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International Center for Policy and Conflict



Preliminary Report on Confirmation of Charges Hearings Process in the Kenya Case II – ICC - 01/09-02/11, The Prosecutor –v- Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali

Executive Summary

The report documents the background and emerging legal issues and their relevance to victims (represented and unrepresented) of case II of the Kenyan situation before the ICC. It summarises ICPC's trial monitoring and observation process of the confirmation of charges hearing in case II and the perception of victims as to its relevance. The overriding objective is to help the victims appreciate with ease the confirmation process and its potential impact on them.

It attempts to do this by assessing the historical background to Kenya Case II, how victims are engaged with it so far, the challenges (including fears) the victims face and the implications on victims.

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. The report concludes that victims have generally had to rely on third parties to intimately comprehend the proceedings, 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 involved and the circumstances surrounding the case. Most victims also express fear of reprisals and victimisation from the government and supporters of some of the suspects. The fact that all the suspects in Kenya Case II are still senior government officers has also created fear of government intimidation through intelligence services, the police and organised groups.

Just like Kenya Case I, the media coverage of Case II was found to be broad. However, the media focus in this case tended to be more on political issues from domestic perspective and hardly delved into the actual legal issues which are likely to significantly inform the decision of the Pre-Trial Chamber II. Going forward, the report identifies main issues for victims, just like in case I, emerging from the confirmation process which the government and other partners will need to give more attention to.

These can be summarised, in no particular order, as issues relating to concerns of rising tensions and fear of retaliatory attacks, real and perceived misuse of public resources on

the suspects, politicisation of the hearings, dwindling chances for local justice mechanisms and indifference of government to the plight of victims.

The perception seems to be that the government is more preoccupied with protecting the alleged perpetrators while not addressing the concerns of the victims. And even where some help has been forthcoming from the government, most victims express the view that it is largely inadequate and distribution tends to be discriminatory along ethnic lines. It would appear that the government is yet to come out as a neutral player in the post-election violence processes.

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1. About International Center for Policy and Conflict

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 thematic 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.*

The Africa Rights and Democracy Institute (ARDI) overall goal is to strengthen the institutional and technical capacities of civil society and policymakers in the formulation of public policies, the implementation and promotion of human rights, human security, development, gender justice and conflict prevention. The role of Institute is to serve as a resource centre for training, research, experience sharing and policy dialogue for civil society, universities, scholars, experts, policy makers and development partners. The Institute is strategically established to bridge the institutional and operational gaps within civil society and between academicians, universities, policymakers and development partners.

The Centre works in close collaboration with its partners across Africa and other parts of the world toward realization of its objectives. Our team of resourceful professional staff, consultants and networks are committed to delivering on these objectives by engaging in practical work, empirical research and analyses of issues within our remit and disseminating information to various stakeholders both in public and private sectors

2. Introduction

Since 2005, the International Centre for Policy and Conflict (ICPC) has aggressively implemented transitional justice and human rights programme that works closely with

community groups to address the plight of persons who have suffered human rights violations. As a consequence of the post-election violence in Kenya in 2007/08, the Centre engaged critical number of victims with a view to building their capacity to participate in the ensuing transitional justice processes.

The Centre has invariably organised trainings for community based organizations, human rights defenders and representatives of the victims since 2008 and assisted in the registration of victims for purposes of the confirmation of charges process before the International Criminal Court (ICC) as part of that strategy.

ICPC has been a lead human rights organization on the ICC issues in many respects; prior to which it had spearheaded the process of establishing Special Tribunal for Kenya recommended by Commission of Inquiry into Post-Election Violence (CIPEV). Victims quest for justice remain a key priority to ICPC.

Due to undeniably complex nature of the proceedings before the ICC, practical challenges that impede many of the victims from participating or following the proceedings and the fact that the general public may be facing similar challenges of consistently following the proceedings, the Centre established Trial Monitoring and Observation system.

Accordingly, it releases periodic reports to help the victims and other stakeholders appreciate the status of the proceedings and its potential implications on the rule of law, human rights and governance in Kenya.

This summarized report is therefore envisaged to form a preliminary assessment of what has become known as Kenya Case II. Earlier, the Centre had released a report on Kenya Situation Case I. These reports are prepared deliberately with victims in mind and hence the simplicity in the manner of presentation.

