Kenya's Unfinished Journey to Accountability

Lessons; Status of the ICC Process; and the Way Forward Creating a Complementary Mechanism to Address the Post-Election Violence Serious Crimes

International Center for Policy and Conflict

By Doctor Thomas Obel Hansen

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List of Acronyms

African Union (AU)
Attorney General (AG)
Chief Justice (CJ)
Commission Investigating the Post-Election Violence (CIPEV)
Director of Public Prosecution (DPP)
Internally Displaced Persons (IDP)
International Center for Policy and Conflict (ICPC)
International Criminal Court (ICC)
Judicial Service Commission (JSC)
Kenyan National Dialogue and Reconciliation (KNDR)
Lord's Resistance Army (LRA)
Orange Democratic Movement (ODM)
Party of National Unity (PNU)
Truth, Justice, and Reconciliation Commission (TJRC)
United Nations (UN)

Foreword

Rule of law is the cornerstone of democracy. Governance comes with clear responsibilities. Therefore, any legitimate and democratic government in any part of the world has an obligation to have respect for democratic values and safeguard human rights. One such obligation is ending impunity and ensuring justice for victims of human rights violations. Justice curtails impunity and ensures perpetrators do not go scot-free. When national justice systems and political system fails to enforce justice and accountability, institutions like the International Criminal Court have a fundamental role to play in bringing justice for crimes that would otherwise go unpunished.

If perpetrators of human rights violations are held to account, a strong message is delivered that there are consequences for breaking the law and thereby encourages respect for the rule of law. This deters the commission of future crimes, recognizes the harm done to the victims and assists the individuals and communities concerned to restore their dignity. Justice is about both the process and the result. Victims have right to actively participate in administration of justice while respecting their rights for dignity and privacy. Sufficient mechanisms need to be put in place to guarantee victims of their protection and avoid reprisals from perpetrators or the wider community. In this case, justice systems should have genuine, fair and accessible procedures.

International Center for Policy and Conflict (ICPC) has since 2008 being seeking justice for victims of post-election of violence (PEV) as documented by Commission of Inquiry into Post-Election Violence. It has been the desire and expectation of The Center that victims of PEV will access justice and participate in justice system effectively. This would help give voice to some of the most vulnerable and marginalized segment of the Kenya society. Justice process for the PEV has also been critical about re-establishing rule of law and ensuring impunity for perpetrators does not prevail.

Many barriers continue to impede PEV justice and are yet to be broken down. These barriers are found at the victims' level. Victims fear to come forward for fear of reprisal against them and their families even though they are under a lot of pain. At the government and institutional level, there is fear of dismantling conditions sustaining impunity. International community has a challenge of extent to which governments are ready and willing to enforce the principles they exhort about international law without jeopardizing their immediate and long term interests.

The *Kenya's Unfinished Journey to Accountability of PEV* report is a reflection of the ICPC's work on Post-Election Violence justice process for victims and attempts at deterring impunity. Victims are still seeking and fighting for their rights. However, there are doing so against walls of political indifference. We, at The Center retain the strength, hope and determination of commitment to stand alongside the victims and champion their fight for justice, no matter how long or hard the battle. War against impunity is protracted. Nevertheless, there is progress. We will continue to work methodically and with courage each day, to break down barriers to justice and rule of law. We will also work to ensure that perpetrators are held accountable, and promote changes in laws, policies and practices to end impunity.

This report is dedicated to the victims of Post-election macabre violence and atrocious crimes. It is the second part of the initial report; ***'Prosecuting Justice for Victims of Post-Election Violence-Why the Hague Option, 2012"*** report.

This work and the report would be impossible without the unflagging support of committed development partners.

International Center for Policy and Conflict is thank all those who have recognized the significance of what we are doing and have provided much needed moral and financial support to our work and cause.

Thank you!

Ndung'u Wainaina
Executive Director, ICPC

Executive Summary

This Report looks into Kenya's long, but largely unfinished journey to accountability for the 2007/8 post-election violence.

The Report outlines and analyzes the events, both at the domestic and international level, which have surrounded the complicated task of holding to account those responsible for the violence. The ambition is to highlight the factors that led the International Criminal Court (ICC) to intervene, but also to point to the challenges facing international justice and elaborate on some of the key issues that have surrounded the public debate about the ICC. Additionally, the Report aims at providing a framework for creating a complementary accountability mechanism at the national level and how more sustainable solutions to accountability can be created.

Having offered an outline of the accountability process and the background to ICC intervention, the Report examines the current status of domestic proceedings with respect to the post-election cases. It is observed that only a very limited number of prosecutions of low-level perpetrators have taken place in Kenya's national courts, but even these proceedings have faced significant challenges. For example, the investigations carried out by the police have tended to be highly insufficient or flawed, making it difficult to obtain convictions. Because the few proceedings that have taken place have focused on low-level perpetrators, political leaders, government officials and others involved in sponsoring the violence have in effect been granted *de facto* immunity along with police officers and other categories of perpetrators. The very limited scope of criminal accountability at the domestic level stands in contrast to the promises made by the Kenyan leadership in the context of the Kofi Annan-led mediation process.

Furthermore, the Report analyzes some of the key questions pertaining to the legality and legitimacy of the ICC process. In particular, this involves an assessment of whether selecting the Kenyan situation for investigation conforms to the rules and policies guiding situational selection as well as a detailed assessment of the principle of complementarity. It is concluded that selecting the Kenyan situation for investigations presents a change in prosecutorial practices, which however appears to offer enhanced compliance with the Prosecutor's own standards and may offer a more holistic way of assessing "gravity" under the Rome Statute. Similarly, the Court's assessment of complementarity in the Kenyan situation sets precedence in that a high threshold for determining activity has been established. Whereas it might have been more fitting to state that the government of Kenya is unwilling to prosecute those most responsible for the post-election violence, the Report concludes that the ICC was right in rejecting Kenya's admissibility challenge.

In addition, the Report undertakes an assessment of the impact of the ICC process. Examining the question of whether the ICC process will help prevent new political violence in Kenya, the Report concludes that the Court's intervention presents an important step towards combating the country's culture of impunity, but at the same time, observes that the ICC process is being instrumentalized by politicians, something that poses a threat to the holding of peaceful elections. Closely related to this, the Report examines how the ICC process impacts Kenyan politics, noting how the political coalitions are being shaped by the ICC. The impact analysis also involves an assessment of other questions, notably how victims may benefit from the Court's intervention.

Finally, the Report provides for a detailed assessment of how best a complementary accountability mechanism can be created. Comparing the two major opportunities that have been considered in the debate – namely a Special Tribunal which operates outside of the structures of the Kenyan legal system and a Special Division of the High Court – it is concluded that the latter option, at present, appears to be the only feasible way of dealing with complementarity. However, for a Special Division to enable a legitimate and credible solution to accountability for the post-election violence some special measures, including the creation of special prosecutor is needed. This section of the Report also examines whether post-election crimes should be prosecuted as international crimes and/ or crimes under national law, noting that there are several advantages of prosecuting those most responsible for the violence for crimes against humanity. However, doing so requires that Parliament amends the International Crimes Act – which was enacted to domesticate the Rome Statute and came into force on January 1, 2009 – so it becomes applicable to the events that took place in 2007/8. Notwithstanding the need to create special measures to deal with the post-election violence cases, the Report also notes the importance of establishing sustainable solutions to accountability. In particular, the Report emphasizes the need to implement police reforms, create an independent Director of Public Prosecutions (DPP), support the reformed judiciary and take measures aimed at creating high quality legal education in Kenya.

