

**OUR JOINT STATEMENT BEFORE PARLIAMENTARY COMMITTEE ON DEFENCE AND  
FOREIGN RELATIONS**

**WEDNESDAY July 18, 2012**

**Background to the International Criminal Court (ICC) Process in Kenya**

- **The ICC is a government project, invited by this parliament to identify and prosecute perpetrators of the 2007/8 election related violence;**
- Following the outcome of the disputed 2007 general elections, Kenya descended into the worst episode of violence in her independent history;
- During the post-election violence, it is estimated that 1,300 people died and about 600,000 people were displaced from their homes;
- The violence only relented when a peace agreement was reached and signed by President Kibaki and Prime Minister Raila Odinga;
- As part of the National Accord process, it was agreed that a Commission of Inquiry Into Post-Election Violence (CIPEV, otherwise known as the Waki Commission) be established to investigate the violence; This was a government Commission.
- President Kibaki and Prime Minister Odinga signed and accepted the Waki Report including its recommendations, one of which was to set up a Special Tribunal or, if that was not done, hand over the matter to the International Criminal Court to start the process of accountability.
- The Constitution of Kenya applies all treaties and conventions that have been ratified by Kenya to be part of the Laws of Kenya; that Kenya ratified the Rome Statute on the 15th March 2005 and followed up by domesticating the Statute through the International Crimes Act of 2008;
- The Waki report, **adopted unanimously by Parliament**, recommended that the government set up a local special tribunal to prosecute those responsible for the worst crimes. The idea was rejected **by Parliament who voted in favor of the Hague process THREE times, signaling their support for the ICC process;**
- Thus, the cases currently underway at the Hague are being carried out at the behest of Parliament, and Executive and not of any other person or authority.

**WHAT RELATIONSHIP BETWEEN PARLIAMENT AND ICC**

The ICC is an international institution established under the Rome Statute which Kenya is a state party. The Court in carrying out its work in Kenya which is a situation country can get information from individuals or organisations. Any organ of the court may further use as intermediaries individuals or organisations in state parties. This is not unique to Kenya. It happens in all the other situation countries.

The Court relies on intermediaries for purposes of outreach, to reach victims of atrocities and facilitate their participation in proceedings before the court.

That said and with utmost respect to this committee, it is not within the jurisdiction of parliament to demand information on any alleged engagement we have with the ICC either as individuals or as an organisation for the following reasons:

- If any such engagements existed, it would breach their confidential nature which they are based on. Pursuant to **Regulation 97 of the Registry's Regulation**, there is an obligation of confidentiality between the court and persons or organisations serving as intermediaries;

- Needless to state, it would defeat the whole purpose if any individual acting as an intermediary were to be questioned on his or her engagements before a parliamentary committee. Any such relationship is based on high standards of confidentiality because of the obvious security concerns which this committee is aware of;
- We wouldn't be in breach of any law by engaging with the ICC within the bounds of the law;
- The Court (ICC) has its own mechanisms to sanction any of its organs in case of any breach of law;
- The subject matter of this inquiry has no bearing on any alleged engagement or association with the Court;
- If a question arose on the conduct of any individual acting as an intermediary then the right forum would be the Court itself. That said, we would not delve any further on the question of our alleged association with the ICC.

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### **ANSWERS TO THREE QUESTIONS:**

That on or around the 3<sup>rd</sup> July, the Parliamentary Departmental Committee on Defense & Foreign Relations wrote similar letters to the undersigned inviting us to appear before them to provide information on an investigation being carried out by the Committee on allegations against the United Kingdom regarding some Kenyans who are due to be tried by the International Criminal Court (ICC). These allegations are apparently evidenced by documents tabled in the House on 8<sup>th</sup> March, 2012.

**We have not been given an opportunity to review these documents (tabled on 8<sup>th</sup> March), despite our requests for them, and take this early opportunity to again request that they be provided to us expeditiously to allow us to prepare ourselves accordingly.**

**We require further clarity on the terms of reference of the investigation being carried out by the Committee, and the relation of those terms of reference to the three questions above.**

### **RESPONSE TO THREE QUESTIONS**

Following our requests to the Committee for more information, the Committee wrote to us on or around the 13<sup>th</sup> July outlining three questions the Committee wished to interrogate, allegedly on the basis of evidence before it:

1. You have close ties with the ICC witnesses;
2. You have close ties with the Financial supporters of the ICC; and
3. There exist a relationship between your NGO and the ICC.

Until we have further clarity, we can only respond to the questions above as follows:

1. *You have close ties with the ICC witnesses;*

**Who are the ICC witnesses? This is not public information and the ICC has consistently used numbers instead of names or redacted their names in their public documents. We are only able to respond to this question if the Committee**

could provide the names of the witnesses, who could even be among the members of this House.

2. You have close ties with the Financial supporters of the ICC;

**Yes. As a signatory to the Rome Statute, Kenya is a member of the Assembly of State Parties which provides financial support to the ICC. Therefore, as law abiding, taxpaying Kenyans, we do have a close tie to a financial supporter of the ICC: Kenya – like you, the members of this House.**

3. There exist a relationship between your NGO and the ICC.

**Please define this relationship. It appears you (the Committee) have more information on this than we do.**

John Githongo \_\_\_\_\_ Ndung'u Wainaina

Tom Mboya \_\_\_\_\_ Maina Kiai