Part One

3. The Background of Kenyan Case II

The case concerns individuals who were members of what have been called the 'government side' in the post-election violence and who are drawn from the political wing of Party of National Unity (PNU) and its sympathizers within the mainstream public service.¹

As part of a common plan, the ICC Prosecutor alleges that the three suspects played a role in organizing and coordinating perpetration of international crimes against 'opponents of the government' (drawn mainly from groups perceived to have supported ODM) who were considered to have attacked perceived PNU sympathizers.²

The attacks are reported to have predominantly taken place in the Rift Valley area in the Republic of Kenya. Predictably, therefore, the prosecutor named high ranking government officials who are suspected to have been part of the common plan and considered to hold the highest responsibility in accordance with the Rome Statute.

The named suspects are Francis Kirimi Muthaura (Head of Civil Service), Uhuru Muigai Kenyatta (Deputy PM and Minister for Finance) and Mr. Mohammed Ali (former Commissioner of Police presently Post-Master General).³ Collectively, Muthaura and Uhuru are charged with five counts of crimes against humanity under article 7 of the Statute as indirect co-perpetrators within the meaning of article 25 (3) (a) of the Statute.⁴ Ali, on the other hand, was found of possible contribution to commission of the crimes within the meaning of article 25 (3) (b).⁵ Article 25 (3) (d) anticipates contribution to a crime not as an indirect co-perpetrator but as a result of commission or attempted commission in common purpose with other perpetrators. By allegedly directing the police to allow free passage of

¹ As at the time of alleged perpetration of the crimes of humanity, all the suspects held influential positions in government or had direct connections with the government. While Uhuru had no formal role in the government then, his party KANU has entered into pre-election coalition arrangement with PNU, the party of sponsoring President Kibaki. Uhuru therefore was therefore perceived as part of PNU strategy and his reported connections with Mungiki sect is suspected to have played a significant role in coordinating their participation in retaliatory attacks.

² See for instance '[Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali](http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf)' for detailed analysis of the charges. Available on <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf> (accessed on 15/10/2011)

³ For updated information on the case and the profile of the suspects visit the Kenya Case II link <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/icc01090111> (accessed on 15/10/2011)

⁴ Article 7 of the Rome Statute establishes crimes against humanity as international crimes. Specific ingredients relevant to Case II are murder (articles 7(l)(a)), forcible transfer(article 7(l)(d)), rape (article 7(l)(g)), persecution (article 7(l)(h)); and other inhumane acts (articles 7(l)(k))

⁵ Supra, no. 2 above

members of Mungiki, Ali is charged of furthering the common purpose of the other suspects for retaliatory attacks against perceived ODM supporters.

However, the Pre-Trial Chamber II declined to issue summons on account of rape as a crime against humanity as the prosecutor did not submit sufficient evidence to support that element of crime.⁶ The decision however does not bar the prosecutor from applying further to file charges on account of rape as a crime against humanity.

The prosecutor alleges that in response to attacks against perceived PNU supporters in the Rift Valley, Muthaura and Kenyatta devised the plan and held several preparatory meetings. The plan had two components. First, Muthaura and Kenyatta enlisted the Mungiki, a criminal gang, to carry out retaliatory attacks against perceived ODM supporters in and around Nakuru and Naivasha towns during the last week of January 2008. During these attacks, the prosecutor alleges that Mungiki and other pro-PNU youth - some transported to the Rift Valley from other parts of Kenya - killed, raped, and injured (including through forced and crude circumcision) perceived ODM supporters. They also allegedly looted and destroyed properties and displaced thousands of people.

As part of the second part of the plan, Muthaura and Ali ensured that the Kenya police did not intervene to stop the attacks or to punish those who carried them out. As evidence of the plan's existence, the prosecutor alleges that under Ali's leadership the Kenya police later systematically killed Mungiki leaders who had been involved in planning meetings with a view to eliminate potential confessions and their incrimination.⁷ This mysterious pattern of murder also extended to former senior police officers who may have been privy to the involvement of the police in the planning and execution of these attacks.⁸ No conclusive investigations have been carried out into these mysterious deaths and disappearances.

