



THE ICC PROSECUTOR'S APPLICATION FOR AUTHORIZATION TO OPEN AN INVESTIGATION IN THE SITUATION OF KENYA

On November 26, 2009, the Chief Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, announced that he had submitted to the Pre-Trial Chamber II (PTC II)¹ a request for authorization to open an investigation into the situation in Kenya. It is the first time Ocampo has asked the PTC for its authorization under Article 15 of the Rome Statute to investigate on his own initiative, or *proprio motu*. On March 31, 2010 a majority of the PTC II judges granted the Prosecutor's request to investigate crimes against humanity allegedly committed in Kenya.² This authorization is required in absence of a referral by the Security Council or a State Party for the Court to exercise jurisdiction.

In deciding to ask the judges of PTC II for authorization "to investigate on the violence that followed the elections of December 2007 in Kenya," Ocampo had determined that there is a reasonable basis to believe that the "alleged crimes were part of a widespread and systematic attack against the civilian population,"³ and as such amounted to crimes against humanity. Ocampo also considered the gravity of the situation, which he stated left 3,600 injured and 1,220 dead, in deciding whether cases arising from it would be within the jurisdiction of the ICC.⁴ In addition, the lack of action so far by a national Kenyan judicial mechanism to prosecute the suspects further persuaded Ocampo to seek permission from the ICC judges to launch a full investigation into the situation.

Background on the Situation in Kenya

The alleged crimes the Prosecutor wants to investigate arose out of a 2007 election in Kenya and the violence that followed. Mwai Kibaki of the Party of National Unity (PNU) won Kenya's presidential election and was re-elected on December 27, 2007, defeating opposition member Raila Odinga of the Orange Democratic Movement (ODM). Kibaki was subsequently sworn in on December 30 for a five-year term. Odinga and the ODM claimed that the election was fraudulent and rife with large-scale vote rigging on the part of Kibaki in an attempt to retain power. Odinga addressed his supporters stating, "There is a clique of people around Kibaki trying to rob Kenyans of the election,"⁵ and demanded a recount.

On December 31, violent riots erupted throughout the country with particular intensity in the Rift Valley, in response to Kibaki's reinstatement. Various accounts suggest that crimes which were also human rights violations occurred in the post-election violence that reportedly left 1,500 people dead and nearly half a million persons displaced throughout Kenya. The government accused some leaders of the ODM of orchestrating a mass genocide targeting members of the Kikuyu community in the Rift Valley, from which Kibaki originates.

¹ On November 6, 2009 the Presidency of the Court assigned the Situation in Kenya to Pre-Trial Chamber II. See <http://www.icc-cpi.int/Menus/Go?id=32228673-61d2-42f5-aa53-c6f86da9a3e7&lan=en-GB>.

² Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, March 31, 2010, available at <http://www.icc-cpi.int/Menus/Go?id=422f24a9-5a0f-4fd0-bc3e-9ffb24ec7436&lan=en-GB>.

³ Press Conference by the Prosecutor of the ICC, Luis Moreno-Ocampo. November 26, 2009, available at <http://www.icc-cpi.int/Menus/Go?id=a2b59665-397c-4c47-9cfa-18958e6ab28c&lan=en-GB>.

⁴ Id.

⁵ Odinga Rejects Kenya Poll Result, BBC News, December 31, 2007, available at <http://news.bbc.co.uk/2/hi/africa/7165406.stm>.





As well, the ODM sent communications to the ICC, which any person or entity may do, alleging that the government's security forces committed crimes against humanity in the form of pillaging and rape under the pretext of suppressing demonstrations.

