

## Article

# THE ICC AS ARBITER IN KENYA'S POST-ELECTORAL VIOLENCE

By Abraham Korir Sing'Oei\*

Daniel arap Moi, Kenya's long serving former President and a champion of the one party state, held the view that the practice of multiparty politics in the country would engender ethnic divisions. Moi believed that a single party system was the only model that could suppress the emergence of elite ethnic political competition.<sup>1</sup> Sixteen years after the re-introduction of multipartism, fratricidal ethnic violence followed the failed electoral process in December 2007. Unlike previous occasions when electoral violence had not been addressed through judicial means, indications are that those implicated in the recent killings could face the law. The search for the best option for holding accountable those responsible for the targeted killings, destruction of property, and gender-based violence that took place from December 2007 to February 2008 has intensified. On July 9, 2009, a sealed envelope containing a list of persons

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1. See BINAIFER NOWROJEE, HUMAN RIGHTS WATCH, *FAILING THE INTERNALLY DISPLACED: THE UNDP DISPLACED PERSONS PROGRAM IN KENYA* 39 (1997), available at <http://www.hrw.org/legacy/reports/1997/kenya2/kenya0697web.pdf> (noting that Moi opposed multiparty politics because of concerns about the country's stability being threatened if the country became polarized on ethnic lines). What Moi failed to address, however, is whether such ethnic violence could recur after every other election in the face of a working rule of law system. In the two multiparty elections won by Moi in 1992 and 1997, ethnic violence was utilized to alter the demographic profile of political units, particularly in the Coast and Rift Valley provinces, but no person was prosecuted and punished. See generally REPUBLIC OF KENYA, REPORT OF THE JUDICIAL COMMISSION APPOINTED TO INQUIRE INTO TRIBAL CLASHES IN KENYA (1999); REPUBLIC OF KENYA, REPORT OF THE PARLIAMENTARY SELECT COMMITTEE TO INVESTIGATE THE ETHNIC CLASHES IN WESTERN AND OTHER PARTS OF KENYA (1992) (both reports responding to President Moi's request to look into ethnic clashes).

suspected to bear the greatest responsibility for the mayhem and documentary evidence in support of their culpability was transmitted to the International Criminal Court (ICC).<sup>2</sup> This action was consistent with the recommendations of the Commission of Inquiry into Post-Election Violence (CIPEV).<sup>3</sup> On November 6, 2009, the Prosecutor of the ICC sought leave from the court's pre-trial chamber to commence investigations on the Kenyan case.<sup>4</sup> The Prosecutor's decision to proceed, *proprio motu*,<sup>5</sup> was necessitated by the Kenyan government's utter failure to conduct prosecutions at home and its reluctance to refer the situation to the ICC under Article 14 of the Rome Statute.<sup>6</sup>

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2. Press Release, Int'l Criminal Court, ICC Prosecutor Receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya (July 9, 2009), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282009%29/pr436>.

3. The creation of the Commission of Inquiry into Post-Election Violence (CIPEV) was proposed within the framework of the Kenya National Dialogue and Reconciliation process (KNDR). KNDR was steered by the African Union Panel of African Eminent Personalities and chaired by Kofi Annan, former United Nations Secretary General. CIPEV's mandate was to "investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters." COMM'N OF INQUIRY INTO POST-ELECTION VIOLENCE [CIPEV], REPORT OF THE COMMISSION OF INQUIRY INTO POST-ELECTION VIOLENCE vii (2008) [hereinafter CIPEV REPORT], available at [http://www.communication.go.ke/documents/CIPEV\\_FINAL\\_REPORT.pdf](http://www.communication.go.ke/documents/CIPEV_FINAL_REPORT.pdf). The members of the Commission as appointed were its Chair, Mr. Justice Philip Waki, a judge of Kenya's Court of Appeal, and two Commissioners, Mr. Gavin McFadyen and Mr. Pascal Kambale, nationals of New Zealand and the Democratic Republic of Congo, respectively. *Id.* at 7. The CIPEV Report was submitted to the President and Prime Minister on October 15, 2008. For the National Accord and Reconciliation Act 2008, and other documentation related to the KNDR, see <http://www.dialoguekenya.org/agreements.aspx>.

4. Press Release, Int'l Criminal Court, The Situation in the Republic of Kenya Assigned to Pre-Trial Chamber II (Nov. 6, 2009), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282009%29/pr473?lan=en-GB>.

5. The Prosecutor is authorized to initiate independent investigations *proprio motu* ("on his own motion") based on credible information. Rome Statute of the International Criminal Court, art. 15(1), *opened for ratification* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. This authority, however, is constrained by the requirement that the Prosecutor must obtain leave to institute such investigations from the ICC's Pre-Trial Chamber. *Id.* art. 15(3). The Pre-Trial Chamber will grant leave based on two considerations: reasonable grounds warranting the investigations and existence of the court's jurisdictional triggers. *Id.* art. 15(4). *See also* P. Kirsch & D. Robinson, *Trigger Mechanisms* in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 661-63 (A. Cassese ed., 2002).

