



**CONSULTATIVE CONFERENCE ON INTERNATIONAL  
CRIMINAL JUSTICE**

**USING INTERNATIONAL JUSTICE TO END IMPUNITY AND  
PREVENT FURTHER ATROCITIES IN KENYA**

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*September 9-11, 2009, at the United Nations Headquarters*

## **Introduction:**

1. About 18 months ago, Kenya went through its worst political and violent crisis since independence. Many people across the world and in Kenya were shocked by the scale, rapidity, and brutality of the violence following disputed elections that led to the hasty, at dusk, swearing in of the current president, Mwai Kibaki. The crisis was especially a surprise within the international community as Kenya had seemed, from 2002, to be on a forward trajectory—in terms of its economy and democratic development-- following the end of one party rule. Indeed the elections in 2002 were hailed as Kenya's best ever, continuing a trend started in 1992, where the ballot was validated as a critical form of expression and reflecting the will of the people in terms of governance, but also in terms of expressing rejection and discontent in a peaceful way. This sense of confidence in the ballot had been reinforced by the referendum on the constitution in 2005 in which President Kibaki's YES side lost convincingly to the NO side led by Raila Odinga. It is important to note that this referendum was hardly about the constitution: Rather, it was a referendum on the performance of the Kibaki regime and the way it was running the country—no longer fully committed to anti-corruption; more insular and ethnically chauvinist in top public positions and generally arrogant and out of touch with the reality of people's lives across Kenya.
2. I will not go into the details of the crisis, suffice it to say that more than 1300 people were killed in less than 2 months (and more keep dying from their injuries and from the effects of rape and destitution); and about 500,000 people displaced from their homes from all over the country. It was clear that without international intervention the crisis and violence would have worsened considerably as state institutions were compromised and were as much the problem as the youth on both sides that were engaging in a war of attrition that had ethnic expression. Indeed there was fear that these same political and ethnic divisions would surface and explode within the security agencies possibly leading to outright civil war. The Kofi Annan led team of the AU Panel of Eminent Persons put together a peace agreement that

generally presented a credible road map for peace, stability and development in Kenya were it to be implemented properly.<sup>1</sup>

3. For the purposes of this conference, the road map had some crucial elements relating to international crimes. And central in it was recognition of the role that impunity had played in getting Kenya and Kenyans to the point of violence and conflict and certain mechanisms were put in place to address this impunity. First was the formation of what became known as the Waki Commission of Inquiry into post-election violence; and the second was the formation of a Truth Commission that Kibaki had declined to form in 2004, when it was more viable, preferring to adopt a policy of “forgive and forget.”
  
4. The Waki Commission was especially creative, thorough and resourceful in its report and recommendations. Seizing on the fact that there was now an International Criminal Court to which Kenya was a state party, Waki and his team tied up the Kenyan political class in knots by focusing on the personal accountability of those with the greatest responsibility for the violence; recommending a special post-election violence Tribunal with significant international participation to investigate, prosecute and judge and mandated a specific time frame for it, be formed. If the political class failed to set up the recommended Tribunal, Kofi Annan was directed to handover the report’s damning evidence to the International Criminal Court to take over the accountability process. This recommendation was formal recognition of the fact that Kenyan institutions, especially the criminal justice system, are broken and cannot be useful in the fight against impunity. This was a good example where the ICC was used as a possible sword to force some form of domestic accountability.

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<sup>1</sup> The major weakness in the agreement, in my view, was the lack of a specific time frame for the coalition government during which its *raison d’être* would purely be enacting and implementing the reforms that were agreed upon and then holding new elections.

5. The first draft of the law to establish a hybrid local tribunal was done hastily and without much consultation, leaving too many loopholes to excite consensus. Three groups of MPs formed in opposition to the draft Bill: There was a group that was concerned that the loopholes were too egregious to ignore and would not only provide the President with too much power, but that it also created provisions that would shield him and “his people” especially in circumstances when there was/is a chance that he could be implicated in the violence himself directly and indirectly, especially as the substantive Minister for Security in charge of the police force, which committed some of the most serious atrocities.<sup>2</sup> There was a second group that considered the ICC card a bluff, that anyway took too long to act and thought that by publicly calling for the ICC they look good yet not push the accountability issue, and the 3<sup>rd</sup> group was one that was blatant that any accountability was unacceptable and that the country simply needed to “move on and forget.”
  