The political upheaval which threw Kenya into a violent crisis led to the Kenya National Dialogue and Reconciliation process, a round of negotiations which began in late January 2008 with the hope of restoring peace. As a result of the negotiations brokered by the African Union's Panel of Eminent African Personalities chaired by Kofi Annan, Mwai Kibaki and Raila Odinga formed a Grand Coalition government whereby Kibaki retained the presidency and Odinga became Prime Minister. In addition, the accord led to the establishment of various bodies of inquiry to investigate human rights violations and post-election crimes in Kenya. This included the Truth and Justice Reconciliation Commission (TJRC) tasked to investigate historical human rights violations, and the Commission of Inquiry into the Post-Election Violence (CIPEV), otherwise known as the Waki Commission, to investigate the post-election violence and atrocities.

Subsequent Action

Kenya's National Commission on Human Rights (KNCHR) investigated the situation in response to national and international outrage decrying the post-election violence. In its final report issued on August 15, 2008, the Commission revealed that "the violence was mostly instigated by politicians throughout the campaign period and during the violence itself via the use of incitement and hatred."⁶ The Commission gathered evidence that would implicate both government and opposition leaders in committing crimes against humanity, and as such urged the ICC to investigate the involvement of high ranking officials in the violence. Furthermore, the Commission compiled a list of 200 people it believed should be investigated.

The Waki Commission began its work on May 23, 2008, and issued its final report⁷ to President Kibaki and the National Assembly on October 15, 2008. The report proposed several recommendations, one of which called for the establishment of a special tribunal composed of international and national judges to investigate and prosecute those most responsible for the post-election violence. It further outlined a strict timeframe for setting up the tribunal and initiating its work. Accordingly, the Commission called for a bill to be introduced by January 30, 2009, which would establish the tribunal. The report required Kofi Annan, the mediator, to entrust a sealed envelope with the names of chief suspects to the ICC if Kenya failed to abide by the recommendations to undertake genuine investigations and prosecutions.

Communications to the ICC

The Kenyan authorities continue to discuss options for establishing a national court to prosecute cases against those most responsible for the post-election violence. This would permit Kenya to claim "complementarity" with the ICC. This is the Rome Statute's requirement that the ICC defer to domestic investigations and prosecutions. While the international community welcomed the establishment of the Waki Commission and the

⁶ On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, Final Report, Kenya National Commission on Human Rights, August 15, 2008, available at <http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>.

⁷ Available at http://www.eastandard.net/downloads/Waki_Report.pdf.





TJRC as positive national steps in the fight against impunity, these bodies were non-prosecutorial and were restricted to fact-finding investigations. Following the Waki Commission's recommendation that a special tribunal for Kenya be set up by January 30, 2009, the Kenyan government debated for two weeks over a Constitutional Amendment Bill to establish the proposed tribunal. This bill was defeated when the Kenyan parliament voted on February 12. Had it passed, it would have allowed Kenya to try the suspects itself and to undertake genuine judicial proceedings against those most responsible for committing atrocities following the election, thus making any ICC action unnecessary. Despite Kofi Annan's granting the government more time to reintroduce the bill, the government made no progress to establish a genuine prosecutorial body. Consequently, on July 9, Annan sent "the sealed envelope and supporting materials previously entrusted to [him] by the Waki Commission on the post-election violence,"⁸ to the OTP of the ICC.

Moreover, a Kenyan delegation met with Ocampo on July 3, 2009, where all "agreed that should the Kenyan authorities carry out genuine judicial proceedings against those most responsible, the Office of the Prosecutor will have no ground to intervene, and that impunity was not an option."⁹ In keeping with its commitment to end impunity, the Kenyan delegation further agreed to refer the situation to the ICC by July 2010 if the Kenyan authorities failed to fulfill this task. The delegation also agreed to provide the Prosecutor with a report on the current status of investigations and prosecutions, information on measures put in place to ensure the safety of victims and witnesses, and information on modalities for conducting national investigations, at the end of September.

