



THE ICC'S INVESTIGATION IN KENYA INTO CRIMES AGAINST HUMANITY: POTENTIAL AND CHALLENGES

On March 31, 2010 Pre-Trial Chamber II (PTC) of the International Criminal Court (ICC) approved an application from Chief Prosecutor Luis Moreno-Ocampo to open an investigation into crimes against humanity committed in the Republic of Kenya.¹ The decision marks the first investigation opened by the Prosecutor on his own initiative.² This paper addresses the progress, current status, and future of the investigation, as well as the challenges it faces.

Background

Following the December 2007 election in Kenya, violence broke out across the country in protest of the outcome of the flawed election. Opposition leader Raila Odinga lost to then President Mwai Kibaki, who was believed to have rigged the election in his favor.³ This united the politically oppressed ethnic groups that Odinga represented, leading to violent conflict between supporters of the two candidates.⁴ The violence was largely suppressed in February 2008 following the formation of a coalition government; however, by that time approximately 1,333 people had reportedly been killed.⁵

According to the final report of the Kenya National Commission of Human Rights (KNCHR) following its investigation into the post-2007 election violence, “crimes against humanity as defined under international customary law took place.”⁶ The definition employed by KNCHR is comparable to that of the ICC,⁷ which defines crimes against humanity as acts such as murder, deportation and rape, “when committed as part of a widespread or systematic attack directed against any civilian population.”⁸ Despite this similarity, the ICC and KNCHR’s respective mandates differ significantly. The KNCHR was mandated to investigate the “character and scope of human rights violations” during the period of post-election violence, while the ICC investigates and prosecutes individuals for atrocity crimes.⁹

The judges granted the Prosecutor’s application for investigation but limited it to the investigation of crimes against humanity occurring between June 1, 2005 and November 26, 2009, the period of time between the Rome Statute’s entry into force in Kenya and the date of the Prosecutor’s application for investigation into the situation in Kenya.¹⁰ This window includes the period of post-election violence, primarily occurring between

¹ See International Criminal Court Weekly Update #28, April 6, 2010, available at http://www.icc-cpi.int/NR/rdonlyres/66246BE8-CDCB-4895-80FF-F10B2CFF73ED/281720/ed28_eng1.pdf.

² Article 13 of the Rome Statute stipulates that an investigation can be started by a State Party referral, a Security Council referral, or proprio motu, meaning by the Prosecutor own initiative.

³ See Report of the Commission of Inquiry into Post-Election Violence (CIPEV), Commission of Inquiry into Post-Election Violence, October 15, 2008, p. 173, available at <http://www.dialoguekenya.org/docs/PEVReport1.pdf>.

⁴ See Report of the CIPEV, p. 23.

⁵ See Report of the CIPEV, p. 305.

⁶ See On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence, Kenya National Commission of Human Rights (KNHCR), August 15, 2008, p. 5(21), available at <http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>.

⁷ See KNHCR Report, p. 5(21), and Article 7 of the Rome Statute.

⁸ Article 15(4) of the Rome Statute.

⁹ See KNHCR Report, p. 1.

¹⁰ See International Criminal Court Weekly Update #27, March 29, 2010, available at





December 2007 and February 2008, but also includes several years before and after it. This extensive timeframe granted by the PTC contrasts with the strict constraints placed on the rest of the investigation. The judges explained that they granted this long period of time because an investigation should be carried out in relation to a situation as opposed to a particular crime, in addition to the consideration that it is “the Prosecutor’s duty to establish the truth by extending the investigation to cover all facts and evidence.”¹¹ However, they did not extend this logic to the crimes to be investigated, which are limited to crimes against humanity.¹²

The ICC is concerned with only the most serious and grave of international crimes committed; therefore, the investigation into potential instances of crimes against humanity in Kenya is limited to the most serious atrocities, most of which occurred in parts of western Kenya, the Rift Valley and Nairobi slums.¹³ Six hotspots of violence within these regions have been identified by the Office of the Prosecutor (OTP) as the Mathare and Kibera slums of Nairobi, the districts of Uasin Gishu and Kericho, the town of Naivasha, and the city of Kisumu.¹⁴ Although the investigation is not territorially limited to these areas, they will likely be of most interest throughout the investigation in Kenya.¹⁵

The Investigation Now

An essential challenge to a successful investigation is cooperation from the relevant governments and affected communities. ICC investigations rely heavily on access to relevant witnesses, locations, individuals, and documents, many of which are dependent upon government cooperation and popular support. The government of Kenya appears to be cooperating with the investigation, and has offered to help protect witnesses of the violence.¹⁶ Kenyan public opinion also appears to be supportive of an ICC intervention, as shown in a 2009 survey where 62% of respondents were in favor of ICC prosecution of the perpetrators of the election-related violence.¹⁷

