

## THE KENYA TRANSITIONAL JUSTICE BRIEF,

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### *Criminal Accountability, the ICC and the Politics of Succession*

#### **Introduction**

The Kenya Transitional Justice Brief, a quarterly bulletin by the International Center for Transitional Justice, seeks to highlight current developments in the field of transitional justice in Kenya. ICTJ's goal in publishing the Brief is to provide a central and reliable source of transitional justice information for critical stakeholders, including development partners, policy makers, and civil society actors. The Brief will not only summarize events on the ground, but also provide an analysis of those events and their implications in the broader Kenyan context.

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. With its headquarters in New York, ICTJ operates in more than 30 countries in Latin America, Asia, Africa and Europe.

Each issue of the Brief will focus on one or more critical areas for transitional justice in Kenya, including truth-seeking, criminal prosecutions, institutional reforms under the new constitution, and reparations and other victims' considerations. Given the recent activity surrounding the ICC, this issue will focus on criminal prosecutions. ICTJ supports the formation of a feasible domestic justice mechanism to try perpetrators of crimes that led to the violation of human rights in the 2008 post-election violence, not as an alternative to the ICC process but rather to bridge the impunity gap. Below is a concise summary of recent relevant events, accompanied by an analysis of the impact on the country's politics, and the transitional justice process as a whole.

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#### **General Background to Transitional Justice in Kenya**

- Large-scale violence in Kenya erupts following a disputed election in December 2007 where both incumbent President Mwai Kibaki (PNU political party) and his challenger Raila Odinga (ODM political party) claim victory.
- Pressured by the international community, in late January 2008, the two parties to the dispute engage in a mediation process known as the "Kenyan National Dialogue and Reconciliation", led by former UN Secretary-General Kofi Annan. This leads to the formation of a coalition government as well as public commitment to the establishment of a number of processes aimed at addressing Kenya's legacy of political violence, including

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criminal investigations and prosecutions, a Truth, Justice and Reconciliation Commission, a constitutional review process, and other measures.

**Background to Prosecutions**

- In October 2008, the Commission of Inquiry into Post-Election Violence (CIPEV), which had recommended the establishment of a local tribunal, hands over a list of key suspects in the post-election violence to Kofi Annan.
- On February 12, 2009, the Kenyan Parliament votes down a bill concerning the establishment of a local tribunal to deal with the post-election violence. Later attempts to establish local tribunal also fail.
- Due to the reluctance to establish a domestic accountability process, in July 2009, Kofi Annan hands over the list of key suspects to International Criminal Court (ICC) Prosecutor Luis Moreno-Ocampo.
- On March 31, 2010, Pre-Trial Chamber II of the ICC issues a decision authorizing the Prosecutor to commence an investigation into Kenya's post-election violence.
- On December 15, 2010, the Prosecutor submits to Pre-Trial Chamber II an application under article 58 of the Rome Statute for the Court to summon the six individuals he deems bear the greatest responsibility for the post-election violence.
- On December 22, 2010, the Kenyan Parliament passes a motion, which requires the government to take action for the country's withdrawal from the Rome Statute.

**Summary of Events Taking Place between 1 January and 20 April 2011**

- In early January, Vice President Kalonzo Musyoka launches diplomatic efforts aimed at making the UN Security Council defer the Kenyan case.
- On January 16, government officials note that money will be allocated for the legal defense of the two civil servants – Francis Muthaura and Mohammed Ali – named by the ICC Prosecutor as suspects in the post-election violence.
- Following intense diplomatic efforts spearheaded by Vice President Musyoka, in late January, the African Union at a summit in Addis Ababa decides to support Kenya's quest for a UN Security Council deferral of the ICC cases.
- On February 8, Kenya makes a formal request to the UN Security Council to defer the ICC cases.
- On March 1, a large number of civil society groups operating in Africa – including ICTJ – write a letter urging the African members of the UN Security Council - Gabon, Nigeria, and South Africa to reconsider their support for the deferral of the ICC cases.
- On March 8, Pre-trial Chamber II of the ICC issues summonses for the six Kenyans suspected by the Prosecutor to have masterminded the post-election violence. Judge Hans-Peter Kaul dissents.
- On March 10, government spokesman Alfred Mutua says that the ministers and civil servants summoned by the ICC will continue to hold office.
- On March 13, ODM Secretary-General Anyang' Nyong'o writes a letter on behalf of the ODM political party, urging the UN Security Council not to act on the request made by the government of Kenya to order a deferral of the ICC cases.
- On March 14, the ICC Prosecutor files an application for leave to appeal certain decisions in the ruling made by Pre-Trial Chamber II on March 8.