Based on these analyses, the Report puts forward a series of recommendations to civil society, the government of Kenya, Kenya's judiciary and international partners.

The Report should thus be seen as an attempt at offering an accurate and detailed assessment of the accountability process as it has unfolded thus far, in this way providing a tool for informing the public, the media and decision-makers as well as creating documentation which could be of interest for future generations of Kenyans.

THE KENYAN CASE BEFORE THE INTERNATIONAL CRIMINAL COURT

LEMPAA SUYIANKA

Unwillingness or Inability of Kenya to Address 2007 Post Election Violence

Introduction

Kenya has experienced recurrent politically instigated violence since the state turned into a multi party democracy in 1991. This violence has exhibited a distinct pattern in that it occurs either before, or immediately after every general election. The government has responded by setting up commissions of inquiry but has not implemented a single recommendation of the report of the commissions.

However, the clashes that occurred in December 2007 and early 2008 saw the State almost degenerate into a full scale civil war, where over 1, 300 people were killed and approximately 35, 000 persons displaced internally. The government set up a Commission of Inquiry into the Post Election Violence, (CIPEV) that recommended that a special tribunal that meets international standards be set up to try the suspects of the violence. CIPEV further recommended that should the State fail to put in place the tribunal, names of suspected masterminds of the violence be handed to the International Criminal Court (ICC) for investigation and prosecution. This paper tries to analyze the State obligation under the Rome Statute with Kenya as a case study.

This paper is divided into three sections. Section one will focus on complementarity principle. This section will have a sub section discussing the complementarity principle in general terms and the International Criminal Court as a complement to domestic jurisdiction (Kenya, Case Study).

Section two will discuss whether the crimes committed during the 2007/2008 post election violence meet the threshold of crimes falling under the jurisdiction of the Rome Statute.

Section three focuses on the State's (Kenya) failure to mount prosecution that paved way for ICC. This section will be divided into three subsections with each subsection focusing on each of the organs of the state to wit; the Judicature, Legislature and the Executive.

Section one

1.0 Complementarity Principle, General

Complementarity comes from the term complement. To complement means something making up a whole or to make complete. At issue in this essay is what it means for an international court to complement national or municipal courts. This question goes to the heart of jurisdiction which in turns touches on the sovereignty of a State. Scholars have pointed out that the scope of complementarity is not only legally

complex but is also politically sensitive . Under the general principles of law, states have the jurisdiction to investigate and prosecute crimes taking place under their jurisdictions.

As per the Rome Statutes, the principle of complementarity is spelt out in several Articles not forgetting its preamble. It is important to point out that complementarity applies not only to state parties but to non-state parties as well. Perhaps the reason why the drafters dwelt so much on this principle in the Statute was to try and avoid political heat the Statute generated and continues to generate. Be that as it may, what role exactly does the Statute envisage for itself? This question can only be answered by looking at the plain text of the Statute starting with the preamble paragraph 10;

> **Emphasizing that the International Criminal Court established under this Statutes shall be complementary to national criminal jurisdictions**.

It is patently clear that the drafters of this law were from the outset very cautious not to be construed as intended on supplanting the national jurisdiction and hence its clear intentions prominently in the preamble. Also worth focusing on is the first Article which states;

> *An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions….*

The same clarity of intention and its proper niche is well set out where national jurisdiction is given a prominent role to play emphasizing the centrality of sovereignty of state parties. This can be compared to the two United Nations Security Council ad hoc International Criminal Tribunals. These are the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) Articles 8 and 9 respectively. The ad hoc tribunals have concurrent jurisdictions with the national courts to prosecute person suspected of serious violations of international human rights law.

Much as the Statute tried not to be construed as intrusive of the sovereignty of the state, the wording and interpretation of Articles 17 could not escape this as will be discussed in section 3. The Article stipulates that the International Criminal Court will have jurisdiction where the State party is unable or unwilling to prosecute suspected persons, whether it is trying to cover up the case, delay in prosecution and the manner of prosecution. This is where the problem lies. This is because it not easy to tell when a state party is violating the law set out in these Articles without encroaching on matters political hence sovereignty. Complementarity principles can be triggered by a number of several factors

International Criminal Court, a complement to Kenyan Criminal Justice System

Kenya is a state party to the Rome Statute on the 14th day of May 2005 and entered into force on the 1st day of June 2006. As a consequence the State had an obligation to domesticate the Rome Statute by passing the International Crimes Act hereinafter referred to as ICA. In 2008, the ICA was passed by the Kenyan parliament. It came into force on the 1st day of January, 2009. The mischief of this law was clear going by its preamble wording;

> *AN ACT of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions*

Other than this piece of legislation, Kenya has a Penal Code (PC) with some of the crimes falling under crimes against humanity like murder, grievous harm, while rape is covered under the Sexual Offences Act of 2006 and a Criminal Procedure Code (CPC). This penal code is complemented by a Criminal Procedure Code that provides for procedural safeguards to the persons suspected of committing any criminal offences.

In spite of the existence of both elaborate substantive and procedural criminal justice systems in Kenya, the State required extra measures to deal with the suspect of post election violence that rocked six of the former eight administrative provinces under the old constitution. In March 2010 the Pre Trial Chamber authorized (PTC) the prosecutor to commence criminal investigation in Kenya after the State failed to set up a Local Tribunal to try suspects of post election violence.

Section 2.0 Whether Crimes against Humanity Committee in Kenya

This section attempts to find out whether the crimes committed during 2007/2008 in the republic of Kenya fall under the jurisdiction of the ICC. According to the Statute, crimes against humanity are set out under Article 7. However, crimes that are relevant to this essay are murder, deportation or forcible transfer of population and rape. That being said, the Statute has laid down some technical threshold for these offences to qualify as crimes against humanity. Article 7 (2) (a) requires a State or organizational policy. It states;

Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

According to the recommendation of the CIPEV, crimes against humanity were committed and that is why the commission recommended for the formation of a local tribunal to try the suspects of post election violence, and further, that should that not happen, the list of the masterminds of the violence be forwarded to the ICC prosecutor.

The Kenya National Commission on Human Rights (KNCHR) also agrees that under customary international law, crimes against humanity were committed but disagrees that the same were committed under the Statute. Under the latter, organizational policy is required while under the former, this is not a requirement. This was the reasoning of the decision of the Trial Chamber in the Tadic case under the ICTY. This issue has not been fully laid to rest. So far, one of the judges handling the Kenyan case at the Pre Trial Chamber has dissented on this matter ruling that the Kenyan case as presented by the Prosecutor does not meet the requisite threshold of crime against humanity under Article 7 (2)(a). This being a dissenting opinion, the Pre Trial Chamber's majority finds that crimes against humanity were committed in the Republic of Kenya.

General comment No. 29 has also shed some light on what the human rights committees considers being crimes against humanity.

With over 1, 133 people killed and an estimated 350, 000 displaced and a number of rape cases reported, I concur with the majority decision that crimes against humanity were committed in Kenya which ought to have put local mechanism in place that meets international standards to try suspects of crimes.

Section 3.0 Failure by the State to mount prosecution against suspects

Sovereignty of any state can be measured in a way it handles its social, economic and political affairs. Most importantly is the ability of the state to enforce law and order within its territorial boundaries. A country whose systems have fallen apart cannot be expected to maintain law and order. Corollary, the citizenry loses faith in the legal system and resort to crude way of settling disputes.

