

## **The International Criminal Court and Post-Election Violence in Kenya**

May 2010

*In the months that followed the deadly post-election violence witnessed in Kenya in 2008, political and national debate around justice for perpetrators became increasingly complex and polarized.*

The violence was sparked by the disputed result of the Presidential Election in late 2007, with supporters of the opposition challenger Raila Odinga claiming he had been cheated of the premiership by the incumbent Mwai Kibaki. The intervention of the African Union, with former UN Secretary General Kofi Annan leading negotiations, helped to broker a power sharing deal between the two leaders and their respective political parties.

A Grand Coalition Government was formed in early 2008 in the shadow of the devastation of the post-election violence. Official figures from Kenyan authorities put the death toll at 1220, a further 3600 were injured and at least 350,000 citizens forcibly displaced from their homes. Unofficial estimates put the latter figure nearer to 600,000.

As attentions turned to the pursuit of justice for the thousands of victims, a sinister overtone began to emerge. Whilst a great deal of the localized violence was indisputably spontaneous in nature, early investigations into the unrest began to suggest that senior political, civil and business leaders had used their positions and financial resources to orchestrate attacks against civilians.

The official Commission of Inquiry into the Post-Election Violence, the Waki Commission, ultimately compiled a confidential list of 20 high-profile suspects. The list was sealed in, what has become, an infamous envelope pending agreement on the best way to investigate and prosecute the suspected key players.

### **Search for Justice**

The hugely challenging task facing the Kenyan Government and elements of the International Community was to agree upon, and probably legislate for, an appropriate justice model for perpetrators of the Post-Election Violence. The nature of the violence would make this difficult in any country, but Kenya faced additional challenges against an acknowledged backdrop of impunity and low public confidence in the judiciary.

Politicians challenged with passing legislation were deeply divided along party and ethnic lines and also faced the prospect of having some of the unnamed high profile suspects in their midst. The justice debate was also complicated by the breadth of potential crimes involved; many argued that it was not possible to create a 'one

size fits all' model that would try those suspected of inflicting minor injuries upon a neighbor in the same arena as public figures accused of committing crimes against humanity.

The Waki Commission recommended the creation of a Kenyan Special Tribunal to try a wide range of suspected perpetrators, possibly including those named in the sealed envelope. Seemingly mindful of the failure to implement recommendations of Kenyan Commissions of Inquiry in the past, tight deadlines for action on a local justice model were set down in the final Waki report. The much publicized ultimatum: meet the local justice deadline or the sealed envelope will be handed to investigators at the International Criminal Court (ICC) in The Hague.

A year after the post-election violence and a new, polarized, national debate was emerging; whereas twelve months beforehand when the press were gauging support for the two presidential candidates, the question the country now faced was whether post-election violence suspects should be tried in Kenya or at The Hague. Many politicians and commentators seemed gravely uncomfortable at the prospect of ICC involvement in Kenya; when the court's other current investigations are in lesser-democratized countries in the grip of rebel groups and suspected war-lords. Subsequent events have demonstrated that this was a rather over-simplified debate.

A third dimension to the justice debate came with the recommendation to establish a Kenyan Truth, Justice and Reconciliation Commission. The Waki commission argued that such a model, based upon South-Africa's post-apartheid amnesty measures, would represent an opportunity to shed light on the full history of past events, and to heal old wounds before the next Presidential Election in 2012.

At the end of March 2009, the initial deadline for the enacting of a Kenyan Special Tribunal passed without any sign of political agreement on the way forward. The prospect of ICC trials moved a step closer. Kofi Annan, who was still heavily involved in monitoring the implementation of the Waki recommendations, agreed to set a later deadline for September 2009. However, by July 2009, developments confirmed some form of ICC investigation had become inevitable.

## **Kenya and the ICC**

Kenya is a ratified signatory to the Rome Statute, the treaty that created the International Criminal Court – the Rome Statute was adopted in 1998 and entered into force in 2002. Therefore, Kenya has already committed itself to the concept of a permanent international tribunal to prosecute 'the most serious crimes of international concern'. Charges are generally categorized as genocide, crimes against humanity or war crimes. Such strong indictments were being used to describe events in the Kenyan election crisis in the early months after the violence; therefore many leaders argued that some level of ICC involvement was not only inevitable, but mandatory under international law.