6. Article 14 of the Rome Statute provides:

1. A State Party may refer to the Prosecutor a situation in which one or

This Article discusses two inter-related questions. First, is the ICC the most viable option for ensuring justice for the victims of Kenya's post-electoral violence? Second, what are the ICC's prospects of success in Kenya, when it has yet to register success anywhere else in the African continent? This discussion takes place against the backdrop of the ongoing discourse in Africa over the impact of international criminal justice on punishing those guilty of mass atrocities while still meeting the imperatives of peace and stability in post-conflict countries.<sup>7</sup> In

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more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Rome Statute, *supra* note 5, art. 14.

On July 3, 2009, the ICC Prosecutor signed an agreement with the Kenyan government delegation for the exchange of information on steps taken by Kenyan authorities to investigate and prosecute those most responsible for crimes against humanity and other gross human rights violations committed in connection with or related to 2007 post-election violence. The agreement also appeared to indicate Kenya's willingness to refer the cases to the ICC should it fail to establish a functioning special tribunal at the national level within a reasonable time. *See, e.g.*, Statement by Hans Corell, Legal Advisor, Panel of Eminent African Personalities, Note on Handover of CIPEV Materials to the Prosecutor of the ICC (July 29, 2009), <http://www.dialoguekenya.org/docs/StatementbytheLegalAdvisorstothePanelofEminentAfricanPersonalities.pdf> (noting that the CIPEV recommended that supporting evidence should be forwarded to the ICC Prosecutor if a special tribunal was not established in a timely fashion); *see also* Int'l Criminal Court, Agreed Minutes of Meeting of 3 July 2009 Between Prosecutor and Delegation of the Kenyan Government (July 3, 2009), *available at* <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Kenya/> (follow "Agreed Minutes of Meeting of 3 July 2009" hyperlink) (stating that the Kenyan government delegation agreed to provide information requested by the ICC Prosecutor).

7. There have been attempts, particularly in the Uganda and Sudan cases, to weigh the goals of peace against the cost of pursuing justice. *See* MAHMOOD MAMDANI, THE QUESTION OF JUSTICE – LESSONS AND CHALLENGES 7–9 (2008), *available at* <http://www.endimpunityinkenya.org/pdf/justice%20lessons.PDF> (debating whether Uganda, Sudan, and other African states should prioritize political reform or criminal justice following human rights violations). In contrast, important resolutions supportive of international criminal justice have been adopted by the continent's human rights body. *See* Afr. Comm'n on Human and Peoples' Rights [ACHPR], *Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court*, ACHPR/Res.87 (XXXVIII) 05 (Dec. 5, 2005) *available at* <http://www.achpr.org/english/Special%20Mechanisms/Women/res.87.doc> (urging African governments to ensure that violators of international human rights and humanitarian law do not

this discussion, African political leaders have been insistent on the need for home-grown solutions in dealing with international crimes perpetrated in the continent.<sup>8</sup>

## I. THE ICC'S ROLE IN KENYA

In theory, as a state party to the Rome Statute,<sup>9</sup> the events in Kenya, to the extent that they were committed within the state's territory by its nationals,<sup>10</sup> can be addressed by the Court. However, two jurisdictional questions remain to be answered. First and foremost is whether the nature and magnitude of crimes that took place in Kenya are of sufficient gravity to trigger ICC's jurisdiction, *ratione materiae*.<sup>11</sup> Second is whether the ICC's action is premature and therefore inadmissible for not meeting the threshold of "unwillingness" or

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benefit from impunity). The resolution further urged ratification of the Rome Statute and adoption of national action plans to implement the Statute at the national level. It also strongly requested for the withdrawal from the Article 98 Bilateral Immunity Agreements on the part of African government. *See also* ACHPR, *Resolution on Strengthening the Responsibility to Protect in Africa*, ACHPR/Res.117 (XXXXII) 07 (Nov. 28, 2007) available at [http://www.achpr.org/english/resolutions/resolution117\\_en.htm](http://www.achpr.org/english/resolutions/resolution117_en.htm) (urging African states to contribute forces to the U.N.-AU hybrid force in Darfur). These resolutions, while adopted by the African Union's main human rights quasi-adjudicatory body, were initiated and strongly supported by African and international human rights NGOs. *See* Human Rights Watch, *AU: African Civil Society Presses States for ICC Support*, Nov. 2, 2009, <http://www.hrw.org/en/news/2009/11/02/au-african-civil-society-presses-states-icc-support> (discussing the 160+ NGOs that have urged African states to reaffirm their commitment to the ICC).

8. Article 4(h) of the Constitutive Act of the African Union provides for the use of force to halt genocide and crimes against humanity, a much more drastic action than prosecution at the ICC. Constitutive Act of the African Union, art. 4(h), July, 11, 2000, AU Doc. CAB/LEG/23.15. The African Union has only recently begun utilizing this provision in, for instance, establishing the independent High Level Panel of Experts to investigate options that would meet the imperatives of accountability and healing in Sudan. INT'L REFUGEE RIGHTS INITIATIVE, JUSTICE FOR INTERNATIONAL CRIMES IN AFRICA AND DARFUR: CONFRONTING THE COMPLEMENTARITY CHALLENGE, SUMMARY OF WORKSHOP PROCEEDINGS 2 (2009), [http://www.darfurconsortium.org/member\\_publications/2009/June/IRRI.summaryworkshop.060609.pdf](http://www.darfurconsortium.org/member_publications/2009/June/IRRI.summaryworkshop.060609.pdf).