- In a letter to the UN Security Council dated March 16, a number of ODM leaders – including Vice Chair Aden Bare Duale, Deputy Organizing-Secretary Benjamin Langat and Deputy Secretary-General Mohamed Mohamud – state that the letter send by ODM Secretary-General Anyang’ Nyong’o does not reflect the party’s position on the deferral issue.
- On March 18, Police spokesman Eric Kiraithe states that post-election cases – implicating as many as 6,000 individuals – are being investigated by Kenyan authorities.
- On March 18, the UN Security Council debates the request made by Kenya to have the ICC cases deferred.
- By late March, the ODM political party seems to soften its stand on the ICC issue, saying it prefers a credible domestic accountability process, rather than ICC prosecutions. However, on March 23, Prime Minister Odinga sends a contravening message when urging the six suspects to go to The Hague to prove their innocence. Furthermore, ODM is split on the question of whether the party should provide legal assistance for Ruto and Kosgey (though Ruto makes clear he is not interested in that).
- In late March, following pressure from the ICC, Muthaura and Kenyatta quit their jobs in Kenyan security agencies. Muthaura resigned as chairman of the National Security Advisory Committee (NSAC), while Kenyatta resigned as a member of the Cabinet Sub-Committee on Security and Foreign Relations as well as a member of Witness Protection Advisory Board. They however retain their cabinet positions.
- On 31 March, Judge Ekaterina Trendafilova rules that the Victims Participation and Reparations Section of the ICC should submit complete applications for victim participation in the Kenyan case no later than 8 July 2011.
- On March 31, Sir Geoffrey Nice and Rodney Dixon, two British lawyers hired by the Kenyan government, file an application with the ICC challenging the admissibility of the cases pursuant to Article 19 of the Rome Statute.
- On April 1, Judge Ekaterina Trendafilova rejects Moreno-Ocampo’s application for leave to appeal certain decisions in the ruling made by the Chamber on March 8.
- As required by the summonses, on April 7 and 8, the six suspects appear before Pre-Trial Chamber II. The Chamber makes sure that the suspects have been made aware of their rights under the Rome Statute, and the confirmation of charges hearings are scheduled for September this year. Further, the suspects are warned by the presiding judge that “dangerous speeches” may be perceived as a violation of the summonses, possibly leading the Court to issue arrest warrants.
- Following a closed-door meeting in the UN Security Council on April 8, the President of the Council declares that “after full consideration”, the members of Council could not agree to support Kenya’s quest for deferral and no further action will be taken on the matter for the time being.
- By mid April, Moreno-Ocampo seeks permission to appeal the Chamber’s ruling that the evidence in the cases must be shared with the defence counsel before a decision has been made on the admissibility challenge.

## Analysis

Though the debate concerning the establishment of a domestic accountability process has re-emerged since ICC Prosecutor Moreno-Ocampo named the six suspects, it seems unlikely that the masterminds of Kenya’s post-election violence can be fairly tried in domestic courts. The ongoing efforts to reform the Kenyan judiciary present a positive move for the rule of

law in the country, and the potential establishment of an independent and impartial domestic accountability process should be supported. However, at present no credible alternative to the ICC has emerged, and the current political climate would not seem to allow existing judicial institutions to carry out a process in which central members of the political elite and high-ranking officials could be tried in a fair and impartial manner.

Attempts have been made to persuade UN Security Council members to order a deferral of the Kenyan case. Given Kenya's legacy of political violence – and the role of impunity in facilitating this violence – such a move should be strongly opposed. A possible deferral of the Kenyan case would likely promote large-scale violence in the country during periods of intensified political competition, rather than preventing such violence.

On the one hand, the government challenges the admissibility of the ICC cases, making reference to Kenya's ability and willingness to prosecute the organizers of the post-election violence. But on the other hand, parts of the Kenyan leadership have for months pushed for the UN Security Council to defer the ICC cases, arguing that an accountability process involving the six suspects poses a threat to peace and security. These simultaneous efforts imply that the main objective of the action taken is not to bring to justice the masterminds of Kenya's post-election violence, but rather to prevent accountability altogether. Nonetheless, it must be noted that there is currently a split in the Kenyan leadership, where certain elements within the Prime Minister's ODM party seem to favor prosecutions.

#### *What crimes are the six Kenyans suspected of having committed?*

On December 15, 2010, ICC Prosecutor Moreno-Ocampo submitted applications requesting Pre-Trial Chamber II to issue summonses for six Kenyans to appear before the Court, all suspected by the Prosecutor of having committed crimes against humanity.

