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**The International Criminal Court
and Kenya's Post-election Violence:
*National Justice through Global Mechanisms?***

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ABSTRACT:

This GGI Analysis Paper provides a preliminary assessment of a case at the International Criminal Court (ICC) against six Kenyans accused of *crimes against humanity*. The paper suggests that while the ICC process in relation to the country has been both roundly denounced and applauded, there is some nascent evidence to suggest that it has marked a crucial step in the evolution of the Court as “complementary to national criminal jurisdictions.”¹ Furthermore, Kenya’s case is providing an acute test of the Rome Statute’s controversial, yet unquestionably precedent-setting Article 15 provisions that have allowed the Prosecutor to exercise powers of initiating investigations *proprio motu*, in addition to providing for civil society participation in informing that decision. It will be argued that the Kenyan situation provides a significant milestone and illuminating example of how the Court can influence State Parties on the long road towards justice and good governance.

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¹ Rome Statute, 1998 (*entry into force* July 1, 2002), Article 1, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

² “ICC at a glance,” ICC: <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/> on Apr 20,

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1. Introduction

The July 1998 Rome Statute established the International Criminal Court (ICC) with the authority to try “persons accused of the most serious crimes of international concern, namely genocide, *crimes against humanity* and war crimes.”² A Court of last resort, it has jurisdiction over cases in which a State Party is “unwilling or unable genuinely to carry out the investigation or prosecution.”³ While the institution is an independent entity from the United Nations, it co-operates with the Security Council on a platform of the latter’s Chapter VII mandate to ensure global peace and security. The Council can thus refer cases to the Court’s Prosecutor,⁴ but may also seek a deferral of cases, from investigation or prosecution, for a renewable period of 12 months based on Article 16 of the Rome Statute.⁵

Within the ICC’s regional parameters, Africa has currently the largest membership by contributing 31 out the total 114 State Parties.⁶ Much to the chagrin of the continent, the Court’s focus has been solely on Africa as all of its current cases and situations emanate from the continent.⁷ As Jean Ping, the African Union (AU) Commission Chairperson bluntly put it, “people who are targeted there, all of them, are exclusively Africans... Why these double standards? We are questioning ourselves on that.”⁸ This criticism has also been registered elsewhere in the world,⁹ never mind the fact that half of the six situations and cases were self-referrals by African State Parties; namely by Uganda,¹⁰ the Democratic Republic of Congo¹¹ and the Central African Republic.¹² Two of the remaining three, Sudan and Libya, were referred to the Prosecutor by Security Council resolutions 1593 (2005)¹³ and 1970 (2011)¹⁴

² “ICC at a glance,” ICC: <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/> on Apr 20, 2011

³ Rome Statute, 1998 (*entry into force* July 1, 2002), Article 17, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

⁴ Rome Statute, 1998 (*entry into force* July 1, 2002), Article 13, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

⁵ Rome Statute, 1998 (*entry into force* July 1, 2002), Article 16, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

⁶ “The State Parties to the Rome Statute,” ICC: <http://www.icc-cpi.int/Menus/ASP/states+parties/> on Apr 11, 2011

⁷ “Situations and cases,” ICC: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> on Apr 20, 2011

⁸ “ICC accused of ‘exclusively’ targeting Africans,” Yahoo! News (Agence France-Presse) April 20, 2011: http://news.yahoo.com/s/afp/20110420/wl_africa_afp/iccjusticeau_20110420170856 on Apr 20, 2011

⁹ “ICC trial may harm Kenya’s reform,” Editorials, *The Washington Post* December 29, 2010: <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122903913.html> on Apr 20, 2011

¹⁰ “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC,” ICC Press Releases 2004 (ICC-20040129-44): http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB on Apr 20, 2011

¹¹ “Prosecutor receives referral of the situation in the Democratic Republic of Congo,” ICC Press Releases 2004 (ICC-OTP-20040419-50): <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB> on Apr 8, 2011

¹² “Prosecutor receives referral concerning Central African Republic,” ICC Press Releases 2005 (ICC-OTP-20050107-86): <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic?lan=en-GB> on Apr 20, 2011