4. The Historical Development of Case II and the Kenyan Situation

⁶ Rape as a crime against humanity is established under article 7 (1) (g) of the Rome Statute, 1998.

⁷ See also 'Ocampo Uses Police Killings as Evidence' available on <http://www.nation.co.ke/News/politics/Ocampo+to+use+police+killings+as+evidence+/-/1064/1215212/-/12vw163z/-/index.html> (accessed on 15/10/2011)

⁸ See 'Former Police Commandant Murdered' on <http://www.standardmedia.co.ke/InsidePage.php?id=2000034043&cid=4&> (accessed on 15/10/2011)

During the period between December 2007 and January 2008, supporters of rival political parties in Kenya, divided largely along ethnic lines, attacked one another in the wake of a highly controversial presidential election between incumbent Mwai Kibaki, head of the Party of National Unity (PNU), and Raila Odinga, leader of the opposition Orange Democratic Movement (ODM). Murder, rape and other forms of sexual violence, the deportation or forcible transfer of the population, and other inhumane acts characterized a period in which more than 1,133 people were killed, 3,500 injured and 350,000 displaced.⁹

The Waki Commission was subsequently established to look into the Post-Election Violence and make recommendations. In his report, Judge Philip Waki who chaired the Commission recommended the establishment of a local tribunal to prosecute individuals responsible for the worst crimes against humanity. He also included a list of names of those individuals he considered most responsible for the violence and recommended that the list be passed to the ICC if progress with the local tribunal was not made. The government was given a deadline of up to July 2010 after which the ICC would refer the case to Luis Moreno Ocampo.¹⁰ The National assembly rejected the idea of a tribunal. It is speculated that the Waki list may contain more names than the six who were indicted by the ICC and calls have been made for it to be made public to facilitate prosecution so as to avoid an impunity gap.¹¹

The Pre-Trial Chamber made a ruling that there existed reasonable grounds to believe that Uhuru Kenyatta and Francis Muthaura were guilty as indirect co-perpetrators of these crimes. Once again, in relation to Mohammed Ali, the Chamber ruled that his contribution was not essential to the commission of the crimes and so he was charged with having otherwise contributed to the same crimes.¹²

⁹ 'Kenya election violence: ICC names suspects' BBC News on 2010-12-15. <http://www.bbc.co.uk/news/world-africa-11996652> (accessed on 6/10/2011)

¹⁰ See 'Kofi Annan hands International Criminal Court list of perpetrators of post-election violence in Kenya' *The Guardian* (London). <http://www.guardian.co.uk/world/2009/jul/09/international-criminal-court-kofi-annan> (Accessed on 10/10/11)

¹¹ For details see *Daily Nation* <http://www.nation.co.ke/News/politics/-/1064/622074/-/item/0/-/kkq7n9z/-/index.html>. (Accessed on 7/10/2011)

¹² Confirmation of charges hearing in the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali scheduled to start on 21 September 2011, International Criminal Court. 2011-04-08 <http://www.icc-cpi.int/NR/exeres/9D747E05-8E7F-46BB-9FB1-93019CF77D55.htm> (accessed on 12/10/2011)

Part Two

5. The Process Leading to a Confirmation of Charges Hearing in Case II

In the lead up to the confirmation hearings proceedings, the office of the Prosecutor was required to surmount certain legal steps that we have outlined below. In 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 channels for information on 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.

The major shortcoming of this scenario is that in a situation like Kenya where victims are not given requisite recognition and their immediate needs not taken care of, they become vulnerable to manipulation and are exposed to prolonged suffering. In the circumstances of Situation Case II, the victims were exposed to higher vulnerability due to the high positions of the suspects in government. Most victims reported fear of potential reprisals from agents of the state primarily at the behest of the suspects. Nonetheless, in the lead up to confirmation hearings the prosecutor still had to go through the following legal steps:

i) Authorization of Investigation

The Pre-Trial Chamber granted the ICC Prosecutor's request for authorization to conduct investigations in March 2010.¹³ By majority, the Pre-Trial Chamber II allowed the prosecutor, for the first time in the history of ICC, to commence investigations on his own following the failure by the Kenyan government to refer the cases to the ICC.