The first application concerns three supporters of Odinga's (ODM) 2007 presidential campaign – suspended Minister of Higher Education William Ruto, former Minister of Industrialization Henry Kosgey, and radio presenter Joshua Sang. According to the Prosecutor, Ruto and Kosgey, as early as December 2006 had started preparing a plan to attack supporters of the PNU political party. The two main goals of the attacks, the Prosecutor claims, were to gain power in the Rift Valley Province, and to punish and expel PNU supporters from the Rift Valley.

When, on December 30, 2007, the Electoral Commission of Kenya declared Kibaki the winner of the presidential election, a network established by Ruto and Kosgey was allegedly activated to kill and oppress perceived PNU supporters in Eldoret town and other locations in the Rift Valley. Sang is suspected of having supported the commission of these crimes by using his radio program to provide signals to members of the plan on when and where to attack. The crimes mentioned in the application include murder, torture, deportation or forcible transfer, and persecution based on political affiliation.

On March 8, 2011, Pre-Trial Chamber II decided to issue summonses for these three individuals. The Chamber did not find sufficient evidence that torture had been committed as part of the plan, but otherwise agreed with the counts presented by Moreno-Ocampo. The Chamber found reasonable grounds to believe that Ruto and Kosgey are criminally responsible as indirect co-perpetrators of crimes against humanity in accordance with article 25(3)(a) of the Rome Statute, but only found reasonable grounds to believe that Sang is responsible for having in other ways contributed to the commission of crimes against humanity, a form of criminal responsibility spelled out in article 25(3)(d) of the Rome Statute.

The second application concerns three supporters of Kibaki's (PNU) 2007 presidential campaign – Head of Public Services Francis Muthaura, Minister for Finance Uhuru Kenyatta, and then-Head of the Kenya's Police Forces Mohammed Hussein Ali. The Prosecutor claims that Muthaura and Ali, as a response to the violence launched by ODM supporters, used their positions in the National Security Advisory Committee to order the Kenyan

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Judge Hans-Peter Kaul

Police Forces to use excessive violence in ODM strongholds, including Kibera (an informal settlement in Nairobi) and Kisumu. Additionally, Kenyatta allegedly facilitated a meeting between Muthaura and the Mungiki criminal gang in early January 2008, during which it was agreed that Mungiki members should carry out retaliatory attacks against civilian supporters of the ODM in the towns of Nakuru and Naivasha. Muthaura allegedly coordinated with Ali to ensure that the police would not interfere with the planned attacks. According to the Prosecutor’s application, Kenyatta provided the necessary financial and logistical support for the plan to be carried out. The goal of committing these crimes, says the Prosecutor, was to consolidate PNU’s grip on power.

The crimes allegedly committed by the three suspects include murder, rape and other forms of sexual violence, deportation or forcible transfer of population, other inhumane acts causing serious injury, and persecution based on political affiliation. The Chamber found reasonable grounds to believe that Kenyatta and Muthaura are responsible as indirect co-perpetrators in accordance with article 25(3)(a) of the Rome Statute, but given the less significant role of Ali, only found reasonable grounds to believe that he is responsible for having otherwise contributed to the commission of crimes under article 25(3)(d). The Chamber agreed that there are reasonable grounds to believe that crimes against humanity were committed when an arrangement was made for Mungiki to attack ODM supporters in Nakuru and Naivasha. However, the Chamber did not find reasonable grounds to believe that the police shootings in Kibera and Kisumu or police inaction in Nakuru and Naivasha constitute crimes against humanity, as the criteria of acting in accordance with a “state or organizational policy” (article 7(2)(a) of the Rome Statute) is seen not to be met. It is this legal qualification – along with the Chamber’s decision to categorize forced circumcision as inhumane treatment, rather than sexual violence – that the Prosecutor unsuccessfully sought to appeal.

#### *Judge Hans-Peter Kaul’s dissenting opinion*

The dissenting judge Hans-Peter Kaul did not find reasonable grounds to believe that crimes against humanity were committed in Kenya following the disputed 2007 elections, thereby holding that the Court lacks subject-matter jurisdiction in the two cases.

Judge Kaul does not disagree that there are reasonable grounds to believe the six suspects have committed crimes in connection to the disputed elections, but is of the opinion that the requirement in article 7(2)(a) of the Rome Statute that the crimes must be committed “pursuant to or in furtherance of a state or organizational policy” is not fulfilled.