6. Eventually, after Kofi Annan handed over the famous envelope to the ICC containing the names of those thought to have the most responsibility for the violence—together with boxes of evidence—sections in government made a renewed effort to crafting a much better law to establish an effective hybrid tribunal, that met international standards. But by this time, a significant amount of goodwill had been lost, the hardliners had dug in and the Cabinet itself refused to accept this recommendation, opting instead to try to shift the process to the Truth, Justice and Reconciliation Commission that had just been named. This was an obvious cop out that was rejected by the majority of Kenyans in opinion polls, and which even the members of the new TURK said was unworkable and rejected.
  
7. Presently, there is an attempt to pass a Private Members Bill in Parliament to establish a hybrid special tribunal basically along the lines of the re-amended draft that Cabinet rejected. This one however goes further and includes

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<sup>2</sup> The government was not helped by comments by senior cabinet members close to the President who argued that it was better to have this local tribunal rather than ceding ground to the ICC as they would have control over it.

offences for the election fraud that was the trigger for the violence in the first place, and explicitly removes the constitutional immunity of the president so that he would also be covered. An interesting facet in this draft is the complementarity role that it gives to the ICC; essentially handing over to the ICC the “big fish” in the envelope on the basis that even a special tribunal based in Kenya would have severe limitations in holding them accountable.

8. It is not certain that the Bill will pass Parliament when it is introduced<sup>3</sup>, but it is certainly making a huge impression on the issues of justice and accountability in Kenya. It reflects what many Kenyans feel about the role of justice in not only halting the tide of impunity that has existed for decades, but also addressing the levels of mistrust in our criminal justice system, and among ourselves. It reflects the unhappiness Kenyans have generated about the imperial presidency that is almost monarchical in its operations; and the understanding that just as Kenya needed international intervention to halt the crisis last year, it needs international cooperation and assistance on matters of accountability. It also reflects the sense of urgency in the country that if this impunity is allowed to thrive, then it is almost certain that violence and conflict will not be avoided—and in way worse forms than before—in 2012 when elections are due to be held.

### **Role of International Criminal Justice Mechanisms:**

9. The prevention mandate outlined in the Prosecutor’s 3 year plan is critical for Kenya. The recent crisis was the consequence of decades of impunity in all aspects of public service in Kenya, and Kenyans’ growing frustration with a system that has the forms of a democracy but little of its substance. It was a reflection of anger with government that allows corruption to thrive, ethnic favoritism to foster, and inequalities to spread, with few peaceful

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<sup>3</sup> At present the sponsors claim that they have the support of about 80 MPs but they require about 146 to cross the two-thirds threshold that it needs in order to also amend parts of the Constitution. The numbers of MPs aligned with people suspected to have been key players in the violence, the state included, suggest that this goal will not be achieved.

ways to express this anger especially between elections. It was also the culmination of impunity for state sponsored violence in Kenya from 1992 that was devised to intimidate and affect the voting patterns especially in the Rift Valley so that Moi could maintain power. The hope that many of us had that a Truth Commission would lift the veil of this state sponsored violence, as well as bring a measure of accountability in the organs of state security and within the communities that were affected by this violence were not fulfilled as President Kibaki decided against the TJRC at a time when there was hope of real transition. Thus the structures used for that violence—and including in state institutions—were left intact, and unleashed in 2007/2008.

10. In a country that has limited resources, holding onto state power, or being close to it, is important where corruption is the easiest and most favored way to become rich, or even get out of poverty for the supporters of those who hold state power. State power determines employment in public service; the quantity and quality of schools and hospitals in particular areas; and the location of government projects that not only generate employment, but can also lead to income-generating operations. The wealthiest Africans in Kenya are or were in government either as politicians or as top civil servants. Holding onto power thus becomes a zero-sum game, and since fraud and violence were proven to be effective tools to acquire and hold onto state power with the introduction of competitive politics, and without any form of accountability, it was not surprising that similar methods would be used in close elections.

11. It then becomes clear that if nothing is done to hold people accountable for the recent violence, where evidence is still fresh, there is every likelihood that the next elections will lead to worse consequences as the message will have been cemented—yet again—that violence all right. And this is not just about the informal violence, pitting ordinary people against each other. It is also about state violence which has been used and compromised by the ruling elite so much that they have also developed into a militia of their own, accountable to no one, as the UN Special Rapporteur on Extra Judicial Executions reported. And making things worse is that fact that the leadership of Kenya's security apparatus, as well as those in control of the public

financial sector, all come from one ethnic group, the Kikuyu, which is President Kibaki's group, and who were victims of violence in parts of Rift Valley during the recent crisis.<sup>4</sup>

12. Compounding matters are credible reports across the country of re-arming of militia and young men, but this time with guns rather than machetes. I have been travelling around Kenya and in many parts one gets reports of the prices of small arms coming down as demand increases. There are also assertions right across the country that the next time there is tensions, there will be no running away and the youth will be ready to hit hard.