¹³ “Security Council refers situation in Darfur, Sudan, to prosecutor of International Criminal Court” UN Press Release SC/8351 March 31, 2005: <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> on Apr 20, 2011

respectively. It is noteworthy that in both of these Security Council decisions, none of the African representatives in the Council disapproved of the referrals; only Algeria abstained in the Sudan resolution, while her counterparts Benin and United Republic of Tanzania were in favor of referral to the ICC.¹⁵ In the Libya resolution, the unanimous referral decision included African nations of Gabon,¹⁶ Nigeria and South Africa.¹⁷

2. Post-Election Violence in Kenya (2007 – 2008)

The other situation being examined by the ICC concerns Kenya and was initiated by the Prosecutor in relation to post-election violence that took place between 2007 and 2008.¹⁸ Kenya signed the Rome Statute in 1999, and in March 2005 deposited its instruments of ratification, allowing for the Court to be domesticated five months later.¹⁹ In 2007, the country held its General Election, whose first phase of civic and parliamentary seats voting was largely devoid of violence. However, significant nationwide chaos ensued “almost within minutes” of the presidential tally result, which gave the incumbent Mwai Kibaki of the Party of National Unity (PNU) a win over his rival Raila Odinga of the Orange Democratic Movement (ODM).²⁰ This disputed presidential election led to conflict that resulted in the deaths of over 1,400 people and displacement (mainly internal) of more than half a million Kenyans.²¹ Previously, election-related violence was characteristic of the Kenyan society since the introduction of multi-party democracy in 1991; nonetheless, the magnitude and scale of the 2007-8 election fighting was unprecedented, making it “the most destructive violence ever experienced in Kenya.”²²

2.1 African Union Response and the Waki Commission

The African Union appointed a Panel of Eminent African Personalities, led by former United Nations Secretary General Kofi Annan and made up of former Tanzanian president Benjamin Mkapa and social activist Graça Machel-Mandela. Following successful mediation talks chaired by Annan, a coalition government was formed that included both parties in the government, with Kibaki retaining the presidency while Odinga assumed the premiership.²³

¹⁴ "In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters," UN Security Council SC/10187/Rev.1** February 26, 2011: <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm> on Apr 20, 2011

¹⁵ UN Press Release SC/8351 March 31, 2005, op.cit.

¹⁶ Gabon is incidentally Ping's home country, where prior to his appointment as Chair of the AU Commission in 2008, he served as Vice Prime Minister and Minister of Foreign Affairs – "Biography of the Chairperson," African Union Commission: <http://www.au.int/en/dp/cpauc/biography> on Apr 20, 2011

¹⁷ "In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters," UN Security Council SC/10187/Rev.1** February 26, 2011: <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm> on Apr 20, 2011

¹⁸ "Situation in the Republic of Kenya: Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II," ICC-01/09-1 November 6, 2009

¹⁹ "Kenya Ratifies Rome Statute," ICC Press Release 2005 (ICC-CPI-20050316-93): <http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202005/kenya%20ratifies%20rome%20statute> on Apr 20, 2011

²⁰ 'On the brink of precipice: A human rights account of Kenya's post-2007 election violence', Key Findings (1), Kenya National Commission on Human Rights Final Report, August 15, 2008, p. 3

²¹ "Kenya's Letter to ICC President," *Daily Nation* March 12, 2011: <http://www.nation.co.ke/News/politics/-/1064/1123454/-/7pl099/-/index.html> on Apr 22, 2011

²² 'Executive Summary' Commission of Inquiry into Post-Election Violence Report, October, 2008, p. vii

²³ "Kenya rivals agree to share power," *BBC News*, February 28, 2008: <http://news.bbc.co.uk/2/hi/africa/7268903.stm> on Apr 20, 2011

As part of a broad settlement, the two parties agreed to a four-part Agenda on the resolution of the political crisis, with the second phase calling for measures to ensure impartial, effective and expeditious investigation of gross systematic violations that occurred.²⁴ It was out of this that the *Commission of Inquiry into Post-Election Violence (Waki Commission)* was born, chaired by a Kenyan Court of Appeal judge, Justice P. Waki, and constituting two foreign Commissioners. It was tasked with investigating the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations. In addition to handing the government and Annan its incriminating report (Waki Report), the Commission also gave Annan a list of individuals it deemed as bearing the greatest responsibility for *crimes against humanity* committed in Kenya during the post election violence.²⁵