By September 30, 2009, the government of Kenya had not made progress in establishing a national court that could try those most responsible for the post-election violence. Consequently, on November 5, 2009, Ocampo met with Kibaki and Odinga in Kenya¹⁰ where he "explained to them that [he] consider[s] the crimes committed in Kenya were crimes against humanity, therefore the gravity is there."¹¹ He further informed them that, based on a variety of information he has reviewed,¹² he would seek permission from Pre-Trial Chamber II judges to launch a full investigation into the situation given that Kibaki and Odinga were not willing to refer the situation to the ICC due to political risk,¹³ and the prospects for trying suspects through a national court seemed unlikely.

⁸ ICC Prosecutor receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya, July 9, 2009 available at <http://www.icc-cpi.int/Menu/Go?id=dbae1d46-3e7d-411d-8d09-87462187066a&lan=en-GB>.

⁹ Kenyan High-Level Delegation meets ICC Prosecutor, July 3, 2009, available at <http://www.icc-cpi.int/Menu/Go?id=1ceb4fad-dfa7-4dc5-b22d-e828322d9764&lan=en-GB>.

¹⁰ Kenyan authorities committed to cooperate as ICC Prosecutor informs them that in December he will request ICC judges to open an investigation into post-election violence, November 5, 2009, available at http://www.icc-cpi.int/NR/rdonlyres/05573AE3-6A23-4109-AD10-89F7365DD031/281179/UpdatedsheetKenya_3_2.pdf.

¹¹ Oliver Mathenge, Ocampo Meets Kenya Leaders Over Poll Chaos, Daily Nation, November 5, 2009, available at <http://www.nation.co.ke/News/-/1056/682290/-/uolr8b/-/index.html>.

¹² Ocampo has been monitoring the situation in Kenya since 2008 and has reviewed documents and supporting materials from the Waki Commission, various Human Rights reports including the KNCHR Report, UN reports, and other reports submitted by the government of Kenya. See <http://www.icc-cpi.int/Menu/ICC/Press+and+Media/Press+Releases/>.

¹³ Macharia Gaitho, Ocampo Leaves Meeting Empty-Handed, Daily Nation, November 5, 2009, available at <http://allafrica.com/stories/200911051014.html>.





Basis for the Jurisdiction of the ICC over Crimes in Kenya

The ICC may exercise jurisdiction over crimes of genocide, war crimes, and crimes against humanity, occurring after July 1, 2002 and committed on the territory or by a citizen of a state that has ratified the Court's Rome Statute, or that has accepted jurisdiction of the Court over the situation in which the crime occurred. In addition, the ICC is a court of last resort and is complementary to national criminal jurisdictions. This means that the ICC must defer to genuine national proceedings not intended to shield individuals from justice.

The Republic of Kenya ratified the Rome Statute on March 15, 2005, which went into effect for Kenya on July 1, 2005. As a result, in accordance with Article 13 of the Statute, the ICC has jurisdiction over the post-election violence provided that the Court's jurisdiction is activated by one of three triggers. Since neither a State Party nor the United Nations Security Council has referred the situation to the ICC, the Prosecutor decided to request permission from judges of the PTC II to initiate an investigation *proprio motu*, on his own initiative. The basis of this request is his conclusion from available information that crimes of humanity within the jurisdiction of the Court were committed in Kenya.

Action by the Office of the Prosecutor

To satisfy the interest of justice, the Office of the Prosecutor sent out a public notice to victims of Kenya's post-election violence on November 23, 2009. The notice invited victims to "send their comments to the judges of Pre-Trial Chamber II on whether an investigation on such alleged crimes should be opened,"¹⁴ within 30 days. The notice did not call for evidence; rather, it encouraged victims to express their opinion on the merits of the investigation given that under the Rome Statute victims are entitled to make representations to the PTC. The judges of the PTC II were obliged to consider any communication from victims when reaching their decision to commence or discontinue an investigation into the situation. In addition, these victims would have a chance to participate during the proceedings and to request reparations at a later stage should the Court find certain perpetrators guilty at the trial phase.