The government had equally failed to initiate genuine investigations and prosecutions locally as recommended by CIPEV.¹⁴ At this stage, the names of the suspects perceived to have highest responsibility remained unknown though it is worth pointing out that several speculations were abound as to who the suspects may be. In fact, following KNCHR's Report

¹³ Human Right Watch 'ICC: Judges Approve Kenyan Investigation'; Human Rights Watch 2011-03-31. <http://www.hrw.org/node/89425> (accessed on 12/10/2011)

¹⁴ For a broader understanding of CIPEV (Waki Commission) and its recommendations see the Commission of Inquiry into the Post-Election Violence (CIPEV) http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-319092.pdf (accessed on 13/10/2011)

'On the Brink of Precipice', both Uhuru and Ruto moved to High Court seeking to have their names deleted from the report as possible perpetrators of the violence.¹⁵

In relation to the victims, their role and participation at this stage is not recognized even though most of them were already languishing in IDP camps and abandoned in various parts of the Country. This, once again, can be attributed to the formal processes established under the Rome Statute that tend not to recognize victims until formal appearances of the suspects. One would expect however, that the Office of the Prosecutor in its investigations accessed some victims. Perhaps a more proactive engagement of victims from early stages ought to be established by the court. Suffice to note that the ICPC did organize a closed door meeting between victims and the Prosecutor.¹⁶

ii) Issuance of Summons to Appear

The Kenya Situation Case II 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 summons or warrants of arrest. By this time, the OTP was expected to have substantial evidence against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to believe their involvement in commissioning of the alleged crimes.

Accordingly, the Prosecutor requested for summons under Article 58(7) of the Rome Statute on 15th December 2010 against the three suspects for crimes they are alleged to have been responsible for. 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 the 3 suspects on 8th March, 2011 and set the date of their first appearance for 7th April 2011. Again, it shows that the Pre-Trial Chamber II was

¹⁵ See 'Court Puts Off Ruto Case' <http://www.nation.co.ke/News/politics/Court+puts+off+Ruto+case+/-/1064/1112936/-/14m5o71/-/index.html> (accessed on 15/10/2010). Also see 'Uhuru Case on Post Election Chaos Starts' on www.standardmedia.co.ke/InsidePage.php?id=2000005974... (accessed on 15/10/2010)

¹⁶ <http://www.afronline.org/?p=5138>;

<http://www.nation.co.ke/News/politics/Ocampo%20in%20quiet%20talks%20with%20victims/-/1064/915380/-/12w2ovgz/-/index.html>

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, it meant that the prosecutor had submitted sufficient evidence to the Pre-Trial Chamber that, on the face of it, pointed towards involvement of the suspects in commissioning of crimes for which the summons 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.

What this possibly points towards 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 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 judicial process.

iii) Confirmation of Charges Hearing

After the first appearance on 8th April 2011, which was largely procedural, the Pre-Trial Chamber II set the date for commencement of confirmation of charges hearings for 21st 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 Mr. Morris Anyah, Attorney-at-Law.

For the victims in Case II, reports of possible reprisals and use of government agents started filtering in.¹⁷ This perhaps shows how precarious the situation of victims generally is where senior government officers are charged as suspects. The next part assesses the confirmation of hearings processes and place of victims.

Part Three

¹⁷ See 'Protect Witnesses' on <http://www.nation.co.ke/oped/Editorial/-/440804/838048/-/oh1637z/-/index.html> (accessed on 15/10/2011)

6. The Legal and Procedural Issues at the Confirmation of Charges Stage in Case II

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.¹⁸ 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.¹⁹ In case II, all the three suspects opted to call live witnesses to rebut the Prosecutor's evidence and organizational policy. In fact, Mr. Kenyatta took the unprecedented step to give his own evidence, which legally speaking may be viewed as a dangerous move at this stage of the proceedings. In addition, Uhuru's defense team commissioned independent reports to discredit prosecutor's witnesses.

On victims, the common legal representative is expected to have conducted preliminary assessment of their various situations and interviews. No formal statements are necessary from them 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, Mr. Anyah spoke in 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 proceedings, their expectations from the court and the inaction of the Kenyan authorities.

However, for the Pre-Trial 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

¹⁸ 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.