While there was no formal, direct referral of the Kenyan situation to the ICC by the state in question, there was certainly a deliberate assent to the Court's involvement by the coalition government. To begin with, the Waki Report, which was adopted by both parties in the Kenyan government and who agreed on its implementation,²⁶ concluded that there were *crimes against humanity* committed and as such called for the establishment of a Special Tribunal for Kenya to investigate, prosecute and adjudicate the atrocities.²⁷ This assertion of *crimes against humanity* opened the window for possible ICC involvement on a critical jurisdictional front, whose purview is provided for by Article 1 of the Rome Statute. Even though some allegations in the report were objected to, ostensibly those implying the pre-2008 government's complicity in the violence,²⁸ the coalition government's decision to pursue a special tribunal²⁹ informed on the need to bring to justice the chief architects of the *crimes against humanity* could only be viewed as an admission that such atrocities did take place.

Secondly, the Waki Report outlined a specific time frame for the establishment of a Special Tribunal for Kenya: an agreement on the formation of the tribunal was to be signed within 60 days after receipt of the Waki Report, while a statute to this effect was to become law no more than 45 days after the signing.³⁰ The tribunal was anticipated to commence its proceedings 30 days after presidential assent to the legislative bill establishing it; this would have been within the first week of March 2009.³¹ By providing a concrete timeline, the Waki Commission in effect laid out the threshold for determining Kenya's willingness or ability to genuinely conduct investigations and prosecutions, thus indirectly calling upon the ICC's

²⁴ "Annotated Agenda and Timetable," The Kenya National Dialogue and Reconciliation February 1, 2008: http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf on Apr 15, 2011

²⁵ "Alleged Perpetrators: To Name or Not to Name?" Commission of Inquiry into Post-Election Violence (Kenya) Report, October, 2008, p. 18

²⁶ "Truth, Justice and Reconciliation Act 2008 Signed into Law," Office of Public Communications November 28, 2008: <http://www.communication.go.ke/media.asp?id=758> on Apr 20, 2011

²⁷ "Recommendations," (1) Commission of Inquiry into Post-Election Violence (Kenya) Report, October, 2008, p. 472

²⁸ See "Correction of Misleading Statements on Security Meetings in Waki Commission's Report" October 22, 2008: <http://www.communication.go.ke/media.asp?id=744> and "Major Contradiction in the Waki Commission Report Concerning State House," October 23, 2008: <http://www.communication.go.ke/media.asp?id=741> Office of Public Communications on Apr 11, 2011

²⁹ Kariuki, A. "Kenya MPs vote against local tribunal", *Daily Nation* February 12, 2009: <http://www.nation.co.ke/News/-/1056/529618/-/u1yqau/-/index.html> on Apr 20, 2011

³⁰ "Recommendations," (3) Commission of Inquiry into Post-Election Violence (Kenya) Report, October, 2008, p. 473

³¹ "Recommendations," (4) Commission of Inquiry into Post-Election Violence (Kenya) Report, October, 2008, p. 473

intervention should there be a failure to meet this bar. Yet the Waki Report went even further, explicitly asserting that should a tribunal not be formed within the contemplated schedule, then a list of individuals and information on those suspected of harboring the greatest responsibility for the crimes should be transmitted to the ICC Prosecutor, “with a view to proceeding with an investigation and prosecuting such suspected persons.”³² As such, by signing the agreement on the implementation of the Waki Commission recommendations,³³ the coalition government acceded to ICC intervention should it not meet this self-set standard.

3. ‘Don’t be vague – let’s go to The Hague’

As a consequence, ICC involvement was given an additional opening and became a conceivable reality when the coalition government signaled its unwillingness to pursue justice for the post-election violence by failing to establish the special tribunal.

The first attempt saw the relevant legislative bills introduced in February 2009 in the Kenyan parliament, about two weeks later than scheduled by the Waki Report. After failing to pass the bill, the government then re-introduced the bills in March 2009, but Kenyan legislators still rejected the efforts to set up a Special Tribunal for Kenya. Of course political games and maneuverings cannot be discounted when examining legislative processes, but the disenchantment was attributed largely to a sincere sentiment that a local process would not result in actual justice.³⁴ The general feeling among parliamentarians was that any suspected power brokers would remain untouched.³⁵ This was made memorably clear when they infamously chanted "Don't be vague, let's go to the Hague"³⁶ in the presence of both the president and prime minister who attended the legislative session to give weight to the second-attempt tribunal bills.³⁷