9. The Republic of Kenya ratified the Rome Statute on March 15, 2005. For states parties ratifications as of July 21, 2009, see ICC, The States Parties to the Rome Statute, <http://www2.icc-cpi.int/Menus/ASP/states+parties/>.

10. Rome Statute, *supra* note 5, art. 12(2).

11. In the Kenya case, the only crimes contemplated are crimes against humanity, defined as: "[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . ." The listed crimes include murder, extermination, rape, and persecution targeting a protected group. Rome Statute, *supra* note 5, art. 7(1).

“inability” on the part of the Kenyan State to prosecute and punish the crimes.<sup>12</sup>

#### A. THE GRAVITY OF THE CRIMES

It seems clear that the gravity of the crimes committed in Kenya justifies ICC intervention. Between December 30, 2007 and the end of February 2008, more than 1300 people were killed and an estimated 300,000 others were displaced.<sup>13</sup> More than 900 women were raped.<sup>14</sup> Large amounts of private and public property were destroyed.<sup>15</sup> The killings and rapes, to a large extent, appear to have targeted the Kikuyu ethnic community,<sup>16</sup> who supported the incumbent President, Mwai Kibaki, and the Kalenjin and Luo ethnic communities,<sup>17</sup> supporters of Kenya's current Prime Minister, Raila Odinga.

Two of the most gruesome targeted ethnic killings stand out. On January 1, 2008, twenty kilometers from the town of Eldoret in western Kenya, twenty-eight besieged members of the Kikuyu community, mostly women and children, were killed when the church in which they were hiding was set ablaze by organized youth groups, presumably from the Kalenjin ethnic community.<sup>18</sup> A revenge mission took place a day later in the town of Naivasha, ninety kilometers from the Kenyan capital of Nairobi. There, nineteen members of one Luo family, huddled together in fear inside a house, were allegedly locked up by members of a Kikuyu youth militia and burned alive.<sup>19</sup> These killings, particularly the former, shocked the conscience of the

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12. Rome Statute, *supra* note 5, art. 17(1)–(3).

13. See generally CIPEV Report, *supra* note 3 (discussing the atrocities that occurred in Kenya). Gunshot wounds caused 35.7 % of the deaths, testifying to the extent to which security forces, deployed to quell the violence, pursued a “shoot-to-kill” policy. *Id.* at 311.

14. The only women's hospital specializing in gender-based violence in Nairobi reported that they had treated 900 women who had been raped, which suggests that the number of raped women could be much higher. *Id.* at 248. Thirty-one victims of rape and other gender-based violence testified before the CIPEV. *Id.* at 242. Some rapes were perpetrated by the police and organized groups from the combatant ethnic communities. *Id.* at 252.

15. The report found that 64,832 houses and 160 motor vehicles were destroyed, along with various government installations, including police stations, dispensaries, infrastructure, and railway lines. *Id.* at 336–41.

16. See *id.* at 344 (noting that 268 Kikuyu died).

17. See *id.* (noting that 158 Kalenjin and 278 Luo died).

18. *Id.* at 45–47.

19. *Id.* at 121–23.

world, and evoked memories of the Rwandan genocide of 1996.<sup>20</sup>

Besides the deaths, displacements, and injuries, the magnitude of sexual violence that occurred during that period demands justice. Sexual violence took the form of gang and individual rapes,<sup>21</sup> as well as female and male genital mutilation. Women and girls' labia and vaginas were cut using sharp objects and bottles were stuffed into them.<sup>22</sup> Men and boys had their penises cut off or were traumatically circumcised,<sup>23</sup> in some cases using cut glass.<sup>24</sup> Entire families, including children, were forced to watch their parents, brothers, and sisters being sexually violated.<sup>25</sup> Even when victims told perpetrators that they were HIV positive, perpetrators still chose to rape.<sup>26</sup> Perpetrators often told victims that the sexual violence inflicted upon them was punishment for belonging to a specific ethnic group or for being affiliated with a particular political party.<sup>27</sup>

While admitting that the underlying causes of the post-electoral violence were structural in nature,<sup>28</sup> the CIPEV investigation and analysis revealed, among other things, that the violence was premeditated, organized, and executed with the support of influential politicians, businessmen, and the security organs of the State.<sup>29</sup> By its statute, the ICC is authorized to intervene only when genocide, crimes against humanity, or war crimes are cognizable.<sup>30</sup> Although CIPEV did not make an explicit finding that crimes against humanity had taken place in Kenya, its report suggests that it could have reached such a conclusion if it had more time to collect

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20. See, e.g., Scott Baldauf, *Ethnic Violence: Why Kenya is Not Another Rwanda*, CHRISTIAN SCI. MONITOR, Jan. 3, 2008, at 1 (stating that the Kenyan violence brought to mind the Rwandan genocide while noting differences between the two).

