

## **Crucial Timelines in the Kenya ICC Situation**

### **28<sup>th</sup> February 2008**

After three weeks of civil unrest and a month of tension The Panel of Eminent African Personalities (Annan Panel) prepares an agreement, which is reduced into the National Accord and Reconciliation Act, establishing a Coalition government between PNU and ODM. Mwai Kibaki assumes the Presidency with Raila Odinga as Prime Minister. The National Accord and Reconciliation Act established the Commission of Inquiry into Post Election Violence (**CIPEV**).

### **15<sup>th</sup> October 2008**

CIPEV submits its report and recommends the establishment of a special tribunal made up of national and international judges to investigate and prosecute perpetrators of the post election violence. In the event of failure by the government to set up such a tribunal, **CIPEV** recommended that the Annan Panel should transmit the information collected and a sealed envelope containing names of possible perpetrators to the ICC for further investigation and action.

### **16<sup>th</sup> December 2008**

The President and the Prime Minister execute an agreement for the implementation of the CIPEV recommendations.

### **27<sup>th</sup> January 2009**

The National Assembly adopts the CIPEV report.

### **12<sup>th</sup> February 2009**

Having adopted the CIPEV report a month earlier, the Kenya parliament voted against a Bill for the establishment of a special tribunal.

### **3<sup>rd</sup> July 2009**

A delegation of three Kenyan Ministers signs an agreement with the ICC binding Kenya to set up a special tribunal by August. The Kenyan delegation further agrees to submit to the ICC documentation in support of their contention that there were ongoing investigations and prosecutions on the post election violence; that there was in place a victim support system and that there were preparations for witness protection. In the event that there would be no action within twelve months it was agreed that the government would refer the matter to the ICC in accordance with Art 12 of the Rome Statute.<sup>1</sup>

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<sup>1</sup> Article 12

#### **Preconditions to the exercise of jurisdiction**

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

## **9<sup>th</sup> July 2009**

The Sealed Envelope and six boxes containing Waki investigation materials are sent to the ICC prosecutor.

## **30<sup>th</sup> July 2009**

The minister for Justice introduces a Bill to expand the mandate of the Truth Commission to deal with PEV but this is shot down by the cabinet. An attempt to reintroduce the special tribunal Bill as a Private Member's Bill fails due to consistent lack of quorum in parliament demonstrating the paucity of support for the special tribunal.

## **9<sup>th</sup> November 2009**

Again the Special Tribunal Bill is brought back to Parliament. Discussions commence with no end in sight. The Bill lies in limbo.

## **26<sup>th</sup> November 2009**

ICC prosecutor files an Art 15 request-seeking authorisation from the Pre-Trial Chamber to open investigations in the Kenya situation.<sup>2</sup>

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2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

### **<sup>2</sup> Article 15**

#### **Prosecutor**

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor

### **31<sup>st</sup> March 2010.**

The three member Pre Trial Chamber 11, with Judge Kaul dissenting, allows for investigations to commence on the Kenya situation. The ruling covers crimes committed between 1 June 2005 and 26<sup>th</sup> November 2009.

### **15<sup>th</sup> December 2010**

The ICC prosecutor requests the court to issue 'summonses to appear' against six Kenyans; William Ruto, Henry Kosgey and Joshua Sang (Case 1) and Francis Muthaura, Uhuru Kenyatta and Hussein Ali (Case 2).

### **8<sup>th</sup> March 2010.**

The Court issues the summons on probable grounds advanced by the prosecutor. As with the decision to authorise the investigation by the Prosecutor, Judge Hans-Peter Kaul dissented and opposed the issuance of summonses.

### **On 22 December 2010**

A week after the ICC Prosecutor announced the individuals he was seeking to prosecute, the Kenyan National Assembly passed a motion seeking to withdraw Kenya as a state party to the Rome Statute. This motion did not itself affect Kenya's status as a State Party to the Rome Statute, but rather obliges ministers to move to repeal Kenya's International Crimes Act which ratified the Rome Statute and made necessarily changes to Kenyan's criminal code.

### **February 2011**

Kenya appealed to the United Nations Security Council asking it to defer the trials at The Hague

### **31<sup>st</sup> March 2011**

Kenya files a challenge on jurisdiction.<sup>3</sup>

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concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

#### <sup>3</sup> **Article 19**

##### **Challenges to the jurisdiction of the Court or the admissibility of a case**

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has

## **1<sup>st</sup> September 2011**

The hearing to confirm case one

## **21 September 2011**

Hearing to confirm case 2

## **January 23, 2012**

Pre-Trial Chamber II confirms charges against Ruto and Sang but declines to confirm charges against Henry Kosgey.

## **January 23, 2012**

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been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

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9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place

Pre-Trial Chamber II confirms charges against Muthaura and Kenyatta but declines to confirm charges against Mohamed Hussein Ali.