Defeat of the tribunal bills, despite a private-member-sponsored third attempt that did not even make it to the floor of parliament for lack of quorum, signified an incapacity by Kenya to conduct genuine proceedings against the violence masterminds, at least as far the political class was concerned.³⁸ The call for the ICC’s involvement, on the additional

³² "Recommendations," (5) Commission of Inquiry into Post-Election Violence (Kenya) Report, October, 2008, p. 473

³³ "Statement of H.E. Kofi Annan on the implementation of the report of the Commission of Inquiry on Post-Election violence (CIPEV) & Independent Review Commission (IREC), Press and Media, The Kenya National Dialogue and Reconciliation, December 19, 2008: <http://www.dialoguekenya.org/docs/KAstatement.pdf> on Apr 16, 2011

³⁴ "Kenya MPs were decisive in rejecting local court", *Daily Nation* April 10, 2011: <http://www.nation.co.ke/News/politics/MPs+were+decisive+in+rejecting+local+court+/-/1064/1142230/-/dhml7bz/-/index.html> on Apr 20, 2011

³⁵ A private conversation with a Kenyan legislature in 2009 who expressed the widely held conviction among parliamentarians, as reported in the media, that a local tribunal was unlikely, even in the best of scenarios, to effectively prosecute suspected kingmakers.

³⁶ "Kenya MPs were decisive in rejecting local court", *Daily Nation* April 10, 2011: <http://www.nation.co.ke/News/politics/MPs+were+decisive+in+rejecting+local+court+/-/1064/1142230/-/dhml7bz/-/index.html> on Apr 20, 2011

³⁷ "Kenya MPs were decisive in rejecting local court", *Daily Nation* April 10, 2011: <http://www.nation.co.ke/News/politics/MPs+were+decisive+in+rejecting+local+court+/-/1064/1142230/-/dhml7bz/-/index.html> on Apr 20, 2011

³⁸ Kariuki, A. "Kenya MPs vote against local tribunal", *Daily Nation* February 12, 2009: <http://www.nation.co.ke/News/-/1056/529618/-/u1yqau/-/index.html> on Apr 20, 2011

incapacity front, could not have been clearer and reinforced the understanding that Kenya was not only unwilling but also unable to conduct credible proceedings against suspects.

3.1 Individuals Matter: The Interplay between Kofi Annan and the ICC

Admittedly, the Waki Report acknowledged that the evidence it had gathered would be insufficient to meet the Kenyan judicial standards to prove criminality, let alone be beyond reproach in demonstrating *crimes against humanity* on an international level.³⁹ But this was neither a weakness of the Waki Report nor a basis to dismiss its findings; rather it provided important information to warrant further investigation by the ICC, as indeed any form of communication would inform the Prosecutor's further examinations.

There is little question about the role played by the former UN Secretary General, Kofi Annan, who in July 2009 actually transmitted to the Prosecutor, Luis Moreno-Ocampo, the sealed envelope of suspected masterminds along with other materials and evidence collected by the Waki Commission.⁴⁰ His actions, in essence, provided a crucial link to the trigger that prompted the Prosecutor to launch a preliminary inquisition into crimes against humanity committed in Kenya.⁴¹ To be fair, the Prosecutor's office had received previous Article 15 communications on the violence in Kenya: the ODM party, before joining the coalition government, had on January 28, 2008 made submissions alleging the then PNU government's culpability in *crimes against humanity* by continued use of security forces to kill civilians;⁴² the PNU government signaled its intention to register its complaints about the opposition leaders, some of whom it accused of planning and executing genocidal acts in the Rift Valley province of Kenya (one of the most hard hit areas⁴³);⁴⁴ the Kenya National Commission on Human Rights (KNCHR), a statutory independent body created in 2002 with the mandate to advance the protection and promotion of human rights,⁴⁵ submitted communications calling for the Prosecutor to investigate pre-coalition government and opposition leaders it accused of planning the violence.⁴⁶ But none of the communications were as comprehensive and seemingly impartial as the Waki Commission, which enjoyed the benefit of acceptance by both sides of the political divide, as well as civil society.