21. CIPEV Report, *supra* note 3, at 94–95.

22. *Id.* at 259.

23. *Id.* at 107.

24. *Id.*

25. *Id.* at 237.

26. *Id.* at 261–62.

27. *Id.* at 237.

28. The report identifies such factors as the institutionalization of political violence, personalization of presidential power, land inequality, and the youth bulge phenomenon as having contributed to the violence. See *id.* at 26–33.

29. The security organs implicated in the violence are members of the paramilitary General Service Unit (GSU), as well as regular and administration police officers. *Id.* at 66–70, 102–03, 121–22.

30. Rome Statute, *supra* note 5, art. 5.

evidence.<sup>31</sup> This challenge notwithstanding, CIPEV believed that crimes against humanity had occurred based on the testimony of Kenya's Attorney General and the findings of the Kenya National Commission on Human Rights,<sup>32</sup> in addition to its own finding of the widespread and ethnically-targeted nature of the murders, rapes, and destruction of property.<sup>33</sup> Its recommendation for the establishment of a special tribunal to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya" testifies to this belief.<sup>34</sup>

#### B. KENYA'S 'UNWILLINGNESS' AND 'INABILITY' TO PROSECUTE

The intent of the framers of the Rome Statute was that the ICC would complement rather than supplant national judicial mechanisms.<sup>35</sup> Under international law, the state has primary responsibility for investigating, prosecuting, and punishing mass atrocities that take place within its territory.<sup>36</sup> Absent such action, the state is expected to extradite perpetrators of such acts to states willing to prosecute, hence the maxim *aut dedere, aut judicare*.<sup>37</sup> Consequently, the ICC's involvement is expected only where a state party to the Rome Statute is unwilling or unable to prosecute and punish international crimes.

"Inability" occurs when the judicial system of a state is unavailable or has been partially or substantially destroyed by

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31. CIPEV Report, *supra* note 3, at 16. CIPEV's mandate was to be executed within a period of three months. It was granted another one month to write its report. This amount of time, in the Commission's view, was inadequate to afford those adversely mentioned facility to respond.

32. *Id.* at 303.

33. *Id.*

34. *Id.* at 472.

35. See Rome Statute, *supra* note 5, pmbl. ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . ."); see also *id.* art. 17(1) (providing that the ICC has no jurisdiction if the state which has jurisdiction is investigating or prosecuting the case).

36. See *id.* pmbl. ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .").

37. See generally M. CHERIF BASSIOUNI & E.M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (discussing that the obligation on states with regard to international crimes is to extradite a suspect to a country that has a clear jurisdictional link or to ensure domestic prosecution and punishment of the crime).

the conflict so that the State cannot realistically be expected to carry out its duty to investigate and prosecute.<sup>38</sup> “Unwillingness,” in contrast, envisages a situation where proceedings against the accused at the national level have commenced but are being conducted or have been conducted in a manner to suggest that the accused is being shielded from justice.<sup>39</sup> Explicit or implicit refusal by the state to prosecute, while not specifically addressed in the Rome Statute, can be construed as an indicator of unwillingness.

In the Kenyan case, the judiciary was incapable of mediating the electoral dispute<sup>40</sup> because the opposition party, the Orange Democratic Movement (ODM), refused to take its complaint of electoral fraud and widespread vote rigging to court. ODM dismissed the entire Kenyan judiciary as a handmaiden not of fairness but of partisan political interests, and therefore incapable of dispensing justice, particularly in the circumstances of this case.<sup>41</sup> The legitimacy of the Kenyan

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38. Rome Statute, *supra* note 5, art. 17(1)(a).

39. *Id.* art. 17(2)(a).

40. Ordinarily under Kenyan law, the Attorney General or any person who was entitled to vote in an election may lodge an election petition to dispute that election. The election petition must be drawn as provided by the Constitution, the National Assembly and Presidential Elections Act (Chapter 7), and the National Assembly Elections (Election Petition) Rules. The petitioner deposits KSh 250,000 (Kenyan Shillings) (U.S. \$3300) with the court at the time (or very soon after) he or she presents the election petition, which is some kind of security for costs of the litigation. The petition must be lodged and served within twenty-eight days after the date of the publication of the results in the Kenya Gazette. The election petition challenges:

- (a) the validity of the nomination of a President, or
- (b) the validity of the election of the President or a Member of Parliament.

A bench of three Judges of the High Court, called the Election Court, hears the election petitions. Several such election courts are usually established. An election court can only:

- (a) nullify the nomination of a Presidential candidate, or nullify the election of a President or a Member of Parliament, or
- (b) dismiss the petition.

There is no provision for appeal to the Court of Appeal on the determination of the question of the validity of the nomination and/or election. The National Assembly and Presidential Elections Act, (2009) Cap. 7 §§ 19–31. (Kenya).