This cooperation facilitated Ocampo’s first investigatory visit to the country from May 8–12, 2010 when he met with victims, civil society groups, communities and politicians.¹⁸ During his visit Ocampo focused on the violence that had occurred in Nairobi, primarily within the slums. He spent time in Mathare, one of Nairobi’s largest and most violent slums, speaking to victims and witnesses of crimes such as the stoning of people and

http://www.icc-cpi.int/NR/rdonlyres/503118D2-49E0-4DBF-A238-C58D677ED69F/281694/ed27_eng.pdf.

¹¹ See Situation in Kenya Decision at para. 205, available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

¹² See Situation in Kenya Decision at para. 208.

¹³ See Situation in Kenya Decision at para. 176.

¹⁴ Daily Nation, ICC investigations identify six hotspots in Kenya chaos, July 16, 2010, available at <http://www.nation.co.ke/News/ICC%20investigators%20identify%20six%20hotspots%20in%20Kenya%20chaos/-/1056/959036/-/m7q1tmz/-/>.

¹⁵ See Situation in Kenya Decision at para. 211.

¹⁶ Capital FM, Kenya vows to protect ICC witnesses, May 11, 2010, available at

<http://www.capitalfm.co.ke/news/Kenyanews/Kenya-vows-to-protect-ICC-witnesses-8434.html>.

¹⁷ See International Criminal Court OTP Weekly Briefing Issue #20, January 12-18, 2010, available at

http://www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary_Issue20.pdf.

¹⁸ AllAfrica, Ocampo arrives to begin probe process, May 8, 2010, available at <http://allafrica.com/stories/201005090001.html>.





the hacking off of limbs.¹⁹ He also met with senior politicians and government officials, including President Kibaki and Prime Minister Odinga, whose controversial election preceded the violence in 2007. Although the Prosecutor has stated that he did not collect suspects' names or identify witnesses on this visit, he gathered many statements from potential perpetrators, victims, and witnesses that will aid his investigation in the future.²⁰

Next Steps

The Prosecutor's visit to Kenya was the beginning of the investigation into the situation in Kenya; however, a number of steps must be taken before the Prosecutor presents his cases against the responsible individuals to the ICC judges. As noted above, visits to identify suspects, discover witnesses, and collect evidence are an essential part of the investigation. The Prosecutor has planned further visits later this year to areas outside of Nairobi such as the Rift Valley, where many of the most violent outbreaks during the post-election period took place.²¹

Ocampo anticipates that he will conclude his investigation by the end of 2010. He has stated that at that time he will present two cases, each against approximately three people, to the PTC and hopes that warrants will be issued for the arrest of those individuals soon after.²² Although the OTP has not yet released the names of the individuals against whom it will pursue cases, there has been some speculation that several may be senior political officials.²³ The Prosecutor has stated that he will pursue charges against individuals from both sides of the conflict, which could quell fears that ICC cases perceived as unbalanced would re-ignite violence in Kenya.²⁴

Remaining Questions and Challenges

The investigation into the Kenya situation is progressing, but there remain a number of ongoing challenges and unanswered questions. One challenge is the adequate protection of witnesses. The Kenyan government has pledged that it will protect witnesses. Recently it radically amended Kenya's Witness Protection Bill to provide a comprehensive program of protection.²⁵ The ICC Prosecutor has also stated that the Victims and Witnesses

¹⁹ Kenya Broadcasting Corporation, Ocampo tours Kenyan slum, May 10, 2010, available at <http://www.kbc.co.ke/story.asp?ID=63863>.

²⁰ Christian Science Monitor, In Kenya, International Criminal Court to try six top Kenyans, May 12, 2010, available at <http://www.csmonitor.com/World/Africa/2010/0512/In-Kenya-International-Criminal-Court-to-try-six-top-Kenyans>.

²¹ See International Criminal Court Weekly Update #33, May 10, 2010, available at http://www.icc-cpi.int/NR/rdonlyres/2E2702B9-A2B0-4AA3-8DEF-55FA253414CF/281908/ED33_ENG.pdf.

²² Daily Nation, I'll nail suspects in 6 months: Ocampo, May 8, 2010, available at <http://www.nation.co.ke/News/politics/-/1064/914766/-/wb62afz/-/index.html>.

²³ AllAfrica, Kenya: ICC targets four MPs over poll violence, July 13, 2010, available at <http://allafrica.com/stories/201007130727.html>.