The national courts of any state have a big role to play in the promotion of the rule of law and order. Kenyan as a state would have moved a big step forward had it obliged to set up a local tribunal to try suspects of post election violence. Cassese has enumerated socio-political and legal advantages of territorial jurisdiction in international criminal law. In addition, by the States failure to put up a local tribunal, the impunity gap will remain big as ICC can only handle a handful of cases.

3.1 The State's Parliament role in Complementarity principle.

Kenya as a democracy has a written Constitution and indeed a new one that creates institutions and distributes power with a clear doctrine of separation of those powers in place. As a consequence, parliament, as it were, has its traditional role of making the laws of the country. Parliament is established under Article 93 of the Constitution of Kenya.

After the post election violence in 2007 and 2008 the CIPEV recommended that parliament puts in place a local tribunal that meets international standards to try suspects. This tribunal was supposed to be protected from constitutional challenges by being entrenched in the Kenyan Constitution to avoid a Sierra Leonean situation. In this sense, the CIPEV was aware of the challenges that would hamper the work of the tribunal.

So far, four years down the line, the Kenyan parliament has been unwilling and/or unable to set up a Special Tribunal for Kenya (STK) as recommended. Parliament has twice rejected a Bill to create a STK exposing the State to the rigours of Article 17 (1) (a) that requires the state to demonstrate unwillingness or inability to prosecute after investigation. To pass the Bill, parliament required a two thirds majority as required of a constitutional amendment. The Special Tribunal was supposed to have been in place by March 2009 but not even an attempt by a member of parliament to reintroduce the same Bill as a private members Bill was forthcoming.

Parliament has exacerbated its bad faith by not only undermining the formation of a Special Tribunal, but also passing a motion that seeks to withdraw Kenya from the Rome Statute. This is by amending the International Criminal Act. This development came after ICC prosecutor applied for summonses against six individuals who included three members of parliament.

After failing to assert its sovereignty by forming a Local Tribunal, parliament resorted to the rhetoric of imperialism. This has been the stereotype that developing countries resort to, when accountability is

demanded at international level. That being said, the most important thing to the victims of post election violence is justice. Discourse on sovereignty is meaningless in so far as justice is not served. In any case, when sovereignty and justice clash, justice should always prevail as it is an absolute concept while sovereignty is relative.

In international law, failure by any organ of the state engages the responsibility of that state. It is therefore the State that takes any responsibility of the actions or omissions of parliament. Indeed this is the language of the International Law Commission in its Article 4 of Articles Responsibility of the States for Internationally Wrongful Act 2001;

> *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*
>
> *An organ includes any person or entity which has that status in accordance with the internal law of the State.*

The Inter American Court of human rights was unequivocal in its interpretation of this Article in the case of the Last Temptation of Jesus Christ. From the foregoing, it can be concluded that the Kenyan parliament as a principal arm of the government has failed the state in articulating its complementary role under the Statute.

3.2 The Role of Kenya's judiciary in complementing the Statute

The Judiciary is one of the arms of the Kenyan government. It is established under Chapter Ten of the State's new Constitution. The Courts are charged with the responsibility of settling disputes and punishing law breakers. Article 159 states clearly this role;

> *The Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*

The plain words of this section do not rule out the establishment of tribunals to supplement courts. The Kenyan law as it existed before and immediately after post election violence was not sufficient to deal with the suspect. This is because most of the crimes committed were international in nature. The then Minister for Justice, Constitutional Affairs and National Cohesion agrees that the judicial system was not adequate.

The few cases that have gone to courts clearly demonstrated the State's inability and/or unwillingness to deal with post election violence. This has led to acquittals with judges complaining of poor investigation. This case concerned a police officer who was charged with the murder of two demonstrators at the height of the violence. The prosecution presented a different gun in court from the one that was taken for ballistic analysis.

Although the Kenyan criminal justice system is adversarial, the Court would have done better if for example it called for the guns that had been issued to all the officers who were at the scene of crime. This is the type of prosecutions that are envisaged under Article 17 (2) (a), that the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of court referred to in Article 5. The second case concerned four people charged with the murder of seven people who were among 34 women and children burned in a church at the height of post election violence. This is a classic example of a case that dovetails the words of Article 17 (1) (b) especially on the question of unwillingness and inability of the State to genuinely prosecute . These are the type of reasons that point to the fact that a local tribunal with an independent and well facilitated prosecution department will do professional investigation. Although the court convicts or acquits on the strength or weakness presented to it by the prosecution, under international law, the state of which the judiciary is an arm of has failed in its obligation. In the eyes of the international law, this second arm of the government acquittals can only be attributed to the State's weak systems.

3.3 The Role of the Executive in Complementing the Statute.

The Executive completes the tripartite nature of arms of the Kenyan government. Under the State's new Constitution, Executive is established in Chapter Nine. Article 129 is unequivocal on how the Executive should conduct itself thus**;**

> *(1)Executive authority derives from the people of Kenya and shall be exercised in accordance with this constitution.*
>
> *(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well- being and benefit.*

The Executive in liberal democracies is charged with the day to day running of the government. It formulates polices and is responsible for their implementation**.** A *fortiori*, a weak executive will negatively impact on the performance of other arms of the governments. This is due to the high level of interaction

amongst these arms for the smooth running of functions of the State. The executive is in charge of the police which are in turn vested with the powers of maintaining law and order which include investigating crimes. The police work closely with the attorney general who is the principle advisor to the governments. Indeed, the office of the Director of Public Prosecution is in the office of the attorney general. The Executive has not been keen to implement the recommendation of CIPEV as relate to justice for the post election victims.

The CIPEV report had clear time frames within which to act but the government failed to adhere to them heralding the takeover by the ICC. The government has throughout the crisis not demonstrated political good will even at the level of drafting the Bill. Critics were quick to cast doubt on the quality of the Bill to deal with the prominent individuals suspected to be the masterminds of the violence. These are very serious allegations especially when coming from a member of the cabinet.

The office of the attorney general which is supposed to be the fountain of justice does not seem to be alive to the legal truism that justice delayed is justice denied. Four years down the line and the government seems to be driven by panic in its latest attempt to defer its case when ICC flexed its muscles.

Analyst and scholars are unanimous that the Kenyan government has failed in the way it is dealing with the ICC on this case. The Government has been trying to pile pressure on the Court to defer its case through the Support of the African Union under Article 16 of the Statute. The feeling by most African countries albeit misplaced is that ICC is more political than judicial. The reason of seeking a deferral from the Security Council sidestepping the Assembly of State Parties (ASP) is strange. One would only assume that the state fears the consequences of not cooperating with the ICC as demanded by the Assembly.

The unwillingness or bad faith by the government cannot be better expressed than by the judges who have handled the few cases prosecuted under the Kenyan Jurisdiction. Judges Maragaand Ochieng did not mince their words on the way the prosecution handled the cases.

3.4 Conclusion

The essay points out that Kenya, a State party to the Rome Statute, has failed in its obligation in dealing with the crimes against humanity that were committed in its territory between 30th December 2007 and February 2008. This has consequently triggered the International Criminal Court concluding that under Article 17 (1) (b), the State has been unwilling and/or unable to exercise its territorial jurisdiction over

crimes that were committed in its territory. This is derived from the fact that the Sate failed to beat the deadlines given by the Commission to set up credible local mechanisms to deal with the matter. The recent efforts by the State to pull out of the obligation under the Rome Statute points a grim picture of impunity in the face of crimes committed in 2007/2008. Further, the state's effort to have the United Nations Security Council defer its case is not only unfounded but also unreasonable. The State had three years within which to put its house in order but failed to do so. The Kenyan case is definitely a good test of an ICC founding principle especially the complementary principle.