¹⁹ At the hearing, the person may: (a) Object to the charges; (b) Challenge the evidence presented by the Prosecutor; and (c) Present evidence

that constitute criminal liability of an alleged offence.²⁰ And the burden for establishing subjective and objective case is with the OTP at this stage.

Of relevance to the victims at this stage is that the court can invoke its powers under Article 58 (c) of the Rome Statute of the ICC to provide for the protection and privacy of the victims and witnesses.

In this regard, the court put in place some protective measures where necessary, which included permitting witnesses to testify in closed sessions inaccessible to the public. Arguably, these are the measures the court took when it allowed the Prosecutor to entirely rely on witness statements which were largely redacted. This substantially is aimed at protecting the identity of witnesses some of whom may also be victims of Case II. Moreover, the application forms by victims were also largely redacted including their names as a strategy by the court to offer them some sort of protection.

7. Victims Participation in the Confirmation of Charges Hearing

Victims' participation in the proceedings before the ICC is provided for under the Rome Statute²¹ and their role is distinguished from that of witnesses.²² This system which permits the victims to make their views and concerns known to the court through their legal representatives is an important innovation that ensures that the victims are directly engaged in the proceedings.

For indigent victims who cannot afford legal representation, the court is obligated to provide financial support since under the Rome Statute; the Court has the duty to take all measures

²⁰ CC-02/05-03/09, *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

²¹ Applications for victims' participation in the proceedings are required to be made in accordance with the provisions of Rule 89 of the Rome Statute Rule of Procedure and Evidence.

²² The International Criminal Court, Press Release ICC-CPI-20110830-PR715; *Nairobi: ICC legal representative consults with Kenyan victims on identity disclosure and clarifies distinction between victims and witnesses at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr715>* accessed on 10/10/11.

possible to ensure the safety of represented victims. The judges also have to ensure that the participation of the victims is not prejudicial to the suspects' right to a fair trial.

In this case, the court has accepted 233 people – represented by a single, common legal representative appointed by the chamber, Mr. Morris Anyah, for purposes of the confirmation of charges hearing. More victims may still apply to be accepted.

Unfortunately, none of the victims was physically present at the confirmation of charges hearings. However, their common legal representative was allowed to make opening and closing statements during the hearing and he also sought the court's permission to question witnesses and make closing submissions to the chamber. He is also expected to submit his final written submissions on behalf of the victims.

However, ICPC is of the opinion that the International Criminal Court Victims Trust Fund²³ should by now have started to engage victims of post-violence with a view of causing awareness on how it works and what avenues are available for victims to seek reparations for violations suffered.

8. What Happens after the Hearing?

After the hearing, the judges have 60 days to provide a written decision.²⁴ Article 61 (7) of the Rome Statute of the International Criminal Court provides that 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 the crime is charged. If the judges find that there exist substantial grounds, then the case will proceed to trial.

The judges could also decide that there is not enough evidence to confirm some or all of the charges for one or more of the defendants. If that happens, the prosecutor can submit additional evidence to support the charge or charges in question and then request a second confirmation of charges hearing.²⁵

²³ <http://www.trustfundforvictims.org/>

²⁴ *The Rome Statute of the ICC*, Article 61.

²⁵ *The Rome Statute of the ICC*, Article 61 (8)

9. Challenge on Admissibility, is this avenue still open to Suspects at this Stage?

Article 19 (4) of the Rome Statute of the International Criminal Court provides that:

The admissibility of a case or the jurisdiction of the court may be challenged only once by any person or state or state referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Therefore, according to this provision, Mr. Muthaura, Mr. Kenyatta, and Mr. Ali still have an opportunity to challenge the admissibility of their case against them at the ICC. Two of the suspects – Mr. Uhuru Kenyatta and Mr. Hussein Ali have expressed that they intend to make admissibility challenges on the cases against them. In addition, all the three defendants have indicated that they intend to challenge the jurisdiction of the ICC. This implies that they are intending to argue that the case against them falls outside the time period and geographic area of the ICC.

