 165, 168, 169 & 213*, Kenya National Assembly, Tenth Parliament, Fourth Session, pp. 20-22. For 2013/14 numbers, see: Institute of Economic Affairs, *Budget Guide 2013*, p. 7.
 - v *Fresh Doubts About Mandate of Kenya’s Special Court*, Institute for War and Peace Reporting, February 21, 2014, available at <https://iwpr.net/global-voices/fresh-doubts-about-mandate-kenyas-special-court>
 - vi *MPs vow to continue with plan to ditch Rome Statute*. Daily Nation, October 10, 2013.
 - vii *Kenyan women want justice over post-election sexual violence*, The Guardian, March 25, 2014, <http://www.theguardian.com/global-development/poverty-matters/2014/mar/25/kenyan-women-fight-justice-sexual-violence>; *Crying for Justice: Victims’ perspectives on justice for the post-election violence in Kenya*, Amnesty International, July 13, 2014, available at <http://www.amnesty.org/en/library/info/AFR32/001/2014/en>.
 - viii *Crying for Justice: Victims’ perspectives on justice for the post-election violence in Kenya*, Amnesty International, July 13, 2014, available at <http://www.amnesty.org/en/library/info/AFR32/001/2014/en>.
 - ix *How to Destroy the International Criminal Court from Within*, Foreign Policy, October 10 2014, available at <http://foreignpolicy.com/2014/10/10/how-to-destroy-the-international-criminal-court-from-within/>
 - x See for example, *Onward to Closure for Post-Election Violence Victims: Reparations, Resettlement and Justice for Post-Election Violence Victims, 7 Years On*, http://www.onward.co.ke/pev_victims_status_report
 - xi *Further Threats to ICC’s Key Witnesses*, IWPR, August 28 2013, available at <https://iwpr.net/global-voices/further-threats-iccs-kenya-witnesses>
 - xii The Waki Commission Report noted women had been turned away from some hospital and police stations. Commission of Inquiry into Post Election Violence (Waki Commission) report, pages 56, 96, 245, 400, 412, available at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf
 - xiii *Lessons to Be Learned: An Analysis of the Final Report of Kenya’s Truth, Justice and Reconciliation Commission*, International Center for Truth and Justice, May 20, 2014, available at <http://www.ictj.org/publication/kenya-TJRC-lessons-learned>; *Kenyan Parliament Hinders Justice Process*, Freedom House, December 17, 2013, available at <https://freedomhouse.org/article/kenyan-parliament-hinders-justice-process>
 - xiv <http://covaw.or.ke/covaw-in-the-news/press-release-nairobi-21-january-2014-hearing-of-the-constitutional-petition-filed-on-behalf-of-sexual-gender-based-violence-survivor-of-the-post-election-violence-at-the-high-court-of-kenya-bef/>
 - xv October 16 2014 Letter No. 514/14 to the President of the ASP from the Permanent Mission of the Republic of Kenya to the United Nations
 - xvi Transcript of February 13 2014 Status Conference in The Hague, Page 9 at Lines 8-12
 - xvii When African States adopted a protocol to grant criminal jurisdiction to the African Court on Justice and Human Rights, Kenya ensured the inclusion of a provision that will grant immunity to serving heads of state and senior government officials. Kenya continues to push that similar amendment be made to the Rome Statute. See *African Leaders Grant Themselves Immunity in Proposed Court*, New York Times, July 2 2014, available at http://www.nytimes.com/2014/07/03/world/africa/african-leaders-grant-themselves-immunity-in-proposed-court.html?_r=0. See also *Kenya Continues Push for ICC Changes*, IWPR, June 4 2014, available at <https://iwpr.net/global-voices/further-threats-iccs-kenya-witnesses>.
 - xviii *Kenya Parliament Votes to Withdraw from ICC*, Aljazeera, September 5 2013, available at <http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html>
 - xix *Kenya’s UN Envoy Launches Stinging Attack on ICC*, Daily Nation, November 1 2014, available at <http://www.nation.co.ke/news/Kenya-UN-envoy-launches-stinging-attack-on-ICC-/1056/2507206/-/ipvbfa/-/index.html>
 - xx *Kenya: Rights Defenders Under Attack*, Human Rights Watch, October 4 2013, available at <http://www.hrw.org/news/2013/10/04/kenya-rights-defenders-under-attack>
 - xxi *Kenya media: President Kenyatta signs ‘draconian’ bill*, <http://www.bbc.com/news/world-africa-25418234>