13. So can international criminal justice help prevent this potential slide into chaos and anarchy? The answer must be in the affirmative, especially seeing the panic that the threat of ICC involvement generated in the political class unused to being held accountable, and used to controlling the course of justice in Kenya. Indeed, if there was one compelling reason for the ICC to engage in Kenya, especially when compared with atrocities around the world, then that reason would have to be the extremely strong possibility of preventing more killings and human rights violations. The Kenyan ruling elite is closely linked up to the international community and the views of the international community matters to them. Acceptance in the world of civilized nations, as well as being the shining (or least not the most gruesome) star in Africa has always been important to Kenyan leadership and partly accounts for the existence of many of the features of democracy that are in place.

14. It can be argued that in certain ways, action by the ICC would probably have similar impact on Kenya as the indictment of Charles Taylor by the Special Court on Sierra Leone had on Liberia. But any action by the ICC would need to be balanced and swifter than it has been in other circumstances. Balance

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<sup>4</sup> The Kikuyu were also perpetrators in Nairobi and in other parts of the Rift Valley, especially in the towns of Naivasha and Nakuru, which were described in the Waki Report as the scenes of some of the most brutal and barbaric forms of violence during the crisis. People were chopped up into small bits, and women routinely gang-raped.

meaning that the main theatres of conflict would need to be addressed simultaneously so that the defensiveness that we have seen with Bashir's indictment is countered. I am told that one of the reasons the Ituri region of the DR Congo has been relatively calm in the last few months is because the ICC indictments there targeted both sides and thus reduced the sense of bias and defensiveness that could have been used to whip up more tensions and violence.

15. There is also the factor that at present, the sub-region of the Horn of Africa and the Great Lakes is easily the most volatile region in Africa, if not in the world, and action on Kenya could have a ripple effect in the sub-region. Already Somalia is in a crisis and in serious conflict; Sudan has the potential of going further down as elections and the referendum on secession approaches with both sides arming and anxious. Uganda has elections coming up in 2011 which Museveni will undoubtedly "win" as the foundations for the rigging are already in place. DR Congo continues with its very complex and difficult situation while Rwanda and Burundi are still works in progress that have yet to resolve the ethnic issues that have led to unspeakable horrors in both countries. Within that context, and given the role Kenya has played as a base for international peace-making, and humanitarian efforts in the sub-region, it is even more critical that international criminal justice is focused on Kenya. Action on Kenya could deter Museveni and Meles especially if they recognize that opening rigging would prompt reactions from civilians that would not now be put down harshly. It could temper both sides in Sudan as Kenya, Uganda and other neighbors would be hesitant to be directly or indirectly involved and could also impact on DR Congo, Rwanda and Burundi who all rely heavily on Kenya and their neighbors both politically and economically.

16. But at the same time, there is also the fear that international geo-politics may dictate support for the ruling elite in Kenya--if it can maintain some form of stability in Kenya--so as to allow for the interventions within the sub-region to continue, in much the same way that Meles in Ethiopia got support from the international community after disputed elections and a serious clampdown on perceived opponents by invading Somalia at the end of 2006.

If Kenya is seen as the “indispensable” state in the region, then the role of international criminal justice apparatus to act on Kenya becomes even more indispensable to ultimately stop the slide into chaos of the whole region. An untransformed Kenya is not in the best interests of the international community and the best spur to that transformation remains an end to impunity.

17. There is the likelihood that urgent intervention by the ICC in Kenya will raise more hubris and consternation among African leaders especially if Kibaki were to be indicted. But that is to be expected because the impunity in Africa has been caused by African leaders and the ICC presents the first real threat they have had to their way of doing things. Even though no other continent has as many countries that are either unwilling or unable to bring to justice perpetrators of grave human rights violations as there are in Africa, African leaders have used the pride card to try to reduce the role of the ICC in promoting accountability.