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List of Abbreviations

ASP	Assembly of State Parties
CIPEV	Commission of Inquiry into the Post Election violence
ICA	International Criminal Act
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
KNCHR	Kenya National Commission on Human Rights
PC	Penal Code
PTC	Pre Trial Chamber
TC	Trial Chamber

THE JOURNEY, CHALLENGES, LESSONS AND WAY FORWARD

Dr. THOMAS OBEL HANSEN

Introduction

More than four years after Kenya's post-election violence came to an end, no one responsible for organizing and planning the violence, which left more than 1,100 dead and displaced several hundred thousands, has yet been held to account.

A very limited number of prosecutions of low-level perpetrators have taken place in Kenya's national courts, but even these proceedings have faced significant challenges. For example, the investigations carried out by the police have tended to be highly insufficient or flawed, making it difficult to obtain convictions. Because the few proceedings that have taken place have focused on low-level perpetrators, political leaders, government officials and others involved in sponsoring the violence have in effect been granted *de facto* immunity along with police officers and other categories of perpetrators. The very limited scope of criminal accountability at the domestic level stands in contrast to the promises made by the Kenyan leadership in the context of the Kofi Annan-led mediation process. The agreement to conduct "impartial, effective and expeditious investigation of gross and systematic violations of human rights" and punish those found guilty have never materialized in any genuine, credible accountability process.

Due to the lack of a credible criminal justice process in Kenya, in November 2009, the International Criminal Court (ICC) Prosecutor, relying on the *proprio motu* powers granted by the Rome Statute, requested Pre-Trial Chamber II to authorize the opening of an investigation into the Kenyan situation. In a majority decision of 31 March 2010, the Chamber authorized the investigation, which less than a year later led the Prosecutor to name six suspects who he deemed bear the greatest responsibility for the violence.

Although the government has continuously expressed commitment to cooperating with the ICC, the Kenyan leadership has made a series of steps aimed at undermining the process. For example, the government attempted to obtain a United Nations (UN) Security Council deferral of the cases under Article 16 of the Statute, claiming that the ICC would have a negative impact on peace and security in the country. Paradoxically, the government almost simultaneously filed an admissibility challenge, alleging the existence of domestic proceedings which, it was claimed, aimed at prosecuting those most responsible for the violence. Unfortunately, the efforts to compromise international justice are not only a problem of the past: Most recently the Kibaki administration stated that it wishes to "transfer the ICC cases" to the African Court of Justice or the East African Court of Justice, though these courts are currently neither mandated nor resourced to conduct such trials. In any event, the Rome Statute does not offer a basis for transferring ongoing ICC cases to a potentially competing regional court. These statements, therefore, point not to the government's commitment to accountability principles, but rather an intention to confuse the debate about accountability, possibly aimed at laying the ground for non-cooperation with the ICC.

Despite government opposition however, the ICC process is still ongoing. With the trials scheduled to commence in April 2013 there is finally hope that Kenya's legacy of impunity will be challenged. But, it is still too early to celebrate. Leaving aside the danger of non-cooperation, the possible conviction of less than a handful of Kenyan leaders is insufficient to fundamentally make up with the perception that violence can be used as a tool of political competition. The ICC, despite the value of its intervention, cannot deliver renewed faith in Kenya's judicial system; it cannot fully satisfy victims' call for justice; and it will likely not deter the majority of perpetrators, including police officers. Quite simply, the ICC cannot on its own deliver the kind of justice Kenya so desperately needs, nor can it guarantee that the horrendous events in 2007/8 do not repeat themselves. This is why a comprehensive accountability process at the national level to complement the ICC is so required. Creating it, however, will be difficult as large segments of the country's political leadership continue to oppose fundamental political change, including building a more peaceful and just democracy with respect for the rule of law.

This Report looks into Kenya's long, but largely unfinished, journey to accountability for the post-election violence. The Report outlines and analyzes the events, both at the domestic and international level, which have surrounded the complicated task of holding to account those responsible for large-scale violence. The ambition is to highlight the factors that led the ICC to intervene, but also to point to the challenges facing international justice and elaborate on some of the key issues that have surrounded the public debate about the ICC. Further, the Report will offer a framework for understanding why a credible accountability process at the national level is so far lacking, and what road ahead is the preferable attempting to create such a process. Accordingly, the Report puts forward a series of recommendations concerning how the ICC process can best be supported, while at the same time promoting a complementary accountability scheme at the national level.

2. Background to Report: The Post-Election Violence and Its Consequences

Large-scale political violence has occurred in Kenya on various occasions, in particular in the context of elections. In 1992, for example, Human Rights Watch estimates that electoral violence claimed the lives of approximately 1, 500 people and displaced around 300, 000 Kenyans. Five years later, the 1997 elections were similarly followed by large-scale violence, especially in the Coast Province and in the Rift Valley. Though far more peaceful than the two previous elections, some violent incidents also took place in connection to the 2002 elections.

In 2007, this trend of violence persisted. Following a disputed presidential election in December 2007 where both incumbent President Mwai Kibaki and his challenger Raila Odinga claimed victory, violence exploded in various parts of the country and in particular, the Rift Valley and Nairobi slums. In the few weeks that followed the announcement of President Kibaki as the winner, violence erupted and more than a thousand Kenyans died in the clashes between supporters of Kibaki and Odinga. Many of the victims were simply being targeted on the basis of their ethnicity. The violence was driven by armed youth groups and the *Mungiki* criminal gang, but the police were also involved in the attacks, responsible for perhaps one-third of the total casualties. Initially, the violence appeared sporadic, but it is now clear that it was not. Politicians, government officials and businessmen had planned a violent response to the presidential election results months in advance.

Under the auspices of the Panel of Eminent African Personalities, headed by former UN Secretary-General Kofi Annan, an internationally-sponsored mediation

process known as the "Kenyan National Dialogue and Reconciliation" (KNDR) enabled a settlement to the dispute and thereby an end to the violence. This entailed the creation of a coalition government in which Kibaki remained president and Odinga became prime minister. Under pressure from the international community and Kenyan civil society, the two parties to the dispute publically stated their commitment to establishing a number of mechanisms aimed at addressing Kenya's legacy of political violence, including criminal prosecutions; a Truth, Justice and Reconciliation Commission (TJRC); a constitutional review process; and other measures.

While debates about transitional justice have taken place on a number of occasions in Kenya's history, the current discussions about accountability, truth-seeking, and a number of related issues tend to be specifically linked to the post-election violence.

3. Objectives and Methodology of Report

According to the terms of reference of this Report, the International Center for Policy and Conflict (ICPC) requests an outline and assessment of the efforts made to date to promote accountability for the 2007/8 post-election violence, both at the national and international level. In particular, the Report will: 1) Describe and analyze the background to the accountability debate; 2) Provide an overview of the initiatives taken to promote (or obstruct) accountability, including the role of civil society; 3) Analyze why a domestic accountability mechanism has not yet been created; 4) Analyze key issues pertaining to the ICC process, including its impact and ability to promote desired goals of criminal justice such as deterrence and promoting respect for the rule of law; and 5) Offer recommendations with respect to the way forward creating a complementary accountability mechanism and promotion of more sustainable solutions to accountability.

Accordingly, the Report will offer an in-depth and nuanced account of the process of seeking accountability for the post-election violence, which aims at increasing the understanding among relevant actors – including the general public, the media and decision-makers – concerning issues of particular importance to the pursuit of accountability, both at the national and international level. By offering a comprehensive account of the accountability process as it has unfolded thus far, the Report also aims at creating documentation which could be of interest for future generations of Kenyans.

The Report relies on various methodologies, including a desk review of relevant legal literature, legislation and news reporting. Although no interviews or other forms of stakeholder consultations have been carried out in the context of this specific study, the Report draws on previous consultations with various stakeholders in Kenya's accountability process undertaken both by the ICPC and the consulted author of this Report.

Although the present Report is based on a thorough assessment of the issues outlined above, the Report must be read in light of the dynamic nature of the topics under consideration, meaning that some of the findings may lose relevance over time.

The report is structured as follows: Section 4 provides for a detailed outline of the attempts made to date at pursuing (or obstructing) accountability for the post-election violence, both at the national and international levels. Section 5 elaborates on some of the key issues pertaining to the legitimacy and legality of ICC intervention in Kenya, including situational selection and complementarity. Section 6 discusses the impact of the ICC process, including the question of whether the Court's intervention may prevent new violence, its broader impact on the political landscape in Kenya and relevance to victims. Moving from the international to the national level, Section 7 attempts to lay the foundation for moving ahead with establishing a complementary accountability process by discussing how such a process could be constructed and key challenges for giving effect to a legitimate and credible accountability process at the national level. Section 8 concludes by contextualizing the findings of the Report, including a brief discussion of the lessons learned from Kenya's contested accountability process. The Report's recommendations can be found in Section 9.

4. The Attempt to Pursue Accountability for the Post-Election Violence: An Outline of a Four Year Journey

Fact Box 1: Summary of key events with respect to the pursuit of accountability

Pressured by the international community, in January 2008, the two parties to the electoral dispute engaged in a mediation process known as the "Kenyan National Dialogue and Reconciliation", led by former UN Secretary-General Kofi Annan. This resulted in the formation of a coalition government as well as public commitment to the establishment of a number of processes aimed at addressing Kenya's legacy of political violence, including criminal prosecutions.
In October 2008, the Commission of Inquiry into Post-Election Violence published its report recommending the establishment of a Special Tribunal under the threat that any failure to do would lead the Commission to hand over a list of key suspects to the ICC Prosecutor.
In December 2008, Kenya enacted the International Crimes Act to domesticate the Rome Statute.
On February 12, 2009, the Kenyan Parliament voted down a bill concerning the establishment of a Special Tribunal to deal with the post-election violence. Later attempts to establish a national accountability process also failed.
Due to the reluctance to establish a domestic accountability process, in July 2009, Kofi Annan handed over the list of key suspects to the ICC Prosecutor.
On 26 November 2009, the ICC Prosecutor requested Pre-Trial Chamber II of the ICC to authorize an investigation into the Kenyan situation.
On March 31, 2010, Pre-Trial Chamber II in a majority decision issued a decision authorizing the ICC Prosecutor to commence an investigation into Kenya's post-election violence.
On December 15, 2010, the ICC Prosecutor submitted to Pre-Trial Chamber II an application under article 58 of the Rome Statute for the Court to summon the six individuals he deems to bear the greatest responsibility for the post-election violence.
On December 22, 2010, the Kenyan Parliament passed a motion, which required the government to take action for the country's withdrawal from the Rome Statute.
In early January 2011, the government of Kenya launched diplomatic efforts aimed at obtaining a UN Security Council deferral of the Kenyan situation, a move supported by the African Union.
On March 8, 2011, Pre-trial Chamber II of the ICC issued summonses for the six Kenyans suspected by the Prosecutor to have masterminded the post-election violence. Judge Hans-Peter Kaul dissented, arguing that the post-election violence did not amount to crimes against humanity.
On March 31, 2011, the government of Kenya filed an application with the ICC challenging the admissibility of the cases pursuant to Article 19 of the Rome Statute.
On April 8, 2011, the President of the UN Security Council declared that "after full consideration", the members of Council could not agree to support Kenya's quest for a deferral and no further action will be taken on the matter.
On May 30, 2011, Pre-Trial Chamber II rejected Kenya's admissibility challenge, noting there remains a "situation of inactivity" in the country.
On August 30, 2011, the Appeals Chamber decided that Pre-Trial Chamber II did not err when it dismissed Kenya's admissibility challenge.
On January 23, 2012, Pre-Trial Chamber II of the ICC confirmed charges against four of the initial six suspects (Ruto, Sang, Kenyatta and Muthaura).

During the early months of 2012, the government once again stated that it wishes to "bring the cases home", simultaneously arguing that it will prosecute the ICC suspects in national courts, in the East African Court of Justice and in the African Court of Justice and Human Rights.
On July 9, 2012, Trial Chamber V announced that the trials will commence in early April 2013.
On August 17, the multi-agency taskforce established by Kenya's Director of Public Prosecution and mandated to review the cases relating to the post-election crimes and make recommendations for how to move ahead dealing with them, stated that most of the cases were unsuitable for prosecution.

4.1. The Kofi Annan-Led Mediation Process and Early Attempts at Creating a Domestic Accountability Mechanism

As the post-election violence was escalating, various attempts were made to bring Kibaki and Odinga to the negotiation table. Former Ambassador Bethwel Kiplagat (who later, to the regret of many, became the chairperson of the TJRC) attempted to resolve the impasse, but with no results. As it became clear that a nationally brokered solution was unviable, regional and international authorities, including Archbishop Desmond Tutu of South Africa attempted to mediate between the parties. However, Kibaki and Odinga refused to engage in dialogue, the former insisting he was the democratically elected president and the latter claiming the elections had been rigged and his victory stolen.

On 8 January, 2008, Ghanaian President John Kufuor, in his capacity as Chairman of the African Union (AU), arrived in Kenya with the purpose of making the parties agree to external involvement in a mediation process. Though Kufour did not succeed in bringing the parties together, shortly after leaving Kenya, he announced the establishment of an AU Panel of Eminent African Personalities to facilitate resolution of the crisis. Kufour approached Kofi Annan who agreed to chair the Panel, which also included former President Benjamin Mkapa of Tanzania and former First Lady Graça Machel of Mozambique.

The KNDR, which was officially launched by the Panel on 29 January, 2008, enjoyed the support of most significant international players, and received technical support of various UN agencies, as well as the Geneva-based Centre for Humanitarian Dialogue (HD Centre).

The objectives of the mediation process were twofold: 1) To bring about a political resolution in order to end the violence; and 2) To facilitate a dialogue to address the long term structural problems in Kenya that

had enabled this level of violence and lay the ground for the reforms needed to effect sustainable peace in the country.

The first goal was reached on February 28, 2008, after around 6 weeks of negotiations, when Kibaki and Odinga signed a power-sharing agreement. Recognizing that "neither side is able to govern without the other", the agreement acknowledged that Kibaki would remain the President, but created the post of Prime Minister for Odinga, and otherwise stipulated that the composition of the coalition government should reflect the parties' relative power in parliament.

Dealing with the second goal, the two parties to the dispute signed agreements with regard to establishing a number of mechanisms aimed at addressing Kenya's legacy of political violence, including criminal prosecutions, the TJRC, a constitutional review process and other measures. With regard to accountability, it was agreed that further discussions were to be held concerning how to ensure "the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice". The need to prosecute the perpetrators of the post-election violence was reiterated in a public statement of February 14, 2008. To solve the political crisis surrounding the election violence, the parties agreed that reconciliation and healing was imperative, and reaching this end, it was acknowledged, would require the "identification and prosecution of perpetrators of violence".

It was in this light that the parties to the KNDR decided to create the Commission Investigating the Post-Election Violence (CIPEV), which was mandated to investigate the post-election violence and make recommendations on how to prevent its recurrence, including recommendations with regard to prosecuting the organizers and perpetrators of the violence. In its October 2008 publication – which is widely recognized to offer a comprehensive and accurate account of the post-election violence – CIPEV highlighted the role of impunity as a cause of the violence and recommended the establishment of a Special Tribunal with specific jurisdiction over the post-election violence and a judicial staff made up of Kenyans as well as foreigners. CIPEV envisaged that the main objective of the Special Tribunal would be to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the [post-election violence]", and suggested that the Special Tribunal should apply Kenyan law as well as the "International Crimes Bill, once this is enacted". The Report requested the parties to reach an agreement on the establishment of a Special Tribunal and put forward a Bill in Parliament. The request was made under the threat that a possible failure to comply with this proposal would result in a list of names with high-profile Kenyans, who CIPEV suspected to be responsible for the violence, would be handed over to the Prosecutor of the ICC.

Prior to the publication of the CIPEV report, the government had taken a series of steps, which on the surface of it seemed to indicate support for a domestic criminal justice solution. For example, newly appointed Minister of Internal Security George Saitoti had drawn up a list of post-election violence related cases to be treated with particular speed, and ordered the Police to speed up investigations and prosecutions of the remaining cases. Furthermore, in June 2008, the Attorney General (AG) instructed the Director of Public Prosecution (DPP) to appoint a team of State Counsel tasked with identifying all post-election violence cases that had been filed. Moreover, by December 2008 Kenya domesticated the Rome Statute by enacting the International Crimes Act. Kibaki and Odinga had signed an agreement stipulating that a Cabinet Committee would draft a Bill on the Special Tribunal.

While these developments could have led one to believe that the Kenyan leadership was indeed committed to keeping the promises made during the KNDR, soon into the New Year, it became clear that important segments of the leadership would fiercely oppose criminal justice for the violence.

First, on February 12, 2009, the Constitution of Kenya amendment Bill 2009 – drafted by then Justice Minister Martha Karua to establish the Special Tribunal – was voted down by Parliament. (101 members of Parliament voted in favor of the bill, while 93 voted against it, but the threshold of votes to amend the constitution is two-thirds of the members of Parliament). Many of the parliamentarians who opposed the Bill criticized it for failing to ensure the Tribunal's independence from the executive, some arguing that a credible accountability process could only take place in The Hague. Although some politicians may have had sincere concerns about the proposed tribunal's independence and impartiality, others seemed to use the "don't be vague, let's go the Hague" slogan as a way of forestalling any form of an accountability process, hoping that neither of the processes would materialize. At the same time, independent commentators and civil society organizations, including the ICPC, criticized the Bill for being drafted with insufficient input from Kenyan civil society.

Next, on 30 July, 2009, the Cabinet rejected to table in parliament a second Bill on a Special Tribunal, which had been drafted by then Justice Minister Mutula Kilonzo, this time with more input from civil society. In this context, the government issued a statement saying that "The cabinet on Thursday rejected a local tribunal and instead settled on Truth, Justice and Reconciliation Commission (TJRC) to deal with post-election violence perpetrators." In a rather contradictory language however, it was also emphasized that "[t]his does not in any way reduce [the cabinet's] desire to punish impunity".

In yet another attempt at creating an accountability process, in November 2009 Member of Parliament Gitobu Imanyara presented the Constitutional Amendment Bill before Parliament, but parliamentarians showed their opposition by simply staying away from the sessions where the Bill was to be discussed (for

instance, on 11 November 2009 when the Bill was scheduled to be discussed, only 30 of 222 parliamentarians were present, which resulted to the postponement of the debate till 18 November 2009. But, on that date, only 17 parliamentarians were present). Therefore, due to lack of quorum, the Imanyara Bill was never passed.

Analyzing these events in combination, it seems clear that important segments of the leadership had decided to engage in delaying tactics, hoping to ultimately exhaust those who called for a legitimate and credible accountability process. This could have worked had it not been for the unwillingness of the Kenyan leadership to create a credible solution to accountability.

4.2. ICC Involvement and the Responses of the Government of Kenya

On July 3, 2009, a Kenyan government delegation, which included the Justice Minister, Lands Minister and the Attorney General met with the ICC Prosecutor. This led to a joint statement, which acknowledged the need to hold those most responsible for the post-election violence to account in order to prevent the recurrence of election violence. Further, the Kenyan authorities committed themselves to refer the situation to the ICC should the efforts to create a national process fail.

As the Kenyan government failed to create a domestic accountability mechanism and refer the situation, in November 2009 the ICC Prosecutor Moreno-Ocampo – who Annan had provided with the CIPEV's list of suspects – requested the Pre-Trial Chamber II to approve a formal investigation of the post-election violence. On March 31, 2010 the Chamber authorized the opening of the ICC's first *proprio motu* investigation in a majority decision. Judge Hans-Peter Kaul dissented, arguing that the post-election violence albeit serious did not meet the threshold for crimes against humanity due to the absence of a "state or organizational policy" as mentioned in Article 7(2)(a) of the Statute.

On December 15, 2010, less than a year after the Pre-Trial Chamber granted the Prosecutor permission to open an investigation into Kenya's post-election violence, Moreno-Ocampo submitted applications requesting the Court to summon the six individuals he deemed to bear the greatest responsibility for the violence. In contrast to some of the preceding ICC interventions, the Prosecutor seemed committed to pursuing even-handed justice in Kenya: Two separate cases, each involving three suspects, were to be opened – one targeting supporters of Kibaki's presidential campaign (the so-called PNU case) and the other targeting supporters of Odinga's campaign.

Furthermore, while the ICC had earlier refrained from indicating government officials of a state party, in the Kenyan case, several of the suspects formed part of the country's political leadership: Uhuru Kenyatta, son of the founding father, Jomo Kenyatta, then served as Minister for Finance and Deputy Prime Minister (the latter is still the case at the time of writing) and is considered a frontrunner for the March 2013 presidential elections; William Ruto, who portrays himself as the leader of the Kalenjin ethnic group and similarly has presidential aspirations, had also held a cabinet post in the coalition government, though he was suspended on the basis of corruption charges prior to being indicted by the ICC; and Francis Muthaura, served as head of Kenya's civil service at the time he was indicted and is seen as one of President Kibaki's closest advisors.

Though Kenyan leaders, including President Kibaki, restated their commitment to cooperate with the ICC, it soon became clear the country's leadership would do its best to undermine the process.

On December 22, 2010 – only a week after the ICC Prosecutor had announced the identity of the suspects, the Kenyan Parliament passed a motion which required the Government to take appropriate action to withdraw from the Rome Statute and repeal the International Crimes Act. The motion, which was opposed by only one member of parliament (former Justice Minister and presidential candidate for the 2013 elections, Martha Karua), was passed under the threat that any failure to comply with its contents within sixty days would lead to actions against the Kibaki administration, including sabotaging government business in the Parliament. Noting that "any criminal investigations or prosecutions arising out of the post election violence of 2007/2008 be undertaken under the framework of the new Constitution," the motion not only rejected ICC intervention, but once again brought attention back to the possibility of establishing a domestic accountability process. Although some cabinet members initially appeared in favor of the motion, the government ultimately chose not to take any action on it. Rather than reflecting commitment to the ICC process however, this decision should be understood in light of the fact that a possible withdrawal from the Rome Statute would not affect the country's obligation to cooperate with the ICC concerning the already pending cases.

Fact Box 2: Withdrawal from the Rome Statute

Article 127 of the Rome Statute:

(1) A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

(2) A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Instead, the government, spearheaded by Vice President Kalonzo Musyoka, used significant diplomatic resources attempting to obtain a UN Security Council deferral of the Kenyan cases under Article 16 of the Rome Statute, according to which the Council can order a temporary – but possibly renewed – stop to ICC investigations or prosecutions if it deems that such action threatens international peace and security. In support of the request, government officials stated that because "some of the individuals mentioned by the ICC prosecutor are among the front runner presidential candidates and the civil servants mentioned are in office and charged with responsibilities for peace and security," the ICC process poses "a real and present danger to the exercise of government and the management of peace and security in the country." Having obtained the support of the African Union, on February 8, 2011, the Kenyan government formally requested the UN Security Council to defer the cases. However, because several permanent members of the Council, including the US, the UK and France made it clear they would oppose Kenya's request, the deferral request has never been brought to a formal vote.

Fact Box 3: UN Security Council deferral of ICC proceedings

Rome Statute:

Article 16: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

UN Charter

Chapter VII, Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Alongside the attempts at obtaining a deferral, the government took steps to have the ICC cases declared inadmissible by the Court. On March 31, 2011, two British lawyers (Sir Geoffrey Nice and Rodney Dixon) hired by the Kenyan government filed an application with the ICC challenging the admissibility of the cases pursuant to Article 19 of the Rome Statute, which states (with reference to Article 17 of the Statute) that the Court cannot exercise jurisdiction if a state with jurisdiction is investigating or prosecuting the case. To support its position, the government argued that ongoing judicial reforms meant that the "national courts will now be capable of trying crimes from the post-election violence, including the ICC cases, without the need for legislation to create a special tribunal, thus overcoming a hurdle previously a major stumbling block". Further, "investigations and prosecutions mostly of low level offenders involved in the 2007/8 violence", it was held, would soon "reach up to those at the highest levels who may have been responsible". However, Pre-Trial Chamber II rejected the admissibility challenge, stating that possible future investigations are irrelevant for challenging admissibility and that no credible information had been provided to show that Kenya was actively undertaking an investigation. In its landmark decision, the Chamber made it clear that for an admissibility challenge to succeed; national proceedings must involve the same suspects as well as the same crimes under investigation by the ICC, thus dismissing the government's claim that a domestic accountability process which involves "persons at the same level in the hierarchy" would render an ICC case inadmissible.

In its appeal of this decision, the government seemed to partly change its position, arguing that national proceedings with regard to high-level perpetrators, including the ICC suspects, were in fact already ongoing. To support this claim, the government submitted information indicating the types of investigatory steps made, including information that indicated that a case file had been opened on one of the ICC suspects (Ruto). Upholding the "same person/ same crime threshold" however, the Appeals Chamber held that the Pre-Trial Chamber had not erred in dismissing Kenya's admissibility challenge. The Chamber explained that it was up to the government of Kenya to ensure that the admissibility challenge was sufficiently substantiated by specific evidence pointing to national proceedings at the time when it was filed, and that a state challenging admissibility cannot expect to be allowed to amend an admissibility challenge, nor can it expect that it will be allowed to submit a substantial amount of additional evidence once the admissibility challenge has already been filed.

4.3. Current Status of the ICC Process

Following the September 2011 confirmation of charges hearings, on January 23, 2012 Pre-Trial Chamber II made the much-awaited decision as to whether the suspects would stand trial. The majority of judges found substantial grounds to believe that four of the six suspects committed the crimes alleged by the Prosecutor. In the PNU case, the Chamber concluded that "there is sufficient evidence to establish substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are individually criminally responsible as indirect co-perpetrators" for murder, deportation or forcible transfer of population, rape, persecution and other inhumane acts, all constituting crimes against humanity under the Rome Statute. The evidence supported, thought the judges, the Prosecutor's allegations of close links between Kenyatta and Muthaura and the crimes committed by the Mungiki gang. In the ODM case, the Chamber found sufficient evidence to establish substantial grounds to believe that Ruto is criminally responsible as an indirect co-perpetrator and Sang for contributing to the crimes of murder, deportation or forcible transfer of population, and persecution, amounting to crimes against humanity. The Chamber found reasons to believe that Ruto played a crucial role organizing the attacks on PNU supporters, including adopting a "stipendiary scheme and a rewarding mechanism to motivate the perpetrators to kill and displace the largest number of persons belonging to the targeted communities as well as to destroy their properties."

Although the Prosecutor has stated he will "keep investigating Kosgey and the activities of the police as well as crimes allegedly committed in Kibera and Kisumu," the Prosecutor also declared that the office would not appeal the Court's decision not to confirm the charges against Kosgey and Ali.

In May 2012, the Appeals Chamber rejected the suspects' challenge to the Court's jurisdiction. The suspects had submitted that the interpretation of "organizational policy" adopted by Pre-Trial Chamber II was incorrect. The Appeals Chamber dismissed this petition, noting that the question of whether the Pre-Trial Chamber erred in its interpretation of "organizational policy" and its conclusion that such a policy existed, are not issues of subject-matter jurisdiction for the purposes of articles 19(6) and 82(1)(a) of the Statute, but rather a question of whether crimes against humanity were in fact committed, which the Appeals Chamber held is for the Trial Chamber to decide.

Fact Box 4: The Policy Requirement in Article 7(2)(A) and Its Implications for the Kenyan Cases

Article 7(2)(a) of the Rome Statute stipulates that crimes against humanity are preconditioned on the existence of an attack on a civilian population "pursuant to or in furtherance of a state or organizational policy to commit such attack." This so-called policy requirement has come to play a crucial role for the Kenyan ICC cases. Notably, Judge Hans-Peter Kaul's dissent to authorizing an investigation into Kenya's post -election violence – as well as his subsequent dissents to summon and confirm charges against the Kenyan suspects – was based on the understanding that the policy requirement is not fulfilled. But what is the policy requirement about, and why has it come to play such a crucial role in the Kenyan ICC cases?

There has never been much consensus concerning how Article 7(2)(a) should be interpreted. For example, commentators have disagreed as to whether Article 7(2)(a) adds a separate requirement to crimes against humanity or if the existence of a policy to commit an attack should simply be understood as something that can support that a widespread or systematic attack has taken place, as required by article 7(1) of the Rome Statute. In the case against Jean-Pierre Bemba an ICC pre-trial chamber held that the latter is the correct interpretation. However, in the more recent decisions relating to the Kenyan situation, the judges in Pre-Trial Chamber II have clearly stated that Article 7(2)(a) should be understood to entail a separate contextual requirement.

Assuming that there is indeed such a separate requirement, the question arises as to what is meant by "policy." In the Kenyan case, all three judges in Pre-Trial Chamber II agreed that a policy need not be formally adopted but can be deducted from a variety of circumstances. The two majority judges set a low threshold for the term policy, in essence holding that a policy can be assumed to be in place if the attack amounts to something more than spontaneous or isolated acts of violence.

But what actors then can establish a policy? As the Prosecutor has never alleged the existence of a state policy in the Kenyan cases, it is the question of what groups qualify as an "organization" under article 7(2)(a) that have become determining for these cases.

In previous cases before the ICC, the term "organization" has been understood to include "groups of persons who govern a specific territory" or "any organization with the capability to commit a widespread or systematic attack against a civilian population." However, in the Kenyan situation, the majority of judges in Pre-Trial Chamber II set a new – and seemingly lower – standard, holding that the relevant distinction concerns "whether a group has the capability to perform acts which infringe on basic human values." Judge Kaul, on the other hand, wanted to set a higher threshold for the meaning of "organization", arguing that only groups that have a "state-like" nature qualify as an organization.

These different interpretations have far-reaching consequences for the Kenyan ICC case. For example, the majority of judges in Pre-Trial Chamber II in their decision to issue summonses in the ODM case found reasonable grounds to believe that Ruto, Kosgey, and Sang had established a network that was "under responsible command;" had a "hierarchical structure;" "possessed the means to carry out a widespread or systematic attack against the civilian population;" "identified the criminal activities against the civilian

population as its primary purpose;" and "articulated an intention to attack the civilian population." Accordingly, the majority argued that the network had the capability to perform acts which infringe on basic human values and, thus, satisfies their understanding of the policy requirement in article 7(2)(a). Using the higher threshold of "substantial grounds to believe", these findings were essentially confirmed in connection to the confirmation of charges, though the evidence was not strong enough to have charges confirmed for Kosgey.

Noting that the prosecutor had alleged the existence of five different branches of the network – a political, a media, a financial, a military, and a tribal branch – Judge Kaul observed that the first four of these branches did either not exist or simply reflected the tribal branch. While Judge Kaul said that the tribal branch of the network seemed to have coordinated its activities, he did not find that the evidence presented pointed to a hierarchy between the different branches of the network. Consequently, a "responsible command within a vertical hierarchical structure" – as known from states – was deemed absent. Judge Kaul also observed that the network – as opposed to states – only had a "temporary existence for a specific purpose," namely to assist the community's political leaders in gaining or maintaining political power in the Rift Valley. Taken together, these features led the judge to conclude that the network did not equal a state-like organization, but rather constituted a "group of perpetrators with a predisposition to violence engaged in a regional campaign of aggressive inter-ethnic violence, at the instigation of those persons within their tribe who were seeking to achieve their political aims at all costs." It is for these reasons that Judge Kaul dissented to the majority's decisions in the ODM case, both with regard to issuing summonses and confirming charges.

Similarly, the policy requirement is central to the PNU case. Concerning the Mungiki crimes in the Rift Valley towns of Nakuru and Naivasha, the majority of judges held Mungiki should be considered the relevant "organization". Taking into account that Mungiki operates as "a large and complex hierarchical structure featuring various levels of command and a clear division of duties in the command structure", and "that obedience to the internal rules of the Mungiki is achieved by way of strict disciplinary measures", the majority of judges found that the Mungiki "is under a responsible command, or has an established hierarchy". Noting that "[t]he material also shows the existence of a trained militant wing of the Mungiki, which is employed to carry out violent operations, including executions," the Chamber indicated that the "group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population". The majority therefore concluded that the Mungiki "qualify as an organization within the meaning and for the purposes of article 7(2) (a) of the Statute".

Judge Kaul again disagreed with the majority of judges, arguing that the threshold for an organization is not met. Judge Kaul understood that the Prosecutor had alleged the existence of a policy of *one* organization, which included the Mungiki, the pro-PNU youth, the Kenyan Police Forces and other PNU politicians and wealthy PNU supporters. In contrast to the majority of judges, Judge Kaul did therefore not perceive Mungiki the relevant organization and instead undertook an assessment of whether these different actors in combination could be seen to constitute a "state-like" organization. Noting inter alia that the Mungiki and the Kenyan police forces had been fighting each other prior to the election violence, Judge Kaul did not find that was the case. Additionally, Judge Kaul rejected the assertion by the majority that the Mungiki on its own could possibly form an organization within the meaning of article 7(2)(a).

All three judges argued that the police inaction as well as the police shootings could not be attributed to an organizational policy as the Prosecutor had suggested, therefore declining to include these aspects in the case against the three suspects. The rationale for the majority of judges was that the "Prosecutor explicitly submitted that the attack occurred pursuant to an 'organizational' policy, without alleging the existence of a State policy by abstention." This must be understood to imply that any allegations made in connection to an actor normally perceived part of the state, such as the police, must make reference to the existence of a state policy – as opposed to an organizational policy – regardless of the fact that actors such as the police may sometimes act on a private basis.

In May 2012, the Appeals Chamber rejected the suspects' challenge to the Court's jurisdiction. The suspects had submitted that interpretation of "organizational policy" adopted by Pre-Trial Chamber II was incorrect. The Appeals Chamber dismissed the challenge, noting that the question of whether the Pre-Trial Chamber erred in its interpretation of "organizational policy" and its conclusion that such a policy existed, are not issues of subject-matter jurisdiction for the purposes of articles 19 (6) and 82 (1) (a) of the Statute, but rather a question of whether crimes against humanity were in fact committed, which the Appeals Chamber held is for the Trial Chamber to decide once the trials commence. Consequently, the understanding of the policy requirement in Article 7(2)(a) will likely be brought into play again during the trials, and the interpretation to be adopted by the Trial Chamber may ultimately decide whether (some of) the suspects are convicted.

On July 9 2012, Trial Chamber V, which will be hearing the two Kenyan cases, announced its decision that the trials of the ODM suspects will commence on April 10, 2013 and the trials of PNU suspects on April 11, 2013. This decision accommodated the wishes of the Prosecutor as well as three of the defendants, Kenyatta, Ruto and Sang, who had asked that the trials commence after the March 2013 elections in Kenya.

In recent months, the government has once again stated that it wishes to "bring the cases home". The government has simultaneously argued that it will prosecute the ICC suspects in national courts, in the East African Court of Justice and in the African Court of Justice and Human Rights. However, the Rome Statute does not offer a basis for transferring cases to a potentially competing regional criminal court and only in "exceptional circumstances" may the ICC grant leave for the government to bring a second admissibility challenge.

Unless the government defies its obligations under the Rome Statute and decides not to cooperate with the Court, the ICC process will thus move on and some of those responsible for organizing the post-election violence may ultimately be held to account.

Fact Box 5: What crimes are the suspects alleged to have committed?

A. ODM Case

The so-called ODM case initially concerned three supporters of Odinga's (ODM political party) 2007 presidential campaign, namely suspended Minister of Higher Education William Ruto, former Minister of Industrialization Henry Kosgey and radio presenter Joshua Sang. The ICC Prosecutor has alleged that Ruto and Kosgey prepared a plan for attacking supporters of the PNU political party, with the goals of punishing and expelling PNU supporters from the Rift Valley and gaining political power in the province. When on December 30, 2007, the Electoral Commission of Kenya declared Kibaki the winner of the presidential election, a network established by Ruto and Kosgey, the Prosecutor alleges, was activated to kill and oppress PNU supporters on various locations in the Rift Valley. Sang is suspected by the Prosecutor of having supported the commitment of these crimes by using his radio program to provide signals to perpetrators on the ground on when and where to attack. The crimes allegedly committed include murder, torture, deportation or forcible transfer and persecution based on political affiliation.

Based on the Prosecutor's application for having summonses issued, on March 8, 2011, Pre-Trial Chamber II in a majority decision issued summonses for these three individuals to appear before the Court. The Chamber did not find sufficient evidence that torture had been committed as part of the plan, but otherwise agreed with the Prosecutor's counts. The majority found reasonable grounds to believe that Ruto and Kosgey are criminally responsible as indirect co-perpetrators of crimes against humanity in accