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**PRELIMINARY REPORT ON CONFIRMATION OF CHARGES  
HEARINGS PROCESS IN THE KENYA CASE 1 – ICC - 01/09-01/11,  
THE PROSECUTOR –V- WILLIAM SAMOEI RUTO, HENRY  
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

## **About International Center for Policy and Conflict, ICPC**

The International Centre for Policy and Conflict is a Nairobi-based Non-Governmental Organization registered in 2005 in Kenya under the Trustee (perpetual succession) Act. The Center is an affiliate of Africa Open Democracy Foundation and partner of Africa Rights and Democracy Institute.

It focuses and exists to stimulate and support informed policies dialogue, develop human capacities and research communications that promote and safeguard human dignity, freedom, justice and equality for all in line with universally recognized standards through building democratic, peaceful, secure and just societies.

Its core programs consist of: *transitional justice, human rights and rule of law; human security, sustainable development and conflict; Gender Justice; capacity building, partnership and information; communication and public affairs and Regional and International advocacy.*

## **Executive Summary**

The preliminary report documents historical background, emerging legal issues and their relevance to victims (represented and unrepresented) of case I of the Kenyan Situation before the ICC. It summarises our monitoring process of the confirmation charges hearing in case I and the perception of victims as to its relevance. The overriding objective is to assess how engaged victims are with the ICC process. On the overall, the report identifies complex legal procedures and issues that inform the process as a major obstacle to many victims directly following the process. Many a times the victims have to engage other people for interpretation, which again make them vulnerable to misinformation. However, our interactions with the victims indicate that they tend to understand basic issues surrounding the confirmation process including the suspects, important dates and the steps expected. It would appear that wide national media coverage in Kenya has helped in this regard. Going forward, the report identifies main issues, especially for victims, during the confirmation process that will need to be addressed by the government and other stakeholders. These include;

- a) **Rising tension:** Most victims reported heightened tensions and threat to their security especially in the Rift Valley.
- b) **Management of Expectations:** It appears most victims have vested all their hopes on the ICC process. There is no expectation of justice being served domestically. It may be advisable that these expectations be managed as the ICC process could turn to be rather long.
- c) **Local Justice:** The victims appear to be so far having confidence in the process largely because they were able to follow it. The level of confidence would have however been higher had the victims had their representatives during the confirmation process. Considering that in the end the ICC process is only designed for those perceived to bear most responsibility, it remains important that local mechanisms of bringing other categories of perpetrators to account still be explored. The issue of local tribunal should not be entirely shelved.
- d) **Political Interference:** Political rhetoric and divergent interpretations that politicians and commentators gave the process also tended to be unhelpful. It tended to confuse the victims. It would have been better for the ICC outreach division to do more to coordinate official information.

## **Introduction**

Since 2005, ICPC has practically implemented and participated locally and internationally in programmes of access to justice and human rights that works closely with community groups to address the plight of persons who have suffered human rights violations. It has conducted workshops for sensitization and an advocacy on critical areas related to justice, peace and conflicts, but more so, has engaged on the national and regional policy formulations as a way of influencing changes towards promoting good governance and democracy.

Following the post-election violence of Kenya in 2007/08, the Centre has been engaging the victims' rights within the transitional justice mechanisms through invariably organising trainings for community leaders and representatives of the victims since 2008. Likewise, ICPC has done a number of media advocacy and publication reports on critical areas of transitional justice processes, human rights and related debates.

Currently the ICPC has undertaken a monitoring and reporting process of the status and analysis impacts of the Kenya cases before the International Criminal Court (ICC) to help the public and the victims to be updated on the unfolding events. ICPC in this respect has summarized a report to form a preliminary assessment of Case 1 with victims' considerations in mind which will be followed by another report of Case 2 at the end of its hearing.

We hope Kenyans find it useful in appreciating the implications of the ICC process for human rights and the rule of law in Kenya.

## Part One

### **1. Background Situation of Kenya Case 1.**

The Kenyan case (1) is among the cases filed by the Office of the Prosecutor (OTP) in relation to the Kenyan post election violence of the 2007/8. It has named the six suspects, being William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang in the first scheduled<sup>1</sup> and the remaining three of the suspects, being Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.<sup>2</sup>

According to the document of charge before the Pre-Trial Chamber II of the International Criminal Court (ICC), the first three suspects are accused of crimes of murder, forcible transfer of people and persecution as crimes against humanity within the meaning of the Statute of the Court.<sup>3</sup> The crimes are alleged to have been committed in relation to the violence in Rift Valley, specifically in Uasin Gishu, Kapsabet and Nandi Hills districts.<sup>4</sup>

William Ruto and Henry Kosgey are charged as indirect co-perpetrators of the crimes meaning they were part of or had knowledge or control of the network that committed the crimes without physically committing the crimes themselves. On the other hand, Joshua Arap Sang was absolved of the charges on account of indirect co-perpetration but the Pre-Trial Chamber nonetheless found substantial grounds to believe that he could be responsible within the meaning of Article 25 (3) of the Statute.<sup>5</sup> This primarily relates to his alleged radio broadcasts which furthered criminal intention of the network<sup>6</sup> that committed alleged crimes.

### **2. Historical Developments on the Case I and the Kenyan Situation.**

The Kenyan Situation arose out of the post election violence in 2007/08. It is alleged that organised and systematic crimes were committed targeting specific populations. According

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<sup>1</sup>ICC 2011. Situation in the Republic of Kenya'. Hague. Accessed on <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/> ( 15/09/2011)

<sup>2</sup> Ibid.

<sup>3</sup> Rome Statute of the International Criminal Court. 1998. Article 7(a),(d) and (h), establish the crimes of murder, forcible transfer of population/deportation and persecution as crimes against humanity. It entered into force on 1 July, 2002 thereby making the crimes universal crimes.

<sup>4</sup>ICC. 2011. Case Information Charge Sheet: on the Kenyan Situation. Hague. available on <http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf> (accessed on 15/09/2011).

<sup>5</sup>ICC 2011. Situation in the Republic of Kenya. Hague. Accessed on <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/> ( 15/09/2011)

<sup>6</sup> ICC Pre trial chamber (II). 2011. Situation in the republic of Kenya: in the case of the Prosecutor v. William Samoei Ruto, Henry Kosgey, and Joshua Arap Sang. Documents containing the charges- the organization leadership, structure and functioning of Rutos's and Koskey's Network. Chapter IV (C), P, 14. [www.icc.org](http://www.icc.org). Retrieved on 29<sup>th</sup> Sept, 2011.

to the Office of the Prosecutor, the populations were reportedly identified along ethnic/tribal lines and based on perceived political affiliations to either PNU or ODM.<sup>7</sup> In Case I situation, the victims were those perceived to be pro-PNU. The first wave of violence was witnessed predominantly in Rift Valley, Nyanza, Western Provinces and some parts of Nairobi. These are alleged to have targeted members of the Kamba, Kikuyu and Kisii ethnic groups who were perceived to have supported the PNU during elections<sup>8</sup>.

The second wave of violence, deemed to have been planned as retaliatory attacks, was predominantly executed in Naivasha, Nakuru and parts of Nairobi.<sup>9</sup> It is reported that it targeted members of Luhya, Luo and Kalenjin ethnic groups.<sup>10</sup> It is due to this wave of organised violence that the Commission of Inquiry into Post-Election Violence (CIPEV) (also called 'Waki Commission') was formed in 2008 to investigate and make recommendations.<sup>11</sup> This was as a consequence of the Kenya National Dialogue and Reconciliation (KNDR) process spearheaded by H.E Dr. Koffi Annan and the Panel of Eminent African Personalities. The other members of the Panel were H.E. Dr. Grace Machel of South Africa and H.E. Benjamin Mkapa of Tanzania.<sup>12</sup>

In its report and recommendations, CIPEV identified that serious crimes that meet the crime of international threshold were committed in Kenya and recommended formation of a local tribunal to try the suspects deemed to have perpetrated the violence.<sup>13</sup> Such a local tribunal was anticipated to be independent from the Kenyan Judiciary with independent prosecution and significant international participation. In essence, CIPEV was recommending formation of a special tribunal for Kenya with operational and structural systems similar to other UN-backed tribunals of UNICTR & ICTTY. It was only in default of forming the anticipated

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<sup>7</sup> ICC. 2011. Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang' delivered on 8 March 2011.Hague. pp.8. Available on <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf> (accessed 16/09/2011). CIPEV reported that the targets were largely organised and coordinated with the first wave targeting communities that were deemed to have supported PNU whilst the second wave was organised by PNU supporters and pro-PNU Mungiki sect to retaliate.

<sup>8</sup> ICC Pre trial Chamber (II). 2011. Situation in the republic of Kenya: in the case of the Prosecutor v. William Samoei Ruto, Henry Kosgey, and Joshua Arap Sang. Documents containing the charges-facts relevant to chapter 7 chapeau elements, widespread or systemic attack. Chapter (V) P, 11.www.icc.org. Retrieved on 29<sup>th</sup> Sept, 2011.

<sup>9</sup> ICC . 2011. Prosecutor claims Ali created 'free zones' to allow sect attacks. Hague. Available on <http://www.standardmedia.co.ke/hague/InsidePage.php?id=2000043389&cid=653&story=Prosecutor%20claim%20Ali%20created%20%E2%80%98free%20zones%E2%80%99%20to%20allow%20sect%20attacks> (accessed 16/09/2011)

<sup>10</sup> Waki Commission report. 2008. Kenya post election violence: criminal attacks by mungiki and Kikuyu politicians. Nairobi, Kenya. Chapter 3. p, 113. www.dialoguekenya.org/docs/PEV. Retrieved on 29<sup>th</sup> Sept 2011

<sup>11</sup>Commission of Inquiry into the Post-Election Violence (CIPEV). 2011. see [http://reliefweb.int/sites/reliefweb.int/files/reliefweb\\_pdf/node-319092.pdf](http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-319092.pdf) (accessed on 16/09/2011)

<sup>12</sup> Kenya National Dialogue and Reconciliation. 2011. One Year Later' for detailed discussion on the background to the national dialogue process in Kenya and progress made in reconciling the country following the divisions caused by the post-election crisis. More available on <http://kofiannanfoundation.org/kenya> (accessed on 16/09/2011).

<sup>13</sup> See no. 8 above

special local tribunal that the situation was to be referred to the International Criminal Court (ICC) to try those perceived to be most responsible for the alleged crime. Generally, those suspected as most responsible were perceived to be those in the special sealed envelope that the CIPEV surrendered to the custody of the Panel of Eminent African Personalities.<sup>14</sup> However, it should be underscored that to date, nobody can say with certainty as to whose names were in the envelope.

As many may have by now known, Kenya failed to establish the special local tribunal for, amongst other reasons, lack of political goodwill. The Panel of Eminent African Personalities was therefore left with no option but to hand over the envelope and available pieces of evidence to the Prosecutor of the ICC on 16th July 2009.<sup>15</sup> It is on this backdrop that the Kenyan case found itself before the ICC after the prosecutor of the court initiated his investigation.

## **Part Two**

### **3. Toward Confirmation Hearings**

In the journey to the confirmation hearings proceedings, the office of the Prosecutor was required to surmount certain legal steps that we outline below. At most of these stages, the role and place of victims was not quite visible and they had no legal representation. Indeed, majority of victims had to rely on disparate non-governmental organisations and other informal channels to keep abreast with the ICC process. This can also be attributed to the legal vacuum in the ICC Statute that only seeks to accord victims' formal recognition in its processes at the commencement of confirmation process.<sup>16</sup> The major shortcoming of this scenario is that in a situation like Kenya where victims are not given requisite recognition and their immediate needs taken care of; they become vulnerable to manipulation and are exposed to prolonged suffering. Indeed, those most affected may also succumb to their injuries and resultant infections.

#### **i. Authorisation of Investigations**

In both case I II, the Kenyan Government failed to either establish a special tribunal as recommended by CIPEV. The government also reneged and or was reluctant to refer the case to the ICC Prosecutor as envisaged under article 14 of the Statute of the Court, despite its publicly stated commitment to cooperate with the Prosecutor. Accordingly, the

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<sup>14</sup> Daily Nation of 6 June 2011 on 'Waki gave Annan secret list to beat impunity, panel told' <http://www.nation.co.ke/News/politics/Waki+gave+Annan+secret+list++to+beat+impunity+panel+told+/-/1064/1176228/-/kvjkb3/-/index.html> (accessed on 16/09/2011).

<sup>15</sup> ICC press release 'Waki Commission list of names in the hands of the prosecutor'. Accessed on <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr439> (16/09/2011).

<sup>16</sup> Rome Statute of the ICC. 1998. Prosecutor. Article 15(3) p, 11

Prosecutor was constrained to move on his own (*proprio motu*) as guaranteed by the statute of the court and request the Pre-Trial Chamber to authorise investigations in Kenya.<sup>17</sup> This led to the Pre-Trial Chamber II, vide its decision of 31 March 2010, to authorise the Prosecutor to commence investigations.<sup>18</sup> Legally speaking, the test of proof is low at this stage. All the prosecutor is required to do is to establish that there are reasonable grounds to believe that crimes within the Statute of the court may have been committed in the jurisdiction of a State party. In fact, many a time, media reports or reports by non-state actors may trigger such a request and suffice to persuade the Chamber to authorise investigations. At this stage, the Statute is not clear on the role of victims. In Kenya however, it was clear that the potential victims were identifiable at the Pre-Trial Chamber authorised investigation as many NGOs had engaged them right from the time the violence subsided. It was therefore in order for the OTP to be expected to commence his investigations from this position of 'known to unknown.' This explains why many organisations may have submitted their reports to the OTP some of which the office relied upon at the confirmation of charges hearings. These reports include CIPEV report, KNHRC report, Human Rights Watch report and that of UN Special Rapporteur Prof. Philip Alston.<sup>19</sup>

## **ii. Request for Summonses**

The Kenyan Case I then proceeded to request for issuance of summons stage. At this stage, the Prosecutor is presumed to have finalised substantially his investigations and has evidence linking the persons against whom he is seeking summonses or warrants of arrest. By this time, the OTP was expected to have substantial evidence against William Ruto, Henry Kosgey and Joshua Arap Sang to believe their involvement in commission of the alleged crimes. Accordingly, the Prosecutor requested for summons under Article 58(7) of the Rome Statute on 15 December 2010 against the three suspects for crimes they are alleged to have responsibility.

As earlier outlined, the Prosecutor alleged that they are criminally liable for crimes of humanity under Article 7 of the Statute. This request was confirmed when the Pre-Trial Chamber II issued summons for William Ruto, Henry Kosgey and Joshua Arap Sang on 8 March, 2011 and set the date of their first appearance for 7 April 2011. Again it shows that the Pre-Trial Chamber II was convinced at this stage that the OTP had done investigations and submitted credible evidence that established reasonable grounds for responsibility to be apportioned. By agreeing to issue the summons what it means is that the Prosecutor had submitted sufficient evidence to the Pre-Trial Chamber that, on the face of it, pointed

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<sup>17</sup> Rome Statute of the ICC. 1998. Prosecutor. Article 15(1). P, 11.

<sup>18</sup> ICC. 2011. Pre- Trial Chamber II 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' 31 March, 2010. Available on <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (15/09/2011)

<sup>19</sup> United Nations High Commissioner for Human Rights: Report from OHCHR fact finding mission to Kenya, 6-28 Feb, Geneva. [www.ushaidi.com/report](http://www.ushaidi.com/report) on post election violence in Kenya. Retrieved on 29<sup>th</sup> Sept 2011.



toward involvement of the suspects in commission of crimes for which the summonses were sought.

Again at this stage the role of the victims in the process is not apparent but it was possible to discern more interests on the part of the ICC on victims and witness protection systems in Kenya.<sup>20</sup> What this possibly point is appreciation by the court that victims form a significant constituency to its mandate that it needs to engage. Nevertheless by this time, the Centre had already engaged victims of the violence through without necessarily differentiating them along the lines of the two cases and with a view of helping them to participate in local processes that were expected to be established. Hopes were however dwindling as to the commitment of the government to any local credible judicial process.

### **iii. Confirmation of Charges Hearing**

After the first appearance on the 7 April 2011, which was largely procedural, the Pre-Trial Chamber II set the date for commencement of confirmation of charges hearings for 1 September 2011. This is in line with Article 61 of the Statute. It is at this stage that the direct participation of the victims became visible as the Pre-Trial Chamber proceeded to appoint a common legal representative for victims in the person of Ms Sureta Chana. The next part assesses the confirmation of hearings processes and place of victims.

## **Part Three**

### **4. Legal and Procedural Issues at Confirmation of Charges Stage –Case I**

What is exactly the law that guides this crucial stage and how does it allow for victim participation? Article 61 (5) provides the entry point for the procedure at the confirmation of charges stage.<sup>21</sup> Subject to his own assessment, especially where security and identity of victims is of concern, the Prosecutor may opt for written statements of witnesses. This is what the prosecution adopted at this stage. It also guides the defence teams as it outlines actions they may take at this stage in opposition to the Prosecutor's case including raising formal objection, challenging evidence that is presented and introducing their own evidence.<sup>22</sup> This explains why both Ruto and Sang opted to call their own witnesses.

On victims, the common legal representative is expected to have conducted preliminary assessment of their situation and interviews. No formal statements are necessary from them

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<sup>20</sup> Victims working group. 2011. ICC victims Legal rights update: situation in the republic of Kenya, Pre trial Chamber II decides on a framework for victims participation- victims not allowed to participate during initial appearance. P. 6. [www.vrwg.org/legal](http://www.vrwg.org/legal) update. Retrieved on 29th Sept 2011.

<sup>21</sup> At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

<sup>22</sup> At the hearing, the person may: (a) Object to the charges; (b) Challenge the evidence presented by the Prosecutor; and (c) Present evidence

as those are easily deducible from the formal applications they made to be included as victims. The common legal representative is ordinarily expected to address the court and highlight key issues of concern to victims. In this case, Ms Chana spoke to great detail on their suffering occasioned by the post-election violence, their perception on responsibility, their fear of reprisals and further violence as a reaction to the ICC trials, their expectations from the court and the inaction of the Kenyan authorities.

However, for the Chamber to confirm charges at this stage, it must analyse the evidence provided by the Prosecutor so that it is convinced that there are substantial grounds to believe that the suspects committed the alleged offences. In doing this the Chamber, must be so convinced of the existence of both the subjective and objective elements that constitute criminal liability of an alleged offence.<sup>23</sup> And the burden of proof for establishing the both subjective and objective elements in the case is with the OTP at this stage.

### **5. What Should the Victims Expect at this Stage?**

Materially, nothing accrues to the victims at this stage. That is not the purpose of confirmation of charges hearings and indeed that of the whole ICC process. In any case, the guilt or otherwise of the suspects is yet to be determined. Procedurally, the victims through their common legal representative are still engaged. The legal representative is required to submit a final written submission on behalf of the victims. In preparing her submission, the common legal representative is expected to widely consult the victims inform of interviews and data collection.

### **6. Emerging Jurisprudence from Confirmation of Charges Hearings.**

No one can tell with certainty what the Pre-Trial Chamber II will decide on this case. The options available to it is to either confirm the charges and direct full hearing before a different Trial Chamber, reject the case and dismiss it altogether, or ask the Prosecutor to conduct further investigations.

However, emerging jurisprudence from the ICC seems to establish guiding threshold for the Chamber which it might follow. For instance, in the *Prosecutor v. Thomas Lubanga Dyilo* (ICC -01/04-01/06), the Pre-Trial Chamber was clear on what it expects of the prosecutor at the that confirmation stage;

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<sup>23</sup> ICC. 2009. *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, As consistently held in the jurisprudence of the Court, the concept of co-perpetration or joint commission of crimes encompasses both objective and subjective elements. On the basis of the evidence submitted by the Prosecutor in support of each charge, the Chamber may only confirm the charges brought against the suspects in the DCC as co-perpetrators if both the objective and the subjective elements of co-perpetration, attain the threshold of substantial grounds to believe required by article 61 of the Statute, para 127

It is neither a trial before the trial nor a mini trial and that the purpose of the confirmation hearing is limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the defence against wrongful and unfounded charges<sup>24</sup>.

From this reasoning, the question that lingers in mind is whether the both parties followed the due procedure in trying to convince the court. In the Abu Garda case, the court tried to define the role or obligation of the Prosecutor at this stage which is to establish a proper connection between a given event which is a crime and a given individual as perpetrator for the event. It appears from this reasoning that the threshold that the Prosecutor is required to meet is quite low. The standard of proof is not beyond reasonable doubt required after a full hearing in a criminal case.

The defence accused the Prosecutor of not bringing out exculpatory evidence<sup>25</sup>. They therefore urged the Pre-Trial Chamber II to dismiss the case. At this stage this may not be fatal because if the Judges of the Pre-Trial Chamber II feels that the Prosecutor has not done enough, they can, pursuant to Article 61 (7), order the Prosecutor to provide the chamber with more evidence.<sup>26</sup> The Defence also exercised its right to object to the charges and challenge the evidence presented by the Prosecutor.

This notwithstanding, the threshold at this stage as established by the Abu Garda Case is “*substantial grounds to believe*”. The next question is to determine whether the case presented by the prosecutor establishes reasonable grounds to believe that the 3 suspects are criminally liable. So far, one might say that based on the theory and corroborating evidence presented, the prosecutor on the face of it established a connection between the suspects and the crimes alleged to have been committed in Kenya.

The scope, object and purpose of the decision on the confirmation of charges was also revisited in the CC-02/05-03/09, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus case* where the Pre Trial Chamber was categorical that in

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<sup>24</sup> ICC. 2009. Prosecutor v. Bahar Idriss Abu Garda: Hague. ICC-02/05-02/09, para 37

<sup>25</sup> Rome Statute. 2008. Article 51(1) (a), The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally

<sup>26</sup> 7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed; (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence; (c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

general terms the Prosecutor is not required to tender into the record the case more evidence than is, in view necessary to convince the chamber that that the charges should be confirmed.

In Case I, it was apparent that the Prosecutor delved into trying to show that the suspects were part of a conspiracy to establish an ‘ODM free zone’ by attacking those perceived to be pro-PNU supporters. As alleged indirect co-perpetrators, the prosecution is required to establish a certain subjective elements for them to be liable namely;

- (a) The suspect must fulfil the subjective elements of the crimes charged
- (b) The suspect and the other co-perpetrators must be mutually aware and mutually accept that implementing the common plan will result in the fulfilment of the objective elements of the crimes; and
- (c) The suspect must be aware of the factual circumstances enabling him or her to jointly control the crimes<sup>27</sup>

It is clear the OTP tried to establish this linkage within the network that was deemed to be part of the 3 suspect’s operations. However, some inconsistencies were highlighted by the defence teams. These tend to be factual inconsistencies and may not be necessarily detrimental to the case. Be that as it may, it requires that the Prosecutor should conduct due diligence to ensure factual correctness of places, designation and names that he presents to the Pre-Trial Chamber II.

### **Conclusion and Observations on Case I**

From our analysis above, it is clear that formal role of victims are somewhat limited at this stage. None of them even travelled to Hague to physically witness the proceedings, which might have had significant emotional and healing effect on them. It could also have improved ‘ownership’ of the process which is very important for the enhancing ‘legitimacy’ and relevance of the ICC process to Kenya as part of the reform and tacking impunity process.

On the substance of the proceedings, it took a considerably formal and legalistic dimension which may not be within the appreciation of many victims. But the decision to transmit it live on many local media houses in Kenya appears to have contributed to enhancing understanding of the ICC processes. On the negative, it also led to increase in ‘distorted’ interpretations being given by various pundits majority of who appeared to have been influenced by personal, even tribal, undercurrents. The proceedings also appeared to have increased level of ethnic tensions with the victims reporting increased hostility and threats from host communities of the suspects.

It is also apparent that some of the three suspects ceased the opportunity and advanced their political agenda by trying to mention persons who were not before the court, especially the Two Principals. It can only be deduced that in so doing, they were trying to admit existence

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<sup>27</sup> Note 8 above, para 150

of the crimes for which they are being prosecuted while highlighting the persons who, according to them, were most responsible. Domestically, this approach is counterproductive as it may escalate ethnic hatred and resentment amongst leaders. Sadly, lack of cohesion at national level often trickles down to the ordinary members of the public.

Finally, the confirmation process appears to have achieved its overall objectives in terms of trying to reign in on impunity. This is a lesson that we hope will be replicated at national level. The real impact of the ICC process will however become apparent after the end of the second phase on confirmation for the other 3 suspects. We hope to release a more comprehensive report on the same after combining the two cases.