Part Four

10. Possible Outcomes

Since the responsibility for the crimes committed is to be borne by individual rather than a group, there are various possibilities with regards to the outcome of the process:

- (a) The judges could throw out all charges against a person(s) from one case only (either Case 1 or Case 2).
- (b) The judges could absolve one or several of the accused (in both Case 1 and Case 2) from all the charges of crimes against humanity brought against them.
- (c) Judges can decide that all the 6 have a case to answer as charged by the Prosecutor
- (d) Judges can decide that all the 6 have a case to answer but on reduced charges (i.e. some charges thrown out)
- (e) Judges can decide that all the 6 have a case to answer but on increased or slightly different charges
- (f) Judges can decide that all have no case to answer (this is the least likely, but probable scenario especially if the accused have 'game-changing evidence').²⁶

If the Pre-Trial chamber does not confirm any charges with respect to all the accused, the ICC process will have come to an end. However, the Prosecutor may conduct more investigations and present them to court although this is very improbable.²⁷ If some charges are confirmed against some or all accused, they can choose to go to trial as soon as judges are ready.

If some charges are thrown out but the Prosecutor insists that he wants the charges to remain as he brought them, he will seek permission to look for or bring more evidence to confirm charges that were thrown out before trial starts. This option would delay the trial by several more months.

The mandate of the Pre-Trial Chamber ends once it has heard all appeals related to the confirmation hearings. The President of the ICC will then constitute a Trial Chamber where none of the judges involved at the Pre-Trial stage can play a role at the trial stage. Subject to discretion of the major, the decision on confirmation will be released within 60 days of the filing of last written submissions by the defence teams. Taken collectively and bearing in mind the chamber's decision to release both decisions for case I and II together, it would be

²⁶ Ibid

²⁷ *The Rome Statute of the ICC*, Article 61 (8)

estimated that a realistic date would be in mid January 2012.²⁸ However, this may be earlier before judges go for their annual leave which begins in Mid-December, 2011 till early January, 2012.

11. Prevalent Concerns of the Victims in Case II

Unlike case I, case II also saw some unique revelations that may eventually have direct impact on the victims. This is due to the fact that all the three suspects are influential public officers and are perceived to enjoy state 'protection'. In a nutshell, these may be classified as follows:

- a) *Level of State Complicity:* The prosecutor presented witnesses' statements and constructed an organizational theory that pointed towards use of state apparatus to organize retaliatory attacks. These include perceived use of Army trucks to ferry the direct perpetrators, use of Statehouse grounds for illegal organizational meetings, distribution of official army/police uniforms to members of Mungiki and involvement of senior government officers from the civil service and the political wing. While all these are yet to be solidly proven, the fact that they found prominence and thus can be imagined to have indeed occurred in one form or another is a very dangerous precedent. This is because it is the same institutions that are meant to offer protection to the victims. Their perceived lack of impartiality can only be viewed as a loss to the plight of victims. It also means that were case II to be confirmed, then the victims will most likely be at a higher risk of further state complicity. Regrettably, the government has not taken any serious steps to rebut these claims which may be perceived to lend credence to them.
- b) *Police Structure, Command and Control and Victims:* It also emerged at the confirmation hearings that the ordinary reporting structure may not have been observed during the post election violence. The Prosecutor alleged that Ali, as Police Commissioner, took orders from Mr. Muthaura and not his direct line Minister. The OTP even produced witness statements to that effect alleging witnesses who heard Mr. Muthaura instructing Mr. Ali not to interfere with Mungiki operations in Naivasha and Nakuru. If this were to be proven true, then it probably explains concentration of victims of case II in these areas and the gruesome nature of their suffering. Furthermore, it does not portend a good picture for the victims as it shows that the police are not an

²⁸ See 'Pre-Trial Chamber II will issue its decisions confirming or declining to confirm the charges in both Kenyan cases on the same date'. Available on <http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/pr737> (accessed 15/10/2015)

independent and impartial institution in execution of their duties. It is hard to see how this will change to the better for the victims if the cases are confirmed despite the envisaged reforms to police under the new constitutional dispensation. Substantially, the circumstances of the post-election violence crisis for the victims remain largely the same. Therefore, the police and government will have to be more proactive in engaging with the victims to offer better protection as the final decision on confirmation approaches.

