



COMMUNICATIONS TO THE ICC REGARDING THE SITUATION IN KENYA

The International Criminal Court (ICC) Prosecutor is monitoring the situation in Kenya following the 2007 post-election violence and subsequent charges of human rights violations. In 2007, Mwai Kibaki won reelection and defeated opposition leader Raila Odinga. Some Kenyans believe the election was rigged by Kibaki in an effort to remain in power. The attacks following the election were perpetrated mainly by those loyal to Kibaki's opposition, Raila Odinga. The violence left 1,500 dead and displaced nearly half a million people throughout Kenya.

Background

Kenya gained independence from Britain in 1963 and until the 1990s the Kenya African National Union, Kanu, was the only major political party. In the early 1990s, international pressure led to the restoration of multi-party politics. Today, some Kenyans still believe that if their own ethnic group or relative is in power they will directly benefit from it. The Kikuyu, the Luhya, the Luo, the Kalenjin, and the Kamba are the five ethnic groups that comprise Kenya and are responsible for the ethnic power struggle present today.

Mwai Kibaki, from the Kikuyu community, won the presidential election in 2002 ending nearly 40 years of Kanu political rule. Kibaki promised to end corruption in the government, but opposition against him grew after Raila Odinga, a one time ally and member of the Luo community, alleged that Kibaki had failed to live up to his campaign promises. These allegations came shortly after Kibaki reneged on selecting Odinga as prime minister. Raila Odinga left Kibaki's party to run for president as a member of the Orange Democratic Movement (ODM) in 2007.

Kibaki defeated Raila Odinga in the 2007 election, winning re-election. Angry Kenyans took to the streets in post-election violence. Attacks in the west and the coast were spontaneous, but in the Rift Valley, where most of the violence occurred, the accounts suggest an orchestrated element to the violence. These attacks included the burning to death of 30 people in a church.

Charges include the government's accusation that some leaders of the ODM planned and executed a mass genocide targeting members of the Kikuyu community in the Rift Valley; and the ODM's accusation that the police used excessive, lethal force against protesters in public rallies.

Communications to the ICC

The Rome Statute of the ICC enables the court to exercise its jurisdiction if a situation is referred to the Prosecutor by a State Party or by the United Nations Security Council. In addition, the Court may exercise jurisdiction if the Prosecutor initiates an investigation on his own initiative with approval of the Pre-Trial Chamber on the basis of information or communications submitted by individuals or organizations on crimes within the jurisdiction of the Court.

On January 22, 2008, before joining the coalition government, the ODM, then Kenya's main opposition party, submitted communications to the ICC, alleging that the Kenyan government committed crimes against



humanity through its continued use of the security forces to kill people under the pretext of suppressing demonstrations in various cities.

In response to the ODM, the Kenyan government announced that it was planning to submit communications against opposition leaders to the ICC with respect to the post-election violence. It did not specify whether it was a State Party referral or if it would make a referral. Government spokesman Alfred Mutua said that the government was collecting evidence. He further stated that the government was aware that some leaders of the ODM planned and executed massive genocide in the Rift Valley. Mutua did not, however, specify which charges the government was targeting.

On August 8, 2008 Kenya's National Commission on Human Rights (KNCHR) urged the ICC to investigate the involvement of high ranking officials in the post-election violence. The commission said both government and opposition leaders planned acts of violence. KNCHR's report reveals that the violence was mostly instigated by politicians throughout the campaign period and during the violence itself via the use of incitement and hatred. The director of the agency, Florence Jaoko, said the group had drawn up a list of 200 people who should be investigated. The Commission did not make the list public.

The ICC's Response

On February 5, 2008 the Office of the Prosecutor (OTP) noted that Kenya is a State Party to the Rome Statute and that it considers carefully all information relating to alleged crimes within its jurisdiction committed on the territory of States Parties or by nationals of States Parties, regardless of the individuals or group alleged to have committed the crime.

On April 22, 2008 OTP spokesperson Florence Olara stated that the Prosecutor is analyzing the situation in Kenya, including the information submitted to it to establish whether there is a basis to launch a formal investigation of crimes committed in Kenya. Such an analysis does not mean that an investigation is open, nor that an investigation will automatically take place in the future. For an investigation to proceed there must be a reasonable basis to believe that a crime or crimes within the jurisdiction of the Court have been committed in Kenya. Even if crimes within the jurisdiction of the Court have been committed in Kenya, the OTP must determine whether these are admissible. In determining admissibility, the OTP must assess the gravity of the crimes committed and the Kenyan authorities' willingness and ability to investigate the abuses in question for the purpose of prosecution. If the Prosecutor concludes that there should be an investigation in Kenya, he must get the approval of a Pre-Trial Chamber of the Court.