41. See C. Bryson Hull, *Kenya Talks Resume, African Ministers Arrive*, REUTERS, Feb. 8, 2008, <http://www.alertnet.org/thenews/newsdesk/L0689152.htm> (“The ODM has insisted on external mediation, saying the president has too much influence over the courts and state machinery.”); *Kenya’s Opposition to Hold Banned Protest Rally*, VOICE OF AM., Jan. 2, 2008, <http://www1.voanews.com/english/news/a-13-2008-01-02-voa47-66729412.html> (noting that the Kenyan courts are seen as corrupt as inefficient).

judiciary has been the subject of much inquiry.<sup>42</sup> Its afflictions have been admitted, including in the CIPEV report, which explains that the attempt to set up a special tribunal was cushioned from the inefficiency, intrigues, and lack of independence of the Kenyan judiciary. Having admitted that its own judiciary was unable to provide a remedy to the victims of the post-electoral violence, it then fell on Kenya to take action to implement CIPEV's recommendation by setting up a special tribunal. Its failure to set up this tribunal, in spite of concerted effort to do so by the President and prime minister,<sup>43</sup> and, lately, a member of Parliament,<sup>44</sup> discloses Kenya's inability to prosecute and renders the Kenyan situation ripe for ICC intervention. Even though the Kenyan justice system has technically not collapsed, it is paralyzed with regard to fully and comprehensively addressing criminal issues arising from the post-electoral violence.

This position, however, is contested by those who view the Kenyan judiciary as capable, with some improvement, to mete out justice for victims of the electoral violence.<sup>45</sup> Proponents of

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42. See, e.g., Press Statement, Prof. Philip Alston, U.N. Special Rapporteur on Extrajudicial, Arbitrary, or Summary Executions, Mission to Kenya 16–25 February 2009 (Feb. 25, 2009), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673> (discussing the inability of the judiciary to deal with extrajudicial killings).

43. Two bills to establish a special tribunal were brought before the Kenyan Parliament by the government but were rejected by members of Parliament on the grounds that the proposed Special Tribunal for Kenya would still be susceptible to political interference. The majority of members of Parliament, echoing overwhelming public sentiment, preferred reference of the Kenyan case to the ICC. See HUMAN RIGHTS WATCH, ESTABLISHING A SPECIAL TRIBUNAL FOR KENYA AND THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, QUESTIONS AND ANSWERS 5 (2009) (discussing the failure of Parliament to pass legislation that would establish a special tribunal).

44. Subsequent to the defeat of the government attempts, Gitobu Imanyara, member of Parliament, former editor of Nairobi Law Monthly, and prominent human rights lawyer, presented a private members' bill to establish the Special Tribunal for Kenya. This attempt also elicited little interest from the Kenyan Parliament. The Parliament failed to debate the bill in November 2009 when only eighteen of 222 members of Parliament were present. Thirty members are required to debate a bill. See John Ngirachu & Njeri Rugenep, *Kenya MPs Snub Debate on Local Tribunal Bill*, DAILY NATION, Nov. 11, 2009, available at <http://www.nation.co.ke/News/politics/-/1064/685208/-/xt2vvtz/-/>. For a critical analysis of this bill, see Lydia Kemunto Bosire, *Misconception II – Domestic Prosecutions and the International Criminal Court* (Oxford Transitional Justice Research Working Paper Series, Sept. 11, 2009), available at [www.csls.ox.ac.uk/documents/Bosire2.pdf](http://www.csls.ox.ac.uk/documents/Bosire2.pdf).

45. See, e.g., Peter Kagwanja, *Breaking Kenya's Impasse: Chaos or Courts?* (Africa Policy Institute, Africa Policy Brief No. 1, 2008) (arguing that Kenya's courts

this view opine that the extent that the entire court system is still functional implies that the country has the capacity to resolve the matter given time and support, and further, that the threshold for the ICC's involvement, the collapse of the national judicial system, has not occurred.<sup>46</sup> Others, moreover, feel that the internationalization of this and other disputes in Africa will not bode well for the uneasy peace that currently prevails in most countries,<sup>47</sup> as the dying embers of ethnic suspicions could be stoked when these issues are parleyed before an international stage.

In assessing the unwillingness of a state to carry out genuine investigation or prosecution, the ICC will, among other things, inquire into the nature of the proceedings at the national level and determine whether such proceedings are genuine or mere devices to shield individuals concerned from criminal responsibility.<sup>48</sup> Regarding Kenya, no meaningful proceedings have been attempted,<sup>49</sup> save for the establishment of the CIPEV itself, whose recommendations remain to be acted on, at least with regard to the establishment of a special tribunal. By enacting the International Crimes Act in 2008, Kenya could argue, in opposition to ICC intervention, that it has broadened its criminal law to accommodate the mass atrocities committed during the post-electoral period, and hence its courts are in a position to try the perpetrators.<sup>50</sup> It could seek time and the ICC's technical support to actualize this intention. To pursue

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are capable of dealing with the crisis).

46. See, e.g., Boniface Njiru, *Moreno Ocampo's Legal Problems with Kenya*, AFR. EXECUTIVE, Aug. 12–19, 2009, available at <http://www.africanexecutive.com/modules/magazine/articles.php?article=4565> (“Kenya’s judicial system is not only available, but is perhaps one of the strongest in the region.”).

