Civil Society Statement on Kenya and the International Criminal Court

On December 15, 2010, International Criminal Court (ICC) prosecutor Luis Moreno-Ocampo requested summonses to appear against six Kenyan citizens for crimes against humanity alleged to have been committed during the post-election violence in Kenya in 2007-08. The request is currently under consideration by a pre-trial chamber of the ICC; no summonses have been issued to date.

Although the prosecutor’s application for summonses was widely welcomed by both local and international civil society, the Kenyan parliament passed a motion on December 22, 2010, urging the government to withdraw from the Rome Statute, the ICC’s founding treaty. While this motion is not binding on the Kenyan government, it has been reported that a group of Kenyan parliamentarians are preparing to table a bill which, if enacted, would effectively require the Kenyan government to withdraw from the Rome Statute.

Media reports also indicate that some Kenyan government officials are engaging in a diplomatic campaign to enlist the support of other African governments at the upcoming African Union (AU) summit for a United Nations (UN) Security Council deferral of the Kenyan cases under article 16 of the Rome Statute. These efforts are reportedly linked to government plans to establish a domestic judicial mechanism to try suspects of the post-election violence. It has also been reported that an earlier objective of this campaign may have been to call for a motion to be tabled at the AU summit to prompt the withdrawal of African states from the Rome Statute. Although Kenya’s Vice-President Kalonzo Musyoka has since been quoted in the Kenyan media as dismissing the withdrawal of other African states from the Rome Statute as an aim of the campaign, he has also been quoted as affirming that he was under instructions to unequivocally move any prosecutions of crimes arising from the 2007-8 post-election violence from the international arena to Kenya.

However, despite committing to the creation of a special tribunal for the post-election violence in December 2008, to date, the Kenyan government has taken no real action on national trials and the special tribunal has not been created. Credible national trials for those responsible for the post-election violence would be welcome. Indeed, to bring full accountability for the violence, national trials are necessary to complement the work of the ICC. But domestic trials should not be used to derail or defeat the ICC process.

It is in this regard therefore that we, the undersigned civil society organizations, urge the Kenyan government and parliament to reaffirm their support for the ICC and put a stop to any attempts to undermine the Rome Statute system and the ICC’s Kenya investigation, including through withdrawal or seeking deferral. We also urge the Kenyan government—in particular the President and the Prime Minister—to clarify its position with regard to the Rome Statute more broadly, and its obligations to cooperate with the ICC in the cases currently before the court.

Kenya’s withdrawal from the Rome Statute would mark a severe break with its commitment to the fight against impunity. In ratifying the Rome Statute in 2005, Kenya—along with the ICC’s 113 other member countries—dedicated itself to the defense of victims’ rights and to bringing to
justice perpetrators of the most serious crimes. Withdrawal now would signal the intention to side with the perpetrators of Kenya’s post-election violence rather than its victims.

The Kenyan government should note that withdrawal from the Rome Statute would not suspend ongoing ICC investigations or judicial proceedings that commenced prior to the date of withdrawal, and that, in any event, Kenya would remain required to cooperate with the ICC on obligations that arose while Kenya was a state party to the court.

As a court of last resort, the ICC places the primary obligation on national authorities to carry out prosecutions. Should Kenya decide to pursue national trials involving those individuals against whom ICC summonses may be issued, it could challenge the court’s jurisdiction over these specific cases under article 19 of the Rome Statute. For a case to be found inadmissible, national proceedings must encompass both the person and the conduct that is the subject of the case before the ICC. This process does not require withdrawal from the Rome Statute.

Similarly, the Kenyan government must be reminded that conducting national trials is not a basis for a UN Security Council deferral of the ICC’s investigation under article 16 of the Rome Statute. An article 16 deferral is intended only in exceptional cases to maintain or restore international peace and security. It is unlikely that ICC investigations in Kenya are detrimental to international peace and security. Moreover, it should be noted that impunity for past cycles of post-election violence in Kenya is widely believed to have contributed significantly to the 2007-08 violence and instability.

African governments, together with civil society, played an active role in establishing the court. We therefore call on our governments to stand firm in their support for the ICC, and reject steps which would undermine the court at the upcoming AU summit. Instead, African ICC states parties should build on important achievements to date and continue to advance justice for victims of human rights violations, including victims in Kenya. The AU’s Constitutive Act, in article 4, calls for, among other things, the rejection of impunity. The ICC is an integral component of this effort.

