

JOINT STATEMENT BY KENYANS FOR PEACE WITH TRUTH AND JUSTICE (KPTJ)
AND HUMAN RIGHTS WATCH

For Immediate Release

Kenya: Local Judicial Mechanism Should Complement ICC Cases
Reaffirm Support for Hague Trials While Pursuing Justice at Home

(Nairobi, April 27, 2012) – The Kenyan government should reaffirm its commitment to cooperate with the International Criminal Court (ICC) in cases stemming from the 2007-2008 post-election violence, while establishing a local judicial mechanism to investigate and prosecute other suspects, Kenyans for Peace with Truth and Justice (KPTJ) and Human Rights Watch said today.

The organizations expressed concern that, notwithstanding President Kibaki’s pledge in his April 24, 2012, State of the Nation address to pursue a local justice mechanism, new efforts are afoot to derail the ICC cases. Recent comments by other members of government and parliament have suggested that the two ICC cases against four prominent Kenyans accused of committing crimes against humanity during the post-election violence should be “brought back to Kenya.”

“We welcome President Kibaki’s statement that Kenya still wishes to establish a local mechanism to prosecute international crimes, and it should be translated into concrete action in the form of a credible mechanism that will vigorously pursue and bring to justice other perpetrators not currently facing trial at the ICC,” said Davis Malombe, Deputy Executive Director of the Kenya Human Rights Commission (KHRC), a member of KPTJ. “But politicians’ recent statements about bringing the ICC cases back to Kenya raise concerns that the proposed local mechanism could be a whitewash.”

The post-election violence claimed the lives of at least 1,133 people, displaced 650,000 others, and left thousands with physical and emotional scars of crimes including assault and rape. But more than four years later, Kenya has taken few concrete steps to identify and prosecute those responsible. The ICC, a court of last resort, opened investigations in 2010 after the government repeatedly failed to uphold pledges to prosecute the cases in Kenya. The president and the prime minister have repeatedly pledged to cooperate with the ICC process.

“Any efforts to withdraw the four cases that have already advanced at the ICC would only undermine Kenya’s obligation under international law and further delay justice for the victims and the accused persons,” said James Gondi, Head of the Kenya Program at the International Center for Transitional Justice. “A local mechanism should complement, not supplant, the ICC process.”

The Kenyan government already lost an “admissibility challenge” to the court’s ability to hear the cases, when ICC judges in May 2011 found no evidence that the government was actually investigating those named by the ICC. In January 2012, ICC judges confirmed charges against four suspects: Francis Kirimi Muthaura, head of the public service; Deputy Prime Minister Uhuru Muigai Kenyatta; William Samoei Ruto, a member of parliament; and Joshua arap Sang, a

radio journalist. Preparations for trial are under way.

President Kibaki's latest statement supporting a local judicial mechanism follows a trail of broken promises by the Kenyan government, including similar assurances in December 2008, November 2009, December 2010, and January 2012 that a local judicial mechanism would be established. But every effort to do so has been blocked by parliament or the cabinet.

The ordinary judicial system has not proven to be up to the task of delivering justice for the election violence. [Human Rights Watch research in 2011](#) found that while some low level perpetrators were convicted of petty crimes, most of those responsible for serious crimes – and virtually everyone suspected of organizing the violence – have benefited from impunity. Only two murder cases, and no rape cases, have resulted in convictions. No police officers have been convicted, despite evidence that police killed at least 405 Kenyans during the violence.

Kenya joined the ICC in 2005 and is obligated to cooperate with the court. While the Kenyan government has formally cooperated with the ICC, factions within the Kenyan political elite have attempted to circumvent it. In December 2010, parliament passed a motion to ask the government to withdraw from the Rome Statute, which created the ICC, though the government did not act on the request.

Kenya next petitioned the United Nations Security Council to defer the ICC cases for a year, on the grounds that ICC prosecutions were potentially divisive and could derail national reforms needed to pave the way for prosecutions in Kenya of the post-election violence. The Security Council—which can in exceptional cases defer ICC investigations where it finds a threat to international peace and security—held informal consultations on the request. But Kenya failed to find support for a deferral among Council members. Kenya then filed the admissibility challenge before the ICC, claiming that Kenya was capable of investigating and prosecuting the suspects. The ICC judges rejected the challenge, a decision upheld on appeal, holding that a promise to investigate is not enough to stop an existing ICC case.

