

# AMNESTY INTERNATIONAL

## PUBLIC STATEMENT

06 April 2011  
AI Index: AFR 32/003/2011

### **KENYA'S APPLICATION BEFORE THE INTERNATIONAL CRIMINAL COURT: A PROMISE IS NOT ENOUGH TO PRE-EMPT THE COURT'S JURISDICTION**

Amnesty International is concerned at an application filed by Kenya before the Pre-Trial Chamber II of the International Criminal Court (ICC), requesting the Chamber to determine that the two cases before them on the 2007-2008 post-election violence in Kenya are inadmissible and should be deferred to Kenya's national courts.

While Kenya states in the application that all necessary reforms to investigate and try all cases arising from the post-election violence are being put in place, Amnesty International is concerned that the application contains empty promises which cannot be used to pre-empt the Court's jurisdiction.

The application states that significant amendments into Kenyan legal framework have been introduced since 2008, including the adoption of a new Constitution and the enactment of the International Crimes Act, whereby "[N]ational courts will now be capable of trying crimes from the post-election violence, including the ICC cases". The Rome Statute clearly provides that the Court shall determine that a case is inadmissible only where the case is *being or has been investigated* and *prosecuted* by a State which has jurisdiction over it. It is not enough to show that it is investigating a case or about to do so when the ICC Prosecutor has completed the investigation, obtained arrest warrants and is ready to prosecute the case as soon as the charges have been confirmed.

Despite the content of the application, no steps have been taken so far to establish a credible local judicial process that would have jurisdiction over the six persons against whom summons to appear were issued. Kenya has declared in its application that it would not be able to complete its investigations until September 2011, while the Prosecutor of the ICC is ready to prosecute any or all of the six suspects named in ICC summonses if/when the Pre-Trial Chamber confirms the charges. Granting the application would only delay prosecutions and justice, both for the victims and for the suspects.

Amnesty International fears that given the enormous problems with the Kenyan criminal justice system, as evidenced by the way it has failed to respond, or to respond effectively to the post elections violence for more than three years, and despite the large police and judicial reform programme initiated following the enacting of the new Constitution, it will not be possible to complete the investigations of these six suspects and prosecute those against whom there is sufficient admissible evidence by September or even in the foreseeable future.

The Witness Protection Amendment Act 2010, which became law in June 2010, substantially modified and improved the Witness Protection Act of 2006. The 2010 Act expanded the definition of a witness in need of protection and established an independent witness protection agency. However Amnesty International is concerned that the law is not yet fully operational and it is too soon to determine whether it will offer effective protection for victims and witnesses of the post-election violence. As of last year up to 22 witnesses who testified before a 2008 official inquiry into the post-election violence, who might be called to testify in future ICC or other court trials, were reported to be living in fear as a result of threats to their lives or

security. An unknown number of other potential witnesses have had to flee Kenya in the last three years because of similar threats against them.

In so far as Kenya may apply to the ICC for a deferral of the case, it must do so on the basis that it is able and willing genuinely to investigate and prosecute the crimes alleged to have been committed and provide adequate protection to witnesses or potential witnesses. Amnesty International remains concerned that this is not the case.

Amnesty International urges the Pre-Trial Chamber not to delay proceedings involving the six persons named in the summonses any further. The organisation also encourages the Kenyan government to ensure that a local credible judicial process is swiftly put in place to investigate, and where there is sufficient admissible evidence, to prosecute all other persons accused of crimes and human rights abuses, including possible crimes against humanity, during the election violence.

Amnesty International is also aware that the UN Security Council will hold a formal meeting on Kenya on 8 April to discuss the Kenyan government's call for the Security Council to request that the ICC defer the cases. Amnesty International remains concerned that any Security Council decision to defer the ICC's proceedings would constitute political interference with the judicial process and could result in impunity.

### **Background**

On 8 March 2011 the Pre-Trial Chamber of the ICC issued two summonses to appear for six Kenyan citizens suspected of bearing responsibility for crimes against humanity alleged to have been committed during the post-election violence of 2008 in Kenya. The six are; Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, Mohammed Hussein Ali, William Somoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.

This decision follows the ICC Prosecutor's applications to the Court, filed in December 2010, for summonses to appear of these six individuals on the basis that they are responsible for crimes against humanity alleged to have been committed during the violence. When the Pre Trial Chamber II authorized the investigation into the Kenyan post elections violence the Court also determined that the case was admissible – without prejudice to a challenge to admissibility.

The Pre-Trial Chamber requires the suspects to appear before the Court on 7 & 8 April 2011 for an initial hearing - a process whereby the Pre-Trial Chamber shall satisfy itself that the six persons have been informed of the crimes which they are alleged to have committed and of their rights under the Rome Statute and that there is sufficient admissible evidence for a prosecution to proceed.