- c) *State Support for the Suspects:* Again unlike case I, the 3 suspects evidently got much more support from the government. This was not limited to official diplomatic support by the Kenyan Mission to the Netherlands. Senior government officials including the President openly wrote letters to the Pre-Trial Chamber in their support. The witnesses they presented were also largely drawn from the top echelons of Kenyan government. Note that from perspective of victims, this can only be interpreted as deliberate policy to shield those perceived to hold highest responsibility for crimes visited on the victims from accountability. In the long run, it shows a picture of a government not interested in the plight of the victims. The Legal Representative for Victims brought this to the chamber.
- d) *Plight of Victims and Indifference of the State:* Connected to point 3 above is the continued deplorable living conditions and suffering of the victims. It should be noted that at the core of the ICC proceedings is the legitimate interests of victims to have their lives restored to normalcy. This will inevitably require genuine commitment and support of the government. In addition, as the ICC reparations process, if it were to come, tends to take long it means the government has primary responsibility to assist the victims in guaranteeing sustainable security and restoring their economic capacity. This also includes proper settlement. Unfortunately, most victims we interacted with reported slow pace of government support, if any. Most of them still live in IDP camps or are temporarily housed by relatives. The government support that initially came by way of resettlement kitty of Kshs. 25, 0000 was largely inadequate and laced with perception of discrimination. In fact, these kinds of clearly uncoordinated government 'interventions' tend to exacerbate tension amongst the victims.

In terms of health care, most victims continue to suffer both physical and psychological challenges due to government neglect. Many have since succumbed to their illnesses that can be directly attributed to the post-election violence injuries. The most prominent case is that of Dorothy Atieno, a woman who was repeatedly defiled and infected with HIV in Naivasha, who died in late October.²⁹ In reality, many victims have suffered and died silently without any meaningful state intervention and

²⁹ See ' The death of an 'ordinary person' <http://www.nation.co.ke/News/The+death+of+an+ordinary+person/-/1056/1264142/-/item/0/-/316i7c/-/index.html> (accessed on 30/10/2011)

many others continue to suffer. Most victims have actually resigned to the fact that the government will never help them and are instead more positive about non-state actors, who have limited resources. This can only get worse as the country approaches the next elections in 2012.

It will therefore be important for the government to be more aggressive in dealing with the resettlement and welfare of the victims. At the moment, they are a natural easy target were situations escalate again. Their levels of resentment can also be exploited to retrigger violence as we approach 2012 elections. In the meantime, intervention processes by the ICC itself also need to be activated especially in the cases of represented victims who are in dire need.

Conclusion and Observation on Case II

From the foregoing, the report does not paint a rosy picture for the victims. Even after the conclusion of the confirmation of charges hearing in this case, the victims continue to express concerns over their security. The situation remains somewhat calm but certainly not peaceful. The government has equally failed to initiate substantive local justice and reconciliation mechanisms. The victims also continue to express concerns over the limited scope of charges drafted by the prosecutor. The document of charge does not include destruction of property as a crime against humanity. This would be important if the victims were to be eventually accepted for reparations in this case for most of them lost all their belongings and livelihood. True justice to this category of victims cannot be achieved unless they meaningfully get their lives back and this will have to involve reparations so that they can pick up the pieces. On a more positive note, the Legal Representative for Victims has been endeavoring to file motions that require the prosecutor to incorporate these charges. It would be expected that this also form part of their final written submissions for confirmation process.

As this report highlights, concerns about the security of the victims remains a major issue. The measures offered so far by the ICC including guaranteeing anonymity are largely inadequate especially because they can be ethnically compartmentalized. Even though the new Attorney General and DPP have recently assured them of their commitment to protect victims and witnesses, no substantive steps have been taken. No doubt, the ICC will have to do more in engaging the government to offer further protection for victims and witnesses in the country. This is of particular urgency as we cannot underrate the influence of the suspects within official government cycles.

On the overall, public support for the ICC process can be said to remain strong. A lot of ethnic divisions have been sadly witnessed since the names of the six suspects were released but that cannot be said to go the substance of justice. This can also be said to be true for victims even though their immediate concerns would be how to get out of the deplorable conditions they find themselves in. It is doubtful that the government has any comprehensive plans for them. Besides, hostility may be simmering between victims themselves for case I and II respectively. This has more to do with perception that the government has not done much for case II victims.