The Hague versus Special Tribunal debate began to subside when a high level Kenyan government delegation met with the ICC Prosecutor, Luis Moreno-Ocampo, in July 2009. Within days six boxes of evidence relating to the post-election violence, including the sealed envelope of leading suspects, were delivered to the Prosecutor in The Hague. Mr Moreno-Ocampo opened the sealed envelope, noted its contents, resealed it and requested that it was stored in a secure vault alongside the rest of the evidence.

Weeks later, as the second deadline for the establishment of a Kenyan Special Tribunal approached, Moreno-Ocampo publicly stated his desire to see a 'three-pronged' approach to justice in Kenya. The Prosecutor's view is that the ICC should handle those 'most responsible' for the post election violence, whilst nationally established structures such as the Special Tribunal should try other perpetrators. The third-prong would come in the form of the now established, although not untroubled, Truth, Justice and Reconciliation Commission.

Even before the events of mid-2009, the probable future role of the ICC in the post-election violence justice process could be easily observed; within weeks of the crisis, a preliminary ICC investigation team had been sent to Kenya. Ultimately, the negotiations between Mr. Moreno-Ocampo, the Kenyan President and Prime Minister removed the need for the Special Tribunal mechanism to fail before any ICC involvement could begin.

For the Prosecutor, this is a unique and critical case. Of the five current cases before the ICC, it is the only instance where prosecutor has used his *proprio motu* power to open an investigation. This means that he has commenced proceedings 'of his own accord' without the Kenya case being referred to him by the United Nations Security Council, or the Kenyan Government. The six boxes of evidence and sealed envelope sent to the ICC by the Waki Commission undoubtedly a key factor in this decision.

In December 2009, Luis Moreno-Ocampo told the Kenyan President and Prime Minister that he believed there was sufficient evidence to investigate allegations of crimes against humanity. He subsequently requested approval for a full investigation from the ICC's Pre-Trial Chamber. This was granted in March 2010, with the ICC investigation team due to return to Kenya just weeks later. There is already considerable pressure from within Kenya and elsewhere for suspects to be brought to trial before the next Presidential Election in 2012.

## **Communicating Justice**

Aspects of the media debate over the 'best justice model' for post-election violence suspects were characterized by an image of the ICC as a distant, almost austere, authority with limited relevance to or understanding of Kenyan affairs. It seemed this perception had not gone unnoticed when Luis Moreno-Ocampo addressed the media in November 2009: *"What we are seeing today is the leaders of Kenya working with me, a prosecutor they elected, with 110 states and committed citizens all over the world, to ensure justice for the victims of violence. The ICC forms part of the judiciary system of Kenya. We will work all together: Kenya should be an example of how to do justice, protect victims and overcome massive conflicts."*

The Prosecutor's position may also be seen evidence of the ICC's experience in other countries; in neighboring Uganda, for example, many local media outlets in the north of the country were swift to condemn the ICC when arrest warrants were issued for a handful of senior figures in the rebel Lord's Resistance Army (LRA) in connection with their part in a devastating 20-year civil war. The apparent motivation for criticism of the ICC is that many northern communities viewed the LRA as just one component part of the war, and that some elements of the Ugandan military should also be investigated.

The reality was that the ICC was far from concluding its investigations in Uganda and that the LRA arrest warrants were, potentially, the beginning of a far longer process. The Kenyan and Ugandan examples

underline the challenges faced by the ICC in communicating the process of international justice to the communities and victims they are trying to serve.

The ICC has a difficult balance to strike. Whilst court reporting laws vary dramatically from country to country, common sense dictates that a drip feed of developments from the ICC to the press would run the risk of 'trial by media'. However, affected communities still need ownership of enough information in order for them to support and embrace the process of international justice. Since the involvement of the ICC began in other African countries, a range of stakeholders have worked to ensure the myriad of local media outlets with an interest, can overcome barriers of distance and communication in order to receive first hand information from the ICC.

Today, experience in Kenya and elsewhere reveals the need for local reporters to be further supported through the process of effective use and contextualization of material on the ICC process. Central to such efforts, should be the marriage of the local history and issues at stake to the ongoing, and often long, legal process at The Hague.