The force of Annan's hand cannot be understated either: beyond being the crucial link between the Prosecutor and the Waki Commission's evidence, he worked to push the Kenyan government to institute mechanisms for ensuring that a local process was undertaken. This followed a failure by the government to establish the Special Tribunal for Kenya as

³⁹ "Alleged Perpetrators: To Name or Not to Name?" Commission of Inquiry into Post-Election Violence (Kenya) Report, October, 2008, p. 17

⁴⁰ "Press Release issued by H.E. Mr. Kofi Annan", Press and Media, The Kenya National Dialogue and Reconciliation: <http://www.dialoguekenya.org/docs/Panelstatement09July09.pdf> on Apr 20, 2011

⁴¹ Otieno, O. "Waki envelope still causing ripples", *Daily Nation*, <http://www.nation.co.ke/News/politics/-/1064/865884/-/wr5de9z/-/index.html> on Apr 20, 2011

⁴² "Communications to the ICC," The American NGO Coalition for the International Criminal Court July 10, 2009: <http://www.amicc.org/docs/Kenya.pdf> on Apr 20, 2011

⁴³ "Key Findings," (1,4) Kenya National Commission on Human Rights, Final Report August 15, 2009, op.cit. p.

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⁴⁴ Ibid.

⁴⁵ "About KNCHR," Kenya National Commission on Human Rights: http://www.knchr.org/index.php?option=com_content&task=blogsection&id=4&Itemid=14 on Apr 20, 2011

⁴⁶ "Communications to the ICC," The American NGO Coalition for the International Criminal Court July 10, 2009: <http://www.amicc.org/docs/Kenya.pdf> on Apr 20, 2011

envisioned in the Waki Report, despite a generous set of reprieves allowed by Annan.⁴⁷ Annan's role was remarkable as it signified an important asset allowed to the Prosecutor in initiating a preliminary examination: he can receive and utilize information from individuals, as well as the larger civil society, at his discretion.⁴⁸ It is particularly noteworthy because it marked the first time the Prosecutor was able to employ this authority, an essential departure from predecessor tribunals and indeed prior ICC examinations that depended on Security Council resolutions or state communications.

The Prosecutor's handling of the Kenyan situation in tandem with Annan, even before receiving the sealed envelope and supporting materials, merits some positive reflection from the Court's supporters and should quell dissent from Article 15 detractors, at least for the time being. This is because he, along with Annan, actively engaged the Kenyan government in an effort to prod a local judicial mechanism,⁴⁹ thus bringing to life the idea that the ICC should indeed be the Court of last resort and that domestic competence takes precedence. In addition to meeting Annan in July 2009,⁵⁰ a high-level delegation comprising of key government representatives including the Kenyan Attorney General and Minister for Justice, National Cohesion and Constitutional Affairs, also held discussions with the Prosecutor ostensibly agreeing that should Kenya "carry out genuine judicial proceedings against those responsible against those most responsible, the Office of the Prosecutor will have no ground to intervene."⁵¹

The significance here is three fold; for one, the ICC is viewed as willing to allow a State Party exercise its primary domestic competence over possible *crimes against humanity*, thereby discrediting the notion of a trigger-happy Prosecutor. The Kenyan government on its part entertained the ICC's involvement, treating the Prosecutor's office as part of the Kenyan judicial system rather than an antagonistic foreign interventionist mechanism. In fact, in the Prosecutor's second visit to Kenya in December 2010, since launching investigations, he met with President Kibaki and Prime Minister Odinga seeking assurances should he issue summonses, he would face no roadblocks from the Kenyan government. Both leaders agreed to cooperate.⁵² The Kenyan Cabinet had also resolved to fulfill its obligations under the Rome Statute.⁵³ Thirdly, Annan's involvement in an apparently ICC-State Party affair, a matter involving a sovereign state and an inter-governmental institution, symbolizes the remarkable

⁴⁷ Namunane, B. "MPs' failure to follow Waki's timetable led to current process in The Hague" *Daily Nation* April 8, 2011: <http://www.nation.co.ke/News/politics/-/1064/1141380/-/item/0/-/xw854sz/-/index.html> on Apr 20, 2011

⁴⁸ "Communications, Referrals and Preliminary Examinations", Office of the Prosecutor, ICC: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> on Apr 20, 2011

⁴⁹ "Agreed minutes of the meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan Government," Office of the Prosecutor, The Hague, 3 July 2009: <http://www.icc-cpi.int/NR/rdonlyres/AA9AC1FD-112F-4582-84D8-AA6C58445D98/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf> on Apr 12, 2011