Kenya has also held a number of diplomatic meetings with various members of the international community in a bid to garner support for the deferral of the Kenyan cases at the ICC. The African Union has also appeared to favour the Kenyan Government's efforts. The East African Legislative Assembly, on April 26, 2012 passed a resolution calling for the ICC cases against the four Kenyans to be tried in Arusha, Tanzania under the East African Community Treaty, although the court currently has no individual criminal jurisdiction.

Supporters of Kenyatta and Ruto, both of whom have declared their intention to be candidates in the March 2013 presidential elections, have embarked on a campaign to collect five million signatures to petition the ICC court to delay the trials until after the elections. The ICC spokesperson has called the campaign futile, since there is no legal basis for delaying trials in response to public pressure.

The Kenyan government has taken some steps recently that could begin to address impunity for election violence. The Director of Public Prosecutions, Keriako Tobiko, established a task force in February to expedite the prosecution of 5,000 post-election violence cases, and the task force has begun analyzing case files. However, the report of a previous Directorate of Public

Prosecutions task force, submitted to the ICC in March 2011 as part of the admissibility challenge, was deeply flawed and contained inaccurate information about the number and type of post-election violence cases that had resulted in convictions.

In March 2012, a working group of 10 prominent Kenyan and international lawyers, established by the attorney general to determine Kenya's response to the January 2012 ICC decision to send the four cases to trial, submitted its report to President Kibaki. Journalists and others who have seen the group's report, which has not yet been made public, have said the working group calls into question Kenya's political will to try the most senior perpetrators of post-election violence, and points out that there is no comprehensive government policy for dealing with crimes committed during the post-election violence. The report further notes that the government has inadequately funded witness protection, and that its assistance to victims has not met Kenyan or international standards for reparations.

Despite a lack of progress on these issues, several Kenyan politicians have recently called for the cases of the four accused to be "returned to Kenya." Fred Gumo, a member of parliament and cabinet minister, said the president and prime minister "ought to dialogue and approach ICC to bring the cases back to Kenya." Vice-President Kalonzo Musyoka questioned "whether Kenyans will be comfortable with matters of this country being discussed outside this country." And Information Minister Samuel Poghiso said that if the cases are heard at the ICC, they could produce tensions during the upcoming elections.

Kenyan politicians have painted the four accused as "victims," in spite of the fact that Kenya voluntarily submitted itself to the ICC's jurisdiction.

"Let's not forget who the real victims are," said George Kegoro of the Kenya Section of the International Commission of Jurists, a member of KPTJ. "They are the hundreds of women who were raped during the post-election violence, the hundreds of Kenyans who were shot by police, the mothers who lost their sons to ethnic violence, the children still languishing in IDP camps. We should support the ICC process, as the only initiative that has taken concrete steps toward ensuring justice for these victims."

With regard to President Kibaki's renewed call for a local judicial mechanism, KPTJ and Human Rights Watch noted that in order for such a mechanism to deliver justice successfully, it should be planned transparently, with maximum input from civil society, and considered complementary to the ICC's ongoing work. It should not be seen as a strategy aimed at bringing the cases against Muthaura, Kenyatta, Ruto and Sang back to Kenya.

A local mechanism should include a special investigatory unit consisting of credible and professional Kenyan and international investigators, to compensate for the weaknesses in Kenyan police investigations that have been documented by Human Rights Watch and others. Kenya should also consider including international judges, prosecutors, and witness protection experts, to concentrate expertise and assuage Kenyans' concerns that a local mechanism might be manipulated by politicians.

"The ICC is likely to only prosecute a handful of suspects, and a local judicial mechanism is

needed to bring justice in some of the thousands of remaining cases,” said Leslie Lefkow, deputy Africa director at Human Rights Watch. “But the Kenyan government should assure the public that it is committed to pursuing and supporting justice on all levels, both at the ICC and in Kenya, and should show that these are not just empty promises.”

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