Moreover, to authorize the start of a full investigation, the judges held a hearing to determine whether there was a reasonable basis to proceed with an investigation into the situation in Kenya and whether the case appears to fall within the jurisdiction of the Court. Accordingly, they reviewed the information Ocampo had submitted to them, including 40 appended annexes and the various reports he has examined. On February 18, 2010, the judges requested the Prosecutor to provide further information to identify a link between "the events, the persons, and the acts of violence allegedly committed [...], and a policy of a State or one or more organizations."¹⁵ Such a link is needed for the crimes to qualify as crimes against humanity under article 7(2)(a) of the Rome Statute. The judges also requested further information on the incidents and groups of persons likely to be the focus of investigations, as well as any relevant domestic investigations. Ocampo

¹⁴ Available at

http://www.icc-cpi.int/NR/rdonlyres/7A34B336-9611-430F-A668-CA5D209471CA/281270/Notificationtovictims_231120091.pdf.

¹⁵ Press release, ICC judges request clarification and additional information with regard to the situation in Kenya, February 19, 2010, available at <http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/pr497>.





provided the judges with the requested information, which included an indicative and non-binding list of 20 suspects.

After analyzing the seriousness of the information in the prosecution's possession, including the nature of the alleged crimes, as well as the strength of the information in the submission, the majority of the judges found that "the information available provides a reasonable basis to believe that crimes against humanity have been committed on Kenyan territory," and that "all criteria for the exercise of the Court's jurisdiction were satisfied." The Chamber therefore granted the Prosecutor's request to commence an investigation in Kenya.¹⁶

What's Next?

Ocampo had already announced that he has a team ready to investigate the situation in Kenya should the judges of PTC II grant his request to commence a full investigation. In a press conference on April 1, 2010, following the PTC II's decision to grant his request, Ocampo stated that he expects a prompt and expeditious investigation to conclude the majority of its work in 2010. He will travel to Kenya in May to meet with victims and to visit some crime scenes. The Prosecutor said that the OTP's list of 20 suspects comprised of "political and business leaders [...] belonging to or associated with both parties, the PNU and ODM,"¹⁷ will serve as a guide for the investigation. However, the prosecution's investigation team will conduct an impartial and independent investigation to determine which perpetrators it believes bear the greatest responsibility for the most serious alleged crimes and should consequently stand trial. There has therefore been no decision yet of who would face justice for responsibility for the atrocities. Such a decision would come when the Prosecutor considers he has enough evidence from the investigation.

Once Ocampo believes he has enough evidence for a prosecution,¹⁸ he can go before Pre-Trial Chamber II and request the judges to issue a Summons to Appear or an Arrest Warrant, at which point it would be the responsibility of states parties where the suspects may be to arrest them. Ocampo stated he would present in Court "at least two cases against one to three persons in each case."¹⁹ When they are in ICC custody, PTC II would hold a confirmation of charges hearing to determine whether the cases against the alleged perpetrators should be sent to trial. Should the Chamber confirm the charges and send the case to the trial phase, the judges of the Trial Chamber would hear the case and render a verdict on the guilt or innocence of the accused.

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¹⁶ See press release, ICC judges grant the Prosecutor's request to launch an investigation on crimes against humanity with regard to the situation in Kenya, March 31, 2010, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr512>. Judge Hans-Peter Kaul did not find reasonable basis to believe the crimes committed in Kenya could be qualified as crimes against humanity.

¹⁷ OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, April 1, 2010, available at <http://www.icc-cpi.int/Menus/Go?id=6b518fb1-c68f-405a-887c-19ceacf91c05&lan=en-GB>.

¹⁸ Pursuant to Article 53 of the Rome Statute of the ICC, the Prosecutor must conclude there is sufficient basis for a prosecution.

¹⁹ OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, April 1, 2010, available at <http://www.icc-cpi.int/Menus/Go?id=6b518fb1-c68f-405a-887c-19ceacf91c05&lan=en-GB>.