On February 11, 2009 the OTP issued a statement stating the Prosecutor is continuing to monitor the situation in Kenya.

April 20, 2009 ICC Judges David Daniel Ntanda Nsereko (Uganda) and Joyce Aluoch (Kenya) traveled to Kenya to participate in a conference discussing the Court and its structure. An ICC press release refuted media reports that the judges would discuss the Court's possible investigations into the 2007 election violence with Kenyan government officials.





On April 20, 2009 the Court confirmed its receipt of a petition from a member of Kenya's parliament, Paul Muite, calling for an investigation into the extrajudicial killings, code named "Kwekew," in Kenya. The alleged extrajudicial killings include those of suspected Mungiki supporters by security agencies and the killings in Kisumu and Kibera that took place after the 2007 election. The petition also cited the deaths of two human rights activists, Mr. Kamau King'ara and Mr. Paul Oulu, and a police officer, Mr. Bernard Kiriinya. A communication from the member of parliament does not have the effect of a State Party referral, thereby triggering the Court's jurisdiction. Without a State Party or UN Security Council referral, the ICC Prosecutor must ask the permission of the ICC's Pre-Trial Chamber to open an investigation.

Peace Talks

In April 2008, Kibaki and Odinga entered into a power-sharing deal in an effort to end the violence. Former United Nations Secretary General Kofi Annan mediated negotiations between Kibaki and Odinga. The power-sharing agreement made Mr. Odinga prime minister, with considerable power, by changing the constitution.

In January 2009, President Kibaki and Prime Minister Odinga agreed to set up a tribunal to prosecute those responsible for the violent attacks following the 2007 election. On February 17, 2009 President Kibaki called an emergency cabinet meeting after parliament rejected a proposed government sponsored constitutional amendment bill to set up a local tribunal. The following day, former United Nations Secretary-General Kofi Annan was set to deliver names of ten officials suspected of causing the post-election violence by March 1 to the ICC. He announced, however, that he was willing to grant Kenya more time to set up a tribunal. In June, Annan announced that he would hand over the names of the suspects in August 2009 if the government fails to establish a tribunal to address the post-election crimes. On July 9, 2009 Kofi Annan handed over a sealed envelope and supporting materials to the ICC Prosecutor, likely including a list of names of persons suspected of post-election crimes.

On February 25, 2009 a UN representative called for the dismissal of Kenya's police commissioner and attorney general because of the country's failure to adequately address the widespread killing following the 2007 elections. On April 27, 2009 Kenyan Prime Minister Raila Odinga stated that new elections would be necessary if the disputes over the power sharing agreement are not resolved.

Analysts have found a rise in trained militias in Kenya, especially in the Rift Valley, the area which suffered most during post-election violence. Reports indicate that politicians in this area are maintaining militia units potential violence, not just election campaigns, and that these militias are acquiring large quantities of firearms. In response, the UN Resident and Humanitarian Coordinator for Kenya, Aeneas Chuma, indicated that the UN is working with the Kenyan government to address the growing militia problem.

Agreement Between Kenyan Officials and the Prosecutor on Establishing a Domestic Tribunal

On July 3, 2009, a delegation of Kenyan officials met with the ICC Prosecutor Luis Moreno Ocampo in The Hague to discuss the investigation and prosecution of crimes allegedly committed after the 2007 election. During the meeting, the Prosecutor confirmed that his office is conducting a preliminary examination of the





Kenya situation. The Prosecutor reiterated that the crimes allegedly committed in Kenya after the 2007 election may fall within the jurisdiction of the ICC.

The Prosecutor and the Kenyan delegation, which including the minister of justice, the minister of lands and the attorney general, agreed that if Kenyan authorities carry out genuine judicial proceedings, the OTP will have no grounds to intervene. Further, the parties agreed that impunity is not an option. In addition, Kenyan officials agreed to submit information regarding investigations and prosecutions to the Prosecutor by the end of September. The agreement is outlined in the Agreed Minutes of the Meeting, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr431>.

Under the agreement, first, Kenya will submit a report on the current status of investigations and prosecutions arising out of post election violence and any other information necessary for the OTP to conduct its preliminary examination. Second, Kenya will provide information on measures put in place to ensure the safety of victims and witnesses pending the initiation and completion of judicial proceedings. Third, Kenya will provide information on modalities for conducting national investigations and prosecutions through a special tribunal or other judicial mechanism adopted by the Kenyan Parliament by July 2010.

If a tribunal is not established by July 2010, Kenya, in keeping with its commitment to end impunity, will refer the case to the Prosecutor in accordance with Article 14 of the Rome Statute.

*Researched and drafted by Aurélie Coppin and Lucia DiCicco
Updated July 10, 2009*