In the case concerning Ruto, Kosgey, and Sang, judge Kaul concludes: “it appears that, in particular, two leading ODM politicians, on the occasion of the 2007 presidential elections in the Republic of Kenya, abused their position and conceived a criminal plan, outside the ODM structure, with a view to achieving their own, personal political goals”, something which according to the judge does not meet the requirements of an “organization” as set out in article 7(2)(a) of the Rome Statute.

In the case concerning Muthaura, Kenyatta, and Ali, judge Kaul agrees that there are reasonable grounds to believe the Mungiki criminal gang was utilized by the suspects to carry out attacks on ODM supporters, but views the construction as a “limited partnership of convenience”, rather than an “organization” within the meaning of article 7(2)(a) of the Rome Statute.

#### *Deferral by the UN Security Council?*

Article 16 of the Rome Statute stipulates that “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”. UN Security Council action under Chapter VII concerns measures

aimed at maintaining or restoring international peace and security. Article 16 of the Rome Statute therefore provides a safeguard if in exceptional circumstances ICC investigations or prosecutions pose a danger to international peace and security.

Kenya's Vice President Musyoka has spearheaded recent diplomatic efforts to obtain support for such a deferral. In a letter dated February 28, Kenya's permanent representative to the UN in New York, Macharia Kamau, claims that since "some of the individuals mentioned by the ICC prosecutor are among the front runner presidential candidates and the civil servants mentioned are in office and charged with responsibilities for peace and security," the ICC process poses "a real and present danger to the exercise of government and the management of peace and security in the country". Similar claims were made in the African Union decision of January 30-31 to back Kenya's quest for deferral.

However, as noted by a large number of civil society groups working in Africa, including the ICTJ, in a letter to the current African members of the UN Security Council (Gabon, Nigeria, and South Africa), "rather than promote instability, the ICC's investigations could counter a climate of impunity in Kenya, which many believe contributed significantly to the 2007-08 violence". In Kenya, periods of intensified political competition – especially the 1992, 1997, and 2007 elections – have tended to be surrounded by large-scale violence. The failure to bring the organizers and planners of this violence to justice has created a culture in which many political leaders act unconstrained by the law. It is therefore vital to deter members of Kenya's political class from once again utilizing violence for political purposes. Given the lack of a credible domestic accountability process, the ICC's action is necessary to achieve this deterrence.

The African Union and some Kenyan leaders have implied that the current efforts to reform the Kenyan judiciary would justify that the UN Security Council defer the case under article 16 of the Rome Statute. While judicial reform may indicate that Kenya is both willing and able to prosecute at some point in the future, this will be a determination based on complementarity as defined in the Rome Statute, and made by the ICC itself, not by the Security Council. Such circumstances, therefore, have no relevance for an article 16 deferral, since Chapter VII of the Charter of the United Nations only allows the Security Council to act when there is a threat to international peace and security.

Taking all of these circumstances into account, it is highly unlikely that the UN Security Council will accommodate Kenya's request. This also seems to have become increasingly clear to the Kenyan leadership following informal discussions in the Council on March 18, where several permanent members stated that they are strongly opposed to a deferral. In addition, on April 8, the President of the Council declared that no agreement could be reached on the topic and that no further debates will be held on the Kenyan matter for the time being.

#### *Will Kenya succeed in challenging the admissibility of the ICC cases?*

On April 1, Attorney General Wako issued a statement confirming that two British lawyers had filed the admissibility challenge on behalf of the Kenyan government.

Article 19(2)(b) of the Rome Statute allows a state which has jurisdiction over a case, "on the ground that it is investigating or prosecuting the case or has investigated or prosecuted", to challenge the admissibility of that case in the ICC. This provision reflects the complementarity principle, which holds that the ICC is a court of last resort and therefore does not have jurisdiction over a case which is already being investigated or prosecuted by a state with jurisdiction over the case.

Should it be found that investigations are presently taking place in Kenya, the Court will defer the cases to Kenya unless it finds that the country is "unwilling or unable genuinely to carry out the investigation or prosecution" (article 17(1)(a)). In determining whether Kenya is unwilling, the Court will consider whether "proceedings were or are being under-

taken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court” (article 17(2) (a)); whether “there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice” (article 17(2) (b)); and whether “the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice” (article 17(2)(c)).