January 25, 2011

**Organizations Supporting this Statement:**
1. Access to Justice, Lagos, Nigeria
2. Action Against Impunity for Human Rights (ACIDH), Lubumbashi, DRC
3. Action of Christian Activists for Human Rights in Shabunda (ACADHOSHA), South Kivu, DRC
4. Africa Legal Aid
5. Africa Centre for Open Governance (AfriCOG), Kenya
6. African Assembly for the Defense of Human Rights (RADDHO), Dakar, Senegal
7. African Association for the Defence of Human Rights (ASADHO), DRC
8. Amnesty International, Dakar, Senegal
9. Association of Lake Kivu Shipowners (ASSALAK), South Kivu, DRC
10. Benin Coalition for the International Criminal Court, Cotonou, Benin
11. Burundi Coalition for the International Criminal Court, Bujumbura, Burundi
12. Children Education Society (CHESO), Dar es Salaam, Tanzania
13. The Center for Research on Environment, Democracy and Human Rights (CREDDHO),
    Goma, DRC
14. Central African Republic Coalition for the International Criminal Court, Central African
    Republic
15. Cite des Droits de l’Homme et de Paix (CIDHOP), DRC
16. Civil Resource Development and Documentation Centre (CIRDDOC), Enugu, Nigeria
17. Civil Society Alternative Process of Sierra Leone (CSAP-SL), Sierra Leone
18. Coalition of Eastern NGOs (CENGOS), Enugu, Nigeria
19. Coalition for Justice and Accountability, Freetown, Sierra Leone
20. Comorian Coalition for the International Criminal Court, Comoros
21. Congolese Coalition for Transitional Justice (CCJT), DRC
22. Congolese Initiative for Justice and Peace (ICJP), Bukavu, DRC
23. East and Horn of Africa Human Rights Defenders Project (EHAHRDP), Kampala,
    Uganda
24. Federation of Women Lawyers (FIDA), Nairobi, Kenya
25. Freedom and Roam, Uganda
26. Global Call to Action Against Poverty (GCAP), Arab Region Secretariat
27. Human Rights and Advocacy Network for Democracy (HAND), Khartoum, Sudan
28. Human Rights Network-Uganda (HURINET), Kampala, Uganda
29. Human Rights Watch, Johannesburg, South Africa
30. Independent Medico-Legal Unit, Kenya
31. International Center for Policy and Conflict (ICPC), Nairobi, Kenya
32. International Center for Transitional Justice (Africa)
    Africa
34. International Gay and Lesbian Human Rights Commission, South Africa
35. International Society for Civil Liberties and the Rule of Law, Onitsha, Nigeria
36. Ivorian Coalition for the International Criminal Court, Abidjan, Ivory Coast
37. Kenya Human Rights Commission (KHRC), Nairobi, Kenya
38. Kenyans for Peace with Truth and Justice (KPTJ), Kenya
39. The Kenya Section for the International Commission of Jurists, Nairobi, Kenya
40. Kituo cha Sheria, Kenya
41. The Law Society of Zimbabwe, Harare, Zimbabwe
42. League for Peace and Human Rights in the DRC (LIPADHO), DRC
43. Liberia Coalition for the International Criminal Court, Monrovia, Liberia
44. Livelihood Improvement Programme (LIPRO), Uganda
45. National Coalition on Affirmative Action, Enugu, Nigeria
46. National Organization for Legal Assistance (NOLA), Dar es Salaam, Tanzania
47. Nigerian Coalition for the International Criminal Court, Abuja, Nigeria
48. Open Society Justice Initiative
49. The Populace Foundation-Uganda (TPF-Uganda)
50. Réseau des Associations des droits de l’Homme du Sud Kivu (RADHOSKI), DRC
51. Solidarity of Women for Peace and Integral Development (SOFEPADI), North Kivu and
    Orientale, DRC
52. SOS Exclusion, Ivory Coast
53. Southern Africa Litigation Centre, Johannesburg, South Africa  
54. Trade Union Confederation of Sierra Leone (TUC-SL), Sierra Leone  
55. Uganda Coalition for the International Criminal Court, Kampala, Uganda  
56. Victimes du Régime de Hissène Habré, Chad  
57. VISION Humanitaire Mondiale, DRC  
58. West African Bar Association, Abuja, Nigeria