47. See, e.g., Mahmood Mamdani, *Beware of Human Rights Fundamentalism*, PAMBAKUZA NEWS, Mar. 26, 2009, available at <http://www.pambazuka.org/en/category/features/55143> (“[P]erpetrators of violence should be held accountable, but when and how is a political decision that cannot belong to the ICC prosecutor . . . . [I]t is the relationship between law and politics – including the politicisation of the ICC – that poses an issue of greater concern to Africa.”)

48. Rome Statute, *supra* note 5, art. 17(2)(a).

49. Only one criminal case was initiated against four individuals accused of eight counts of murder arising from the Eldoret church arson. The state failed to produce prima facie evidence necessary for putting the accused persons on their defense leading to their acquittal. *Republic v. Stephen Kiprotich Leting et. al.*, (2009) e.K.L.R. (Kenya).

50. The Kenyan International Crimes Act domesticates the ICC. However, its operational date is January 1, 2009, well after the commission of the crimes in question here. At domestic level thus, retroactivity may be a feasible defense, even though such a defense would not stand before an international tribunal. The International Crimes Act, (2008) Cap. 16 § 1 (Kenya).

such a cause of action, however, would run afoul of public opinion currently in favor of international prosecutions, especially by the ICC. I will look at this issue in the following section.

## II. ICC'S PROSPECTS OF SUCCESS IN KENYA

The ICC's success in the Kenyan case will depend largely on the extent to which its processes are deemed legitimate and impartial by Kenyan citizens, media, key political actors (who may tilt public attitude), and the international community (whose role as the midwife of Kenya's post-electoral reform initiatives has been quite significant). It will also depend on the ongoing popular discourse within Africa on whether international criminal justice is the new imperialism against the continent.

### A. THE IMPARTIALITY OF THE ICC IN VIEW OF THE "ENVELOPE" IN ITS POSSESSION

Critics of the ICC Prosecutor's involvement in the Kenyan situation argue that the names forwarded to the ICC as recommended by CIPEV's report will prejudice the individuals named by creating a perception, or even a presumption, in favor of their culpability. These critics have argued that CIPEV never afforded them any hearing once their names had been adversely mentioned by victims.<sup>51</sup> Indeed, CIPEV admitted as much:

[T]he Commission hoped that it would have an opportunity to serve all individuals adversely mentioned during its inquiry with notices of such mentions and grant them an opportunity to record their evidence with the Commission. For this Commission that opportunity never arose for a large number of adversely mentioned persons except for a few who came before us . . . . The evidence the Commission has gathered so far is not, in our assessment, sufficient to meet the

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51. It has, for instance, been argued that the names submitted to the ICC by Kofi Annan on behalf of CIPEV were based on the report by the Kenya National Commission on Human Rights. For a copy of the report, see KENYA NAT'L COMM'N ON HUMAN RIGHTS, *ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST 2007 ELECTION* (2008), available at [http://www.knchr.org/index.php?option=com\\_content&task=view&id=174&Itemid=105](http://www.knchr.org/index.php?option=com_content&task=view&id=174&Itemid=105). Two prominent politicians, Uhuru Kenyatta, son of Kenya's first President, and William Ruto, Minister for Agriculture, have both gone to court to have their names expunged from the Commission's report. Sam Kiplagat, *Minister Moves to Clear Name in Poll Chaos Report*, CITIZEN (Mwananchi, Tanz.), Nov. 23, 2009, available at <http://www.thecitizen.co.tz/newe.php?id=15746>.

threshold of proof required for criminal matters in this country: that it be “*beyond reasonable doubt*”. It may even fall short of the proof required for international crimes against humanity.<sup>52</sup>

In conceding the paucity of time to invite responses from those adversely mentioned during its public and private hearings, CIPEV is clear that it was in possession of evidence that formed “a firm basis for further investigations of alleged perpetrators, especially concerning those who bore the greatest responsibility for the post-election violence.”<sup>53</sup> CIPEV did not, therefore, condemn any person unheard. Rather, it considered that in view of the crimes committed, evidence in its possession, while not capable of leading to a conviction in a criminal court, was sufficient to warrant further investigation with a view to prosecution and punishment. This action in the Commission’s view was necessary to ensure that the ingrained culture of impunity, a key factor in the institutionalization of violence in Kenya, was curtailed.<sup>54</sup> Moreover, to the ICC, CIPEV’s report is not a referral but a communication,<sup>55</sup> which on its own is not capable of bringing the ICC’s jurisdiction to bear on the Kenyan situation. The Prosecutor has made it clear that once leave is granted, his office will conduct its own independent investigation unencumbered by the contents of the sealed envelope.<sup>56</sup>

The ICC Prosecutor appears intent on engaging the Kenyan public at each step of the process, a strategy designed to ensure greater ownership of outcomes.<sup>57</sup> By identifying strongly with

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52. CIPEV Report, *supra* note 3, at 16–17.

53. *Id.* at 17.