In Kenya, Internews Network's 'Land and Conflict Sensitive Journalism' Program has a logical relationship with the ICC investigation in the country. The project is working with dozens of mainstream and community media outlets to unpack the range of issues that fuelled the post-election violence. It tackles the sensitive subject of perceived media exacerbation of the violence, by training reporters in recognized approaches to conflict-sensitive journalism. Through meaningful linkages between the ICC and local reporters, their work can be further enhanced with consistent, contextualized and timely coverage of the ICC investigation and any subsequent trials.

Local coverage of the allegations the ICC is investigating in Kenya and elsewhere, can also carry perceived risks for reporters on the front line. Many of the alleged crimes involved ultimately represent human rights violations. Exposing human rights abuses to the public is often a critical step in ending those abuses. For reporters, covering human rights is equally challenging work, fraught with the dangers of reporting on sensitive issues, the responsibilities of protecting the rights of victims, and the difficulties of finding the truth. Therefore, Internews' new Global Human Rights Program has also launched a series of journalism training seminars to build journalists' skills and knowledge of human rights issues and to spur innovative coverage of those issues.

In countries where 'the most serious crimes of international concern' are believed to have occurred; there is a recurring need for their local media to be fully empowered in order to communicate the justice process to affected populations.

## **The ICC in Other Countries**

The most striking difference between Kenya and the other four countries currently involved with the ICC, is the manner in which proceedings began. In Uganda, the Democratic Republic of Congo and the Central African Republic, the states involved referred the situations in their own country to the ICC. In the case of Darfur, Sudan the situation was referred by the United Nations Security Council.

Kenya is the first country where the prosecutor has commenced proceedings of his own volition. However, almost conversely, Luis Moreno-Ocampo has stated his belief that “the Kenyan cases are our easiest cases”.

The prosecutor believes the fact that Kenya is a fully formed democracy and that no organized rebel groups were involved in the violence will allow the legal process to move faster than it does in other countries.

A common, yet critical, misperception of the ICC is that it has the power and resources to parachute into countries under investigation and arrest suspects as soon as warrants have been issued. It does not. The ICC is reliant upon the cooperation of the police, military and security services in the relevant countries to make arrests on its behalf. Subject to the level of capacity and cooperation in the states involved, this has the potential to cause indeterminate delays in bringing suspects to trial. Some or all of the suspects in Uganda, DRC and Sudan remain at large.

Sudan’s relationship with the ICC has received particular notoriety. Among the three suspects still ‘at large’ is the incumbent president, Omar Hassan Ahmad Al Bashir. His arrest warrant for crimes against humanity and war crimes, issued in March 2009, is the first to be released for a sitting head of state. Even if individual states grant immunity from prosecution to their leaders the ICC, in line with the Rome Statute, does not. The Sudanese government, which has not ratified the ICC treaty, was quick to dismiss the arrest warrant as an ‘insult directed against Sudan’s nationalism and sovereignty’.

### **The Kenya Investigation and Trials**

The full pre-trial investigation into Kenya’s post-election violence commences in May 2010 and is likely to continue for the rest of the year. The Prosecutor and his team are expected to meet large numbers of victims throughout the process. A critical consideration over the coming months will be the safety of witnesses; at least 20 individuals thought to hold critical evidence for the investigation have already been placed under formal witness protection, some of them flown out of the country for their own safety.

The protection list may well continue to grow as the investigation unfolds. The ICC has condemned reports of intimidation of witnesses, including harassment from Kenyan Police Officers. The Prosecutor insists that his witnesses will be offered direct protection by the ICC.

By early 2011, it is likely that definitions of charges and suspects will finally be released. Mr. Moreno-Ocampo has already made it clear that he does not consider the list of 20 names in the sealed envelope to be binding, and that that evidence will represent part of a much wider, impartial investigation. Ultimately, he is only expected to file two or three cases, possibly with a handful of suspects for each. It is envisaged trials will begin in 2012.

In November 2009, Luis Moreno-Ocampo told reporters: “This is a long journey, this is just the beginning, the Kenyan government can decide on other mechanisms to do more justice and in particular, to compensate the victims.”