⁵⁰ "Joint Press Statement," Geneva 2 July 2009, Panel of Eminent Personalities African Union: <http://www.dialoguekenya.org/docs/JointPressStatementonmeetinginGeneva.pdf> on Apr 20, 2011

⁵¹ "Agreed minutes of the meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan Government," Office of the Prosecutor, The Hague, 3 July 2009: <http://www.icc-cpi.int/NR/rdonlyres/AA9AC1FD-112F-4582-84D8-AA6C58445D98/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf> on Apr 12, 2011

⁵² Namunane, B. "MPs' failure to follow Waki's timetable led to current process in The Hague," *Daily Nation* April 8, 2011: <http://www.nation.co.ke/News/politics/-/1064/1141380/-/item/0/-/xw854sz/-/index.html> on Apr 20, 2011

⁵³ Mathenge, O. "Kenya to hand over ministers to Hague," *Daily Nation* October 1, 2009: <http://www.nation.co.ke/News/-/1056/666678/-/ungjsn/-/index.html> on Apr 20, 2011

stride in civil society inclusion in issues once considered the absolute domain of state structures.

4. Kenya's Attempts to Forestall

As such, the Prosecutor sought and received authorization from the ICC's Presidency for investigations into Kenya's post election violence in March 2010,⁵⁴ and a year later the Pre-Trial Chamber II issued summonses for six Kenyans alleged to have committed crimes against humanity.⁵⁵ Following an initial appearance of the suspects in April 2011, a confirmation of charges hearing is set to begin in September 2011.⁵⁶ Once it became clear that the Prosecutor was moving ahead with his case, filing his summonses appeal in December 2010 for the six suspects, the Kenyan government continued its dance with the ICC.

4.1 *The Government's Quest for Deferral: A Two-Pronged Approach*

One of the initial strategies Kenya employed was political in nature, as it embarked on a two-pronged approach for achieving a deferral of the case: initially to key member nations of the African Union and then a plea to Security Council countries.⁵⁷ The AU route was sound as a first step because it could easily bank on the organization's frustration with the ICC process to consolidate continent-wide support. In July 2009, the AU had made formally known its displeasure over the ICC indictment of Sudanese President Omar el Bashir by announcing that its Member States should not cooperate with the Court in the arrest and surrender of el Bashir; this followed a denied request for deferral of the case to the Security Council from the AU.⁵⁸ The result played out when el Bashir was able to visit State Parties territories of Chad and Kenya in 2010 without being detained despite the ICC arrest warrant.⁵⁹ It would also seem logical to have the support of the continent in a subsequent appeal to the Security Council for a deferral, obviously adding weight to the request. The AU, therefore, supported and endorsed Kenya's request for a deferral, reasoning that with anticipated judicial reforms under a new constitution promulgated in August 2010, Kenya stood capable of dispensing justice for the post-election violence. The organization also suggested that doing

⁵⁴ "Situation in the Republic of Kenya: Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II," ICC-01/09-1 November 6, 2009

⁵⁵ "Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity," Press and Media, ICC Press Releases December 15, 2010: [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr615](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr615) on Apr 20, 2011

⁵⁶ "Confirmation of charges hearing in the case of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang scheduled to start on 1 September 2011" ICC-CPI-20110407-PR650 April 7, 2011: <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr650> "Confirmation of charges hearing in the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali scheduled to start on 21 September 2011" ICC-CPI-20110408-PR651 April 8, 2011: <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr651> Press Release, ICC Press and Media on Apr 20, 2011

⁵⁷ Mathenge, G. & Some, K. "Shuttle diplomacy over ICC cases escalates" *The Standard*, February 19, 2011: <http://www.standardmedia.co.ke/InsidePage.php?id=2000029567&cid=289&story=Shuttle%20diplomacy%20over%20ICC%20cases%20escalates> on Apr 16, 2011

⁵⁸ Assembly/AU/Dec.245(XIII) Rev.1, Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Decisions and Declarations, Assembly of the African Union, Thirteenth Ordinary Session 1 – 3 July 2009, p. 3

⁵⁹ "Kenya, African Union defend Bashir visit", CNN World, August 30, 2010: http://articles.cnn.com/2010-08-31/world/kenya.bashir.visit_1_al-bashir-new-constitution-president-mwai-kibaki?s=PM:WORLD on Apr 11, 2011

otherwise would likely jeopardize the “peace building and national reconciliation processes” taking place in the country.⁶⁰