²⁴ Reuters India, ICC targets up to six Kenyans, May 12, 2010, available at <http://in.reuters.com/article/worldNews/idINIndia-48430420100512>.

²⁵ Daily Nation, Witnesses finally protected by law, June 8, 2010, available at <http://www.nation.co.ke/News/Witnesses%20finally%20protected%20by%20law%20%20/-/1056/934730/-/7xwx1uz/-/>.





Unit within the Registry of the ICC will work to ensure witness safety.²⁶ Other countries such as the United States have also pledged their support to protect individuals who were witnesses of the post-election violence.²⁷ Although these appear to be earnest efforts to protect those individuals at risk, there remain concerns that security measures will be insufficient due to the difficulty of implementing protection in areas such as the overcrowded slums of Nairobi.

Witness protection within Kenyan slums is challenging for a number of reasons. For many decades the Nairobi slums have not been recognized as legal settlements under Kenyan law, which led to mass evictions of residents with no reparations.²⁸ As a result, slum residents have become wary of any government presence. This general suspicion has been compounded by a large-scale resettlement project where all two million slum residents in Kenya are to be relocated to legal settlements over the next several years.²⁹ This relocation, which started in 2009, has not been welcomed by many slum residents for reasons such as higher rent rates within the new settlements.³⁰ Their opposition to relocation has encouraged many slum residents to reject and turn hostile to any outside intervention.

Even if protection agents were granted access to the slums, enforcement of this protection would be extremely difficult due to the nature of the settlements. Kibera, the largest slum in Africa, was one of the primary sites of post-election violence.³¹ Like many slums it is dense and houses over one million people in single story shacks over less than one square mile of land.³² There is only one road within the slum, so most transportation occurs in the hundreds of narrow passages that run throughout. Navigating these passageways would make enforcing adequate security an immense challenge.³³ Mathare, the other slum that experienced significant post-election violence, is similarly dense and difficult to navigate, which is likely to hinder witness protection efforts.

Another question that remains is exactly which crimes against humanity are being considered and whether there is sufficient evidence to prove them. The category of crimes against humanity is extensive, including atrocities ranging from persecution to extermination. Although the question of which crimes will only be definitively answered when the cases are presented to the Court, one can make an educated guess based on the findings of the major post-election violence reports. For instance, the Kenya National Commission for Human Rights found that crimes such as murder, deportation or forcible transfer of population, rape, and other forms of sexual violence had been committed.³⁴ Although the Prosecutor may find that there is not enough evidence to support

²⁶ AllAfrica, Kenya: Key election chaos witnesses to be flown out, May 16, 2010, available at <http://allafrica.com/stories/201005160128.html>.

²⁷ Voice of America, US to help protect Kenyan violence witnesses, February 11, 2010, available at <http://www1.voanews.com/english/news/africa/east/US-to-Help-Protect-Kenyan-Violence-Witnesses-84133462.html>.

²⁸ See Kenya, *The unseen majority: Nairobi's two million slum-dwellers*, Amnesty International, 2009, pp. 13-21, available at <http://www.amnesty.org/en/library/asset/AFR32/005/2009/en/3b6e7351-8e08-4b61-9d7b-6e3b86eb0057/af320052009eng.pdf>.

²⁹ See Kenya, *The unseen majority: Nairobi's two million slum-dwellers*, pp. 22-23.

³⁰ See Kenya, *The unseen majority: Nairobi's two million slum-dwellers*, pp. 26-29.

³¹ Daily Nation, ICC investigations identify six hotspots in Kenya chaos, July 16, 2010, available at <http://www.nation.co.ke/News/ICC%20investigators%20identify%20six%20hotspots%20in%20Kenya%20chaos/-/1056/959036/-/m7q1tmz/-/>.

³² See Kenya, *The unseen majority: Nairobi's two million slum-dwellers*, p. 3.

³³ See Kenya, *The unseen majority: Nairobi's two million slum-dwellers*, p. 11.

³⁴ See KNHCR Report, p. 5.





prosecution of individuals for some of these crimes, and may find evidence of other crimes, this report's findings are a good indicator of the types of crimes against humanity that could be included in ICC cases.

