

For Immediate Release

ICC: Prosecutor Seeks OK on Kenya Inquiry

Kenyan Authorities Should Cooperate Fully and Hold Credible National Trials

(The Hague, November 26, 2009) – The request today by the International Criminal Court (ICC) prosecutor to the court’s judges to open a Kenya investigation is a decisive step toward justice for the country’s 2007 post-election violence, Human Rights Watch said. The move comes after more than a year of inaction by Kenya’s authorities on national prosecutions.

The [violence that followed Kenya’s flawed 2007 general election](#) left 1,200 people dead, caused 600,000 to flee their homes, and brought Kenya to the brink of civil war. Kenyan authorities agreed in December 2008 to bring those responsible to account in national trials. In July 2009, they again agreed to do so or to refer investigation of the violence to the ICC prosecutor. But no action has been taken. During a visit to Nairobi on November 5, 2009, the ICC prosecutor, Luis Moreno Ocampo, said that he would seek permission to proceed with an investigation.

“The Kenyan government has failed over and over again to keep its promises about justice for the election violence,” said Georgette Gagnon, Africa director at Human Rights Watch. “Kenya’s leaders should provide full cooperation if the ICC opens an investigation.”

The ICC prosecutor can open an investigation using his “proprio motu” powers under article 15 of the Rome Statute, which created the court, if authorized to do so by the ICC judges. Today’s request is the first time the prosecutor has sought to use his article 15 powers. Three of the ICC’s four investigations resulted from voluntary referrals by states, while the fourth was referred by the UN Security Council.

“The ICC is a court of last resort, and when national authorities are unwilling to act, it is supposed to step in,” said Elizabeth Evenson, counsel in the International Justice Program of Human Rights Watch. “Today’s announcement shows that the ICC prosecutor can and will act on his own in situations of serious crimes.”

If the ICC judges authorize an investigation, the court is still likely to bring only a handful of those alleged to be most responsible to trial. Following the prosecutor’s November 5 announcement, President Mwai Kibaki and Prime Minister Raila Odinga pledged cooperation with the ICC and action on national trials.

Kenya’s justice system has substantial deficiencies, including a lack of independence. Several efforts to establish a special tribunal for Kenya have failed to garner sufficient support in parliament.

Given these problems, [further efforts to create a national special tribunal](#) with international judges and prosecutors to provide accountability to mid- and lower-level perpetrators are essential, Human Rights Watch said.

“The promise to prosecute those responsible for last year’s violence was central to the reform and accountability agenda agreed upon by the coalition government,” Gagnon said. “Kenya’s leaders still have a chance to make good on that promise by ensuring that any ICC investigation is complemented by credible national trials.”

In determining whether to authorize the prosecutor to investigate, the three judges of the pre-trial chamber – relying on the materials submitted today by the ICC prosecutor – will consider whether there is a “reasonable basis” to proceed. Victims are also entitled to make their views known to the pre-trial chamber.

Human Rights Watch [urged the ICC and its prosecutor to apply lessons learned](#) from its current investigations if it proceeds with a Kenya investigation. Human Rights Watch pointed in particular to the need to investigate all sides to the violence. Given the high levels of interest and public support for an ICC investigation in Kenya, Human Rights Watch also urged the court to create extensive outreach programs to provide objective information about the court’s activities as soon as possible.

Background

Following the violence set off by the controversial 2007 presidential elections, leaders of both parties agreed to set up the Commission to Investigate the Post-Election Violence (the Waki commission), an independent review committee to look at the flaws in the election (the Kriegler committee), and a truth, justice and reconciliation commission to help heal historical grievances dating from before the 2007 general elections.

The Waki commission recommended wide-ranging reforms of the police as well as the creation of a special tribunal for Kenya, independent of the judiciary, anchored in a constitutional amendment and staffed by both Kenyan and international judges and prosecutors. In the event no special tribunal was established, the Waki commission recommended that former UN Secretary-General Kofi Annan, who was chair of the panel of eminent Africans who negotiated the National Accord that led to the coalition government following the divisive election, hand over a sealed envelope prepared by the commission and containing the names of suspects to the ICC. Annan handed over the envelope and other materials from the Waki commission to the ICC prosecutor in July.

The International Criminal Court is the world’s first permanent court mandated to bring to justice perpetrators of war crimes, crimes against humanity, and genocide when national courts are unable or unwilling to do so. There are currently 110 states parties to the ICC.

The ICC prosecutor has opened investigations in the Democratic Republic of Congo, northern Uganda, the Darfur region of Sudan, and the Central African Republic. Based on those investigations, 13 arrest warrants and one summons to appear have been issued. The ICC prosecutor also is looking at a number of other situations in countries around the world. In addition to Kenya, these include Colombia, Georgia, Cote d’Ivoire, Afghanistan, and Guinea. The Palestinian National Authority also has petitioned the ICC prosecutor to accept jurisdiction over crimes committed in Gaza.

To read the Human Rights Watch report, “Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance,” please visit:

<http://www.hrw.org/en/reports/2008/03/16/ballots-bullets-0>

To read Human Rights Watch’s letter to Kenyan ministers containing recommendations on the establishment of a special tribunal, please visit:

<http://www.hrw.org/en/news/2008/12/22/letter-kenyan-ministers-establishment-special-tribunal>

To read the Human Rights Watch report, “Courting History: The Landmark International Criminal Court’s First Years,” please visit:

<http://www.hrw.org/en/reports/2008/07/10/courting-history>

For more Human Rights Watch reporting on Kenya, please visit:

<http://www.hrw.org/en/africa/kenya>

For more Human Rights Watch reporting on the ICC, please visit:

<http://www.hrw.org/en/category/topic/international-justice/international-criminal-court>

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