It was with this secured backing that Kenya embarked on a diplomatic courtship of the Security Council membership to consider her deferral request before the Pre-Trial Chamber II could issue its summonses for the six suspects expected in March 2011.⁶¹ Kenya, had however, been seeking a Council decision on the deferral since late 2010.⁶² Veto wielding powers the United States and Britain had indicated their unequivocal opposition to the deferral request, while France expressed her belief that Kenya’s case at the ICC did not present a threat to international peace and security that would warrant Security Council intervention.⁶³ In addition to that lack of support from the all important veto constituency, the Kenyan coalition government also presented a divided position on the request: the prime minister’s ODM party wrote to the Security Council disavowing prior deferral petitions from the government. In addition to noting the disunified government stance and more importantly faulting Kenya’s request on the basis that continued ICC proceedings do not pose a threat to international peace and security, the Security Council also viewed Kenya’s assertion that an Article 16 deferral would allow her to set up the local judicial mechanisms as a *non sequitur* that should be presented before the ICC, not the Council. Interestingly, some African representatives in the Security Council similarly shared this general sentiment.⁶⁴ But that’s also an argument it could not present before the ICC because Kenya had yet to institute mechanisms to investigate and prosecute post-election crimes.

4.2. A flawed Argument

Kenya, through her Permanent Representative to the United Nations, also sought to lobby the Assembly of State Parties to the Rome Statute by writing to the Bureau President. The core argument, unfortunately, was that “some of the six individuals accused of masterminding the 2007-8 post election violence, apparently among the frontrunners for the presidency in 2012, are joined at the hip with the peace and security of Kenya and Kenyans, and by extension the peace and security of the region.”⁶⁵ The letter raised fears that the ICC process was being used to “whip up emotions”⁶⁶ ahead of the 2012 presidential elections and that its continuation

⁶⁰ ‘Decisions on the Implementation of the Decisions on the International Criminal Court’, Doc. EX.CL/639(XVIII)” Assembly/AU/ Dec.334(XVI), 30-31 January, 2011 p. 1

⁶¹ Mathenge, G. & Some, K. "Shuttle diplomacy over ICC cases escalates" *The Standard*, February 19, 2011: <http://www.standardmedia.co.ke/InsidePage.php?id=2000029567&cid=289&story=Shuttle%20diplomacy%20over%20ICC%20cases%20escalates> on Apr 16, 2011

⁶² “Kenya and the ICC,” Security Council Report, April 6, 2011: <http://www.securitycouncilreport.org/site/pp.aspx?c=glKWLeMTIsG&b=6717579&printmode=1> on Apr 16, 2011

⁶³ Charbonneau, L. “France sees UN rejecting Kenya ICC deferral request,” Reuters Africa, March 19, 2011: <http://af.reuters.com/article/topNews/idAFJJOE72I01F20110319?pageNumber=1&virtualBrandChannel=0> on Apr 9, 2011.

⁶⁴ “KENYA AND THE ICC,” Security Council Report, April 6, 2011: <http://www.securitycouncilreport.org/site/pp.aspx?c=glKWLeMTIsG&b=6717579&printmode=1> on Apr 16, 2011

⁶⁵ Okwara, E. “Are Kenyans inextricably beholden to politicians?” *The Citizens Blog*, Capital News, March 2011: <http://www.capitalfm.co.ke/news/Eblog/view/Are+Kenyans+inextricably+beholden+to+politicians%3F.html> on Apr 16, 2011

⁶⁶ “Kenya’s letter to ICC President,” *Daily Nation*, March 12, 2011: <http://www.nation.co.ke/News/politics/-/1064/1123454/-/7pl099/-/index.html> on Apr 16, 2011.

would undermine the on going constitutional reforms in Kenya.⁶⁷ While this was an advisory note to the Bureau President, it provides a glimpse of the contradictory and flawed political argument presented by the Kenyan government. The missive actually seemed to provide the case for ICC involvement because it further illustrated Kenya's inability to credibly conduct judicial proceedings against the six suspects, by virtue of the amount of clout wielded by some of the six individuals.⁶⁸

In any event, Kenya eventually sought a belated legal remedy by filing an application on March 31, 2011 that raised three issues: the first requested the Pre-Trial Chamber II to render the Kenyan cases inadmissible pursuant to Article 19 of the Rome Statute; the second sought a status conference to be convened to address the Pre-Trial Chamber II on the procedure to be adopted before any orders or directions are made by Pre-Trial Chamber II; thirdly, the Kenyan government sought to be allowed time to address the Pre-Trial Chamber II during the initial appearing hearings of the six suspects in March 2011. The Chamber rejected the second and third requests, and invited the Prosecutor and defence to present their submissions in relation the first issue raised by April 28, 2011.⁶⁹ Of course a legal route to contest the ICC's involvement could have been pursued as early March 2010, when the Prosecutor indicated his intention to launch investigations: Article 18 of the Rome Statute provides that a State Party, within a month of receiving notification of the Prosecutor's intention to conduct investigations, may inform the Court that it is either investigating or has investigated persons with respect to the alleged crimes. And "At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation."⁷⁰ But the Kenyan government has only recently indicated its intention to investigate the six suspects,⁷¹ long after the Prosecutor has completed his investigations and so it remains to be seen whether this will prove convincing to the Court to view the case as inadmissible. On the face of it, these missteps appear less as a result of negligence on the part of the government agencies in seeking to have ICC intervention impeded than simply a desire to have ICC course be maintained.

5. Conclusion: A glimpse of the ICC's Effectiveness

Kenya's situation at the ICC marked the first time the Prosecutor was able to initiate investigations on his own accord, yet as demonstrated, the Kenyan government willingly acceded to the ICC's involvement should it fail to institute genuine judicial mechanisms for the post-election violence. This in itself is not peculiar nor a signature departure from other State Parties behavior: Uganda, DR Congo and the Central African Republic have all referred situations to the ICC. And despite the challenges the Kenyan government has faced, whether accidental or by design, in its quest to deter the ICC from continued involvement in relation to the post-election violence of 2008 and 2007, it is arguable that the country has nevertheless accepted the Court as an extended part of its judiciary and this is signified through the very

⁶⁷ "Kenya's letter to ICC President," *Daily Nation*, March 12, 2011: <http://www.nation.co.ke/News/politics/-/1064/1123454/-/7pl099/-/index.html> on Apr 16, 2011.

⁶⁸ *ibid*

⁶⁹ "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", ICC-01/09-02/11-40, 04-04-2011, 1/9 FB PT, p. 7

⁷⁰ Rome Statute, 1998 (*entry into force* July 1, 2002), Article 18, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

⁷¹ Namunane, B. "Wako orders police to probe the Ocampo Six", *Daily Nation*, April 26, 2011: <http://www.nation.co.ke/News/politics/Wako+orders+police+to+probe+the+Ocampo+Six+/-/1064/1151428/-/jkl0ym/-/index.html> on Apr 25, 2011

fact that Kenya *utilized all the Court's provisions* in trying to stop the ICC: Kenya could have easily elected to stop cooperating with the Court but chose to pursue political and legal instruments offered by the Rome Statute to stop the ICC.

Moreover, Kenya engaged the Court from even before the Prosecutor's office had received information from the Waki Report on the post-election violence, working to convince the Prosecutor for more time in setting up a local justice remedy. The vision of complementarity was thus in full display when it became evident that Kenya was unwilling and incapable of conducting genuine investigations and prosecutions of the individuals most responsible for *crimes against humanity*.

Furthermore, the involvement of Annan in transmitting information and evidence to the Prosecutor, in addition to pressing for a local tribunal before hand, is symbolic of the blurred lines of sovereignty that accord civil society a crucial voice in core state matters on an international level. At this point, with the confirmation of charges still up in the air while the African Union's membership yet to take further steps (rumoured to be mulling a mass withdrawal from the ICC⁷²), it is too early to suggest that the ICC has achieved its vision of being a domesticated international court. However, the Kenyan case highlights that the Court has demonstrated forcefully its role of influencing State Parties as a Court of last resort. In time, this provides further hope for the effectiveness of global mechanisms in promoting national justice.

⁷² Menya, W. "African states threaten to leave ICC", *Daily Nation*, April 10, 2011: <http://www.nation.co.ke/News/politics/States+threaten+to+leave+ICC+/-/1064/1142278/-/11rtekk/-/> on Apr 15, 2011