An issue of primary concern to the success of this investigation is whether it will yield sufficient evidence that crimes against humanity in fact occurred in Kenya. Although Pre-Trial Chamber II found that there was enough evidence of crimes against humanity to open an investigation, Judge Hans-Peter Kaul raised doubts in a dissenting opinion.³⁵ The category of crimes against humanity requires that a serious crime (i.e. murder) be committed as “a widespread or systematic attack directed against any civilian population.”³⁶ Judge Kaul rejected that crimes against humanity as defined by article 7(2)(a) of the Rome Statute occurred because “there is no reasonable basis to believe that crimes, such as murder, rape and other serious crimes, were committed in an ‘attack against any civilian population’ ‘pursuant to or in furtherance of a State or organizational policy to commit such attack.’”³⁷ Similarly, the Commission of Inquiry into Post-Election Violence (CIPEV) headed by former UN Secretary-General Kofi Annan concluded that “the evidence the Commission has gathered so far... may even fall short of the proof required for international crimes against humanity.”³⁸ Although the KNHCR report argues that such crimes occurred beyond a reasonable doubt,³⁹ the OTP will likely find a challenge in proving this as he presents his cases to Pre-Trial Chamber II and the dissenting Judge Kaul.

Despite the concerns regarding crimes against humanity, it is possible that the OTP will discover evidence of other crimes committed in Kenya. The investigation into the situation in Kenya is limited to crimes against humanity, so the Prosecutor is not currently permitted to formally investigate or present cases of genocide or war crimes.⁴⁰ Given the distinct ethnic component of the post-election violence, it is possible that the Prosecutor could find evidence of genocide. The KNCHR report found that “Kenya presently exhibits characteristics which are prerequisites for the commission of the crime of genocide.”⁴¹ In order to investigate additional crimes the OTP would need to submit a new application to the PTC that includes sufficient evidence of the crimes, which would then be considered by the judges to decide whether to expand the scope of the investigation.

Another worry is that this investigation could incite more political violence, which would harm stability and peace in Kenya.⁴² This concern arises from the largely unresolved ethnic and political motivations that escalated the violence in 2007-2008.⁴³ Some worry that these tensions, if left unaddressed, will fuel similar violence in the 2012 election, or perhaps sooner.⁴⁴ The Prosecutor's declaration that perpetrators on both sides of the political controversy will be tried before the ICC was likely an attempt to address this concern. Ocampo

³⁵ See Situation in Kenya Decision, Dissenting Opinion of Judge Hans-Peter Kaul, available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

³⁶ Article 7(1) of the Rome Statute.

³⁷ See Situation in Kenya Decision, Dissenting Opinion of Judge Hans-Peter Kaul, at para. 4.

³⁸ See Report of the CIPEV, chapter 1, p. 17.

³⁹ See KNHCR Report, p. 5(21).

⁴⁰ See Situation in Kenya Decision at para. 208.

⁴¹ See KNHCR Report, p. 5(20).

⁴² Voice of America, Kofi Annan warns of return to violence in Kenya, December 9, 2009, available at <http://www1.voanews.com/english/news/africa/Kofi-Annan-Violence-Kenya-08DEC09--78874397.html>.

⁴³ See KNHCR Report, p. 3(5).

⁴⁴ Voice of America, Kofi Annan warns of return to violence in Kenya, December 9, 2009.





has also made efforts to include in his investigatory visits various reconciliatory activities, such as meetings held with communities, victims and non-governmental organizations.⁴⁵ This attempt is intended to be supplemented with domestic efforts on the part of the Kenyan government to both prosecute the many individuals responsible who will not be called before the ICC, and to seek reparations and reconciliation for those affected by the violence.⁴⁶ Such a domestic effort remains unlikely in light of Kenya's unwillingness to create the Special Tribunal for Kenya mandated by CIPEV due to lack of political will, possible lack of evidence, and lack of capacity.⁴⁷

Conclusions

The Prosecutor will be pursuing two cases against the individuals most responsible for the atrocities resulting from the post-election violence. Much remains unclear about what the cases might look like, whether they will be successful, and what effect they might have on future elections in Kenya and surrounding nations. Despite these uncertainties, the Prosecutor has stated that through the investigation into Kenya he hopes to send a signal to individuals of the importance of holding free, fair and peaceful elections.⁴⁸ If this investigation deters individuals from engaging in future election violence then, regardless of outcome, the investigation will be deemed a success.

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⁴⁵ See International Criminal Court Weekly Update #33, May 10, 2010, available at http://www.icc-cpi.int/NR/rdonlyres/2E2702B9-A2B0-4AA3-8DEF-55FA253414CF/281908/ED33_ENG.pdf.

⁴⁶ The Standard, Ocampo asks Kenyans not to expect too much, May 12, 2010, available at <http://www.standardmedia.co.ke/InsidePage.php?id=2000009392&cid=4>.

⁴⁷ See Report of the CIPEV, chapter 13(1).

⁴⁸ The Associated Press, ICC Prosecutor wants to use Kenya as an example, May 8, 2010, available at http://www.salon.com/wires/allwires/2010/05/08/D9FIKHMG0_af_kenya_election_violence/.