For the government of Kenya to successfully challenge the admissibility of the cases relating to the post-election violence it must at a minimum convince the ICC judges that authorities in the country are presently carrying out a genuine investigation of the crimes allegedly committed by the persons involved in the ICC cases. It is not sufficient to argue that the Kenyan judiciary is in the process of being reformed, nor is it sufficient to argue that the police are presently investigating post-election crimes if the six individuals implicated in the ICC cases are not among the targets of such investigations. Alternatively, if such proceedings seem to serve the purpose of shielding the six suspects from criminal responsibility, the ICC again will not be able to make a determination that Kenya is willing to carry out genuine investigations and prosecutions. These conditions render it unlikely that the government at this stage will succeed in challenging the admissibility of the ICC cases.

According to article 19(4) of the Rome Statute, a state can only challenge the admissibility of a case once, and this must be done prior to the commencement of the trial. Only in “exceptional circumstances” can the Court grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

#### *Motives behind the admissibility challenge*

Kenya has now had more than three years to commence investigations and prosecutions of the crimes committed following the disputed 2007 elections. The Kenyan Parliament has on several occasions resisted proposals to establish a local tribunal, and many cabinet members seem at best to have a half-hearted commitment to a domestic accountability process. These facts, along with the timing of the claim that a domestic accountability process is under way, call into question the true motive behind the government’s admissibility challenge. The various actions taken by elements of the Kenyan leadership to halt the accountability process merit some amount of skepticism when examining the admissibility challenge that has now been brought before the ICC.

#### *Implications of withdrawal from the Rome Statute*

On December 22, 2010, the Kenyan Parliament passed a motion calling for a withdrawal from the Rome Statute. In early January 2011, a number of cabinet members seemed to favor acting on this motion. Though attention has since shifted to other ways of combating the ICC, the withdrawal issue might once again arise should these other tactics fail.

Article 127(1) of the Rome Statute stipulates that “a State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date”. According to article 127(2) of the Rome Statute, such a withdrawal does not discharge a state from the obligations arising from the statute while it was still a party to the statute.

Should Kenya choose to withdraw, the withdrawal would not affect Kenya’s duty to cooperate with the Court with respect to any obligations that have already arisen in connection to the two cases presently before the Court. Additionally, Kenya would remain obligated to cooperate with the Court on any obligation that may arise until the notification takes effect.

Notwithstanding these legal aspects, should the government of Kenya decide to withdraw from the Rome Statute – possibly as part of a broader African withdrawal – it will be a

strong signal of opposition to the Court. This is likely to be viewed by some as reflecting a general regional resistance to an international judicial institution that has so far focused on prosecuting African leaders. However, a potential collective withdrawal will not only constitute a major blow to the ICC, but will also significantly hamper the prospects of pursuing accountability for the most serious crimes committed on the continent, which in many cases seems a prerequisite for preventing their recurrence.

#### *The ICC and Kenyan politics*

The ICC process significantly influences Kenyan politics, particularly since two of the major presidential candidates for next year's election – Kenyatta and Ruto – are among those suspected of having planned and organized the post-election violence.

The ICC process has contributed to a split in the ODM political party. Key members have established an official policy of support for ICC prosecutions, which is being strongly opposed by supporters of Ruto and Kosgey. As a consequence, Ruto and Kenyatta – who are suspected of having launched violent attacks against each others' supporters in 2008 – are now discussing joining forces in next year's presidential elections, a coalition currently supported by Vice President Musyoka. In the case that Ruto and Kenyatta are acquitted or in some way avoid trial, they would seem to form a powerful coalition. However, the sustainability of such a coalition is questionable as all three politicians seem to have presidential ambitions. On the other hand, should Kenyatta and Ruto still be involved in ICC proceedings during the 2012 elections, other candidates – notably Odinga – will probably stand a greater chance of winning. Some claim this potential political success is one of the main reasons that Odinga supporters in the ODM have started to advocate strongly in favor of the ICC process.

Some argue that this impact on Kenyan politics is unfortunate. However, it is not a reasonable argument that the accountability process should be halted due to the presidential aspirations of individuals whom the Pre-Trial Chamber has found reasonable grounds to believe are responsible for crimes against humanity.

### **Conclusion**

While discussions of establishing domestic accountability measures or engaging with the ICC may be politically motivated, it is notable that they are occurring. The ICC's actions in Kenya are without doubt controversial, but they may provide some measure of accountability that the country so clearly needs. This action may also prove to be the start of legitimate discussions and progress towards domestic accountability mechanisms by which to bridge the impunity gap and potentially change the culture of using violence for political purposes. Other activities such as truth-seeking, institutional reforms, and reparations will also play a key role in Kenya's ongoing transition, and will be discussed in depth in future issues of this Brief.