18. But for the people of Kenya, and I dare say of Africa, there is huge support for ICC intervention—borne out in successive opinion polls since November 2008, and from my own interactions with victims and survivors--partly as a result of lack of confidence in the criminal justice system, and partly because the levels of ethnic mistrust are so high that any Kenyan is first judged by their ethnic identity and presumed to act in favor of their ethnic group. Even some of the most critical African intellectuals who follow Kenya unanimously accept that there are really no viable options for Kenya outside international criminal justice to spark accountability, and prevent more violence. Rather their worry is how international criminal justice is implemented rather than the principle of it. Indeed, victims can only be protected and made secure by accountability, and Kenya has a rather better developed sense of civic duty, a better developed civil society, and more inclination and absorption in the international community than many countries in Africa and could withstand the absence of many of our top leaders were they to be taken to the Hague. Importantly, because the nature of the violence affected all sides, there are victims from both sides of the political divide and balanced indictments would give a sense of vindication

to both sides, tempering the temptation to rally any community against any other in response to ICC action.

19. Nevertheless there is a duty on the ICC to go beyond Africa and take up cases in other regions. I am aware that there are open files from other regions but the sooner that actions are taken the better it will be for international criminal justice in Africa and its legitimacy. Additionally more outreach and connections with victims across the world would be helpful and one can already see signs of this from the Prosecutor.

### **Options beyond the ICC:**

20. But what happens if the ICC decides, as it could, that it will not take up Kenya? What options are there for international criminal justice or other actions? I must say that the options available are not as attractive nor are they as comprehensive as the ICC option. But they would include the use of universal jurisdiction against particular Kenyan leadership for whom there is evidence of involvement either directly or indirectly. The Kenyan elite likes to travel internationally and both legal and political restrictions could have an impact at the very least in confining certain ministers to Kenya or to limited countries where they would face little risk, but that would inhibit their capacity to hold the more important ministerial portfolios that require travel. The question of de-legitimization of the individuals is important however, and we found that during the negotiations last year, calls and threats to impose travel bans on hardliners, and their families, were rather effective in tempering hard-line positions as many of the elite have children studying in Western countries, as well as assets and bank accounts.

21. The TJRC option has been raised by cabinet as an option but denounced in Kenya given the circumstances. Part of this is because there is a sense in Kenya that the recent crimes deserve criminal prosecutions rather than truth telling and recommendations, but part of that is because the President chose for Chairman of the TJRC someone who for many years was an integral part of the Moi regime, thus already leading to a credibility crisis, and someone that victims and survivors clearly do not feel comfortable with. Of course,

Bethuel Kiplagat may eventually prove critics and skeptics wrong but many in civil society are not holding their breath.

22. More fundamentally is the timing of the TJRC. This is normally a transitional justice mechanism that operates when there is a change of government and acts as a signal that the new government has broken with the past. In the present case, we have a regime that is the same as before in terms of temperament and attitudes, and there is a sense of business as usual, with corruption increasing and a sense that the country is in a holding pattern waiting for the next elections to determine whether we move forward or backwards. There is also way more ethnic animosity than ever before, and badly handled, the TJRC may increase, rather than resolve, historical tensions especially if they conduct hearings at a time when there is no clear sense of who is in charge, and what the governing ideology is.

**Some Potential Roles for international criminal justice actors:**

23. There are roles for other actors in the international community and at present the most important one is preserving the evidence and protecting potential witnesses. Already about 60 Kenyans who have solid evidence of the post election violence are in hiding, some in Kenya and some outside Kenya and their continued sustenance and protection is of utmost importance. This includes not just material sustenance but also intellectual and professional so that the time in hiding is not all lost. This is also a role that the ICC as it completes studying the evidence from Waki could engage in.

24. Continued international and national advocacy is critical to focus attention on Kenya. Clearly Kenya is not the worst case in the world, or in Africa, but there are few countries that present such excellent opportunities for prevention as does Kenya. In a sense, Kenya is a case of low-hanging fruit that will be a good measure of the effectiveness and credibility of the international criminal justice system and would bring needed confidence and deterrence if handled well.

25. The African Union chalked up a major success with its handling of the Kenyan crisis last year and its coordination with the broader international community, and especially the speed with which it engaged was commendable. This same spirit and motivation, summarized by Chidi Odinkalu in the phrase “that accountability for the election crisis is not, and cannot be a Kenyan issue alone” must be continued.

26. At the same time there is a focus on the election violence, and on the extra-judicial executions by the police in Kenya over the last 3 years that are not election related, there must be continued pressure on the other issues tied to the power structure—and hence the reason for conflict—in Kenya. Of these stemming corruption remains important and the international community has played a good role in advocacy on anti-corruption, but a less clear role in assisting on asset tracing, documentation and investigations. The more exposures there are on who owns what where, the harder it will be for the Kenyan elite to manipulate ethnicity for their own political survival and hence the less chances for conflict.