54. *See id.* at 468–69 (“It is imperative to guard against further encouragement of the culture of impunity by granting blanket amnesty to all . . . . Having said that, we realize . . . that there are special challenges in terms of investigation and prosecution of post-election violence offences.”).

55. *See* INT’L CRIMINAL COURT, ANNEX TO THE “PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR”: REFERRALS AND COMMUNICATIONS 1 (2003) *available at* [http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy\\_annex\\_final\\_210404.pdf](http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf) (noting that only the Security Council or a state party can submit a referral to the Prosecutor; information provided by other sources are communications).

56. *See* Press Release, Int’l Criminal Court, *Waki Commission List of Names in the Hands of ICC Prosecutor* (July 16, 2009), <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr439> (“[T]he Prosecutor said . . . “[m]y Office will continue the collection of information, and I will reach an impartial conclusion as to whether or not to investigate those individuals or others, or none.”).

57. *See* Press Release, Int’l Criminal Court, *ICC Prosecutor: Kenya Can Be an Example to the World* (Sept. 18, 2009), <http://www.icc-cpi.int/menus/icc/>

the victims and urging the State to establish a comprehensive witness protection framework, the ICC Prosecutor has emerged as the public face for the fight against impunity in Kenya.<sup>58</sup> It is precisely this strength that could become a great disadvantage in the Kenyan case as hypothesized in the last part.

#### B. THE ATTITUDE OF AFRICAN STATES

The ICC's involvement in Kenya is taking place within the context of heightened suspicion on the part of African governments against what it perceives as the capture of the ICC by Western interests and its utilization as a tool of domination.<sup>59</sup> Africa's position is curious given that thirty out of fifty-three countries on the continent ratified the Rome Statute<sup>60</sup> with much enthusiasm. One commentator has pointedly observed that:

Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and kicking to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will, of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the

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press%20and%20media/press%20releases/press%20releases%20%282009%29/pr452 (stating the ICC's hope that Kenya become an example to the world on how to work together to end impunity and prevent future crimes).

58. The Kenyan press has sustained the use of ICC Prosecutor Luis Moreno-Ocampo as a metaphor for the fight against impunity. *See, e.g.,* Martin Mutua, *Ocampo Goes to Court to Indict Poll Violence Suspects*, STANDARD (Kenya), Nov. 21, 2009, available at <http://multimedia.marsgroupkenya.org/?StoryID=273145&p=STATE+HOUSE&page=2> ("Ocampo was also further reported to have said that he would go to various communities, see and listen to victims and collect evidence confidentially."); Cyrus Ombati, *Ocampo's Sword of Justice Sneaked in Discreetly*, STANDARD (Kenya), Nov. 6, 2009, available at <http://www.standardmedia.co.ke/InsidePage.php?id=1144027856&cid=4&ttl=Ocampo%E2%80%99s%20sword%20of%20justice%20sneaked%20in%20discreetly> (stating that Moreno-Ocampo's "arrival had been trumpeted like that of a king come to dispense justice to his subjects . . .").

59. *See Darfur and the ICC: Myths Versus Reality*, HUM. RTS. WATCH, Mar. 9, 2009, <http://www.hrw.org/en/news/2009/03/27/darfur-and-icc-myths-versus-reality> (noting that public controversy about ICC actions in Darfur came about partly because of the perceptions that the ICC is unjustly targeting African leaders and the ICC amounts to a new form of Western imperialism in Africa).

60. Critics of Sub-Saharan Africa's ratification suggest that accession to the ICC appears linked to domestic agendas of political reform rather than the imperatives of justice. *See, e.g.,* Claire Lauterbach, *Commitment to the International Criminal Court Among Sub-Saharan African States*, 5 EYES ON THE ICC 85 (2008).

most serious crimes of concern to the international community.<sup>61</sup>

Africa's current posture is therefore at best hypocritical and at worst grossly negligent, considering that the worst forms of atrocities known to man have most recently happened on its soil. Nevertheless, such an attitude has the potential to derail an initiative such as the ICC's current project in Kenya. Considering that the bulk of the ICC's present case portfolio in Africa was referred to it by states,<sup>62</sup> the criticism of the court as neo-imperialist is unjustified. Political leaders, however, will take advantage of such sentiments to adopt a more intransigent strategy that could undermine ICC investigatory work. It is not difficult to make use of such an approach when the African Union's Assembly itself has adopted a policy of non-cooperation vis-à-vis the ICC.<sup>63</sup>

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61. Hassan Jallow & Fatou Bensouda, *International Criminal Law in the African Context*, in African Guide to International Criminal Justice 16 (Max du Plessis ed., 2008) (quoting P. Mochokocho, *Africa and the International Criminal Court*, in African Perspectives on International Criminal Justice 243 (Ankuma & Kwakwa eds., 2005)). For a similar view, see also Max Du Plessis, *Africa and the International Criminal Court* (Ctr. for the Study of Violence and Reconciliation, Criminal Justice Conference Proceedings, 2005), available at <http://www.csvr.org.za/wits/confpaps/duplessis.htm>. Moreover, Kenya is one of those countries that was keen to preserve the integrity of the ICC while the United States Government under George Bush attempted to whittle down ICC's jurisdiction by coercing its allies into signing bilateral immunity agreements to shield American soldiers from the ICC (Article 98 exemptions). It cannot, therefore, turn back and join those clamoring for non-cooperation with the ICC.

62. Of the four situations under consideration by the Court (Uganda, Central African Republic, Sudan, and Democratic Republic of the Congo), three of the investigations were commenced as a result of referral by African States themselves under Article 14 of the Rome Statute. It is only the Sudan situation that was referred to the ICC through a resolution of the U.N. Security Council pursuant to Article 13(b) of the Rome Statute. For a more detailed appraisal of the Sudanese case at the ICC, see Submission from Georgette Gagnon, Executive Director, Human Rights Watch, Afr. Division and Richard Dicker, Director, Human Rights Watch, Int'l Justice Program, to Thabo Mbeki, Chairman, African Union High-Level Panel on Darfur (June 29, 2009), available at <http://www.hrw.org/en/news/2009/06/29/submission-african-union-high-level-panel-darfur>.

63. At the January 2009 Summit of the Assembly of Heads of States and Governments of the African Union, in response to what it termed the "abuse" of universal jurisdiction by European powers over the Darfur situation, the AU Assembly requested that the AU Commission, "in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010." The Assembly also called for a meeting of African states which are parties to the Rome Statute "to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon . . . ."

The greatest risk facing the ICC in Kenya, apart from direct resistance from the State and its functionaries, is the loss of public confidence. Presently, it seems that victims have overwhelmingly positive expectations that the ICC will not relent in pursuing the high and mighty whose criminal designs resulted in the killings, rapes, and pillaging. Experience from other African countries where the ICC has been active would caution against such high expectations.<sup>64</sup> Indeed, such is the fear of Chidi Adinkalu, who makes the case that the cost associated with international justice in Africa is currently borne by victims:

Victims . . . suffer threats of death, exile and other forms of persecution for their commitment to justice with little protection, assistance or acknowledgement . . . . Most victims need reassurance that when the neighbourhood mass murder arrives, their only defence is not the promise of a warrant from a distant tribunal . . . . They are right in asking that the promise of justice should be accompanied by credible protection from reprisals.<sup>65</sup>

The implications for victims in the Kenyan case are particularly dire considering that the bulk of them are internally displaced persons currently eking out a living in makeshift shacks. The ICC Prosecutor's present advocacy for a comprehensive witness protection policy in Kenya backed with assurances of reparation for victims seems designed to respond to this challenge.

### III. CONCLUSION

Utilizing the findings of CIPEV, this Article has reviewed

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Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, AU Doc. Assembly/AU/Dec.213(XII) (Feb. 1, 2009); *see also* Decision of the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, AU Doc. Assembly/AU/Dec.221(XII) (Feb. 1, 2009) (reiterating the request for ICC states parties to exchange views on the work of the ICC in relation to Africa). On July 1, 2009, the AU made a policy decision not to cooperate with the ICC with regard to the Sudan case. *AU Votes Against Cooperating with ICC Arrest Warrant for Bashir*, FRANCE24.COM, July 3, 2009, <http://www.france24.com/en/20090703-african-union-votes-end-cooperation-over-bashir-indictment-sudan-icc-darfur>.

64. For a general review of the experience of international justice in action in Africa to date, see INT'L REFUGEE RIGHTS INITIATIVE, INTERNATIONAL JUSTICE IN AFRICA: PROSPECTS AND CHALLENGES, REPORT OF WORKSHOP PROCEEDINGS (2008), available at <http://www.refugee-rights.org/Publications/2008/Workshop%20on%20International%20Justice%20in%20Africa.July%2017%202008.pdf>.

65. Posting of Chidi Odinkalu to African Arguments, <http://africanarguments.org/2009/08/saving-international-justice-in-africa/> (Aug. 4, 2009, 03:35 EST).

the feasibility of the ICC as a vehicle for addressing mass killings in the aftermath of a contested election two years ago in Kenya. In reaching the conclusion that the ICC's intervention is indeed necessary and timely, particularly in view of the gravity of the criminal offences perpetrated and the ingrained impunity that pervades Kenya's political culture, the paper has shown that the ICC must nevertheless be prepared to engage in an open investigative process that goes beyond the individuals identified in the CIPEV dossier. In pursuing its urgent work in Kenya, it will be important that the ICC have a strong witness protection scheme in place so those who suffered most from the post-electoral violence are not re-victimized by being exposed to the powerful forces bent on circumventing any legitimate trials. Equally, a clear outreach and communications plan to explain the ICC's role in Kenya and a strategy of dialogue with affected communities will serve to reduce tensions that could result from the ICC's intervention.<sup>66</sup> Most crucial is the need to use the Kenyan process to re-legitimize the role of international justice in a continent that is fast becoming cynical about its potential.

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66. For a similar proposal, see Posting of Korir Sing Oei to African Arguments, <http://africanarguments.org/2009/09/leashing-kenya%E2%80%99s-dogs-of-war-a-theoretical-assessment/> (Sept. 8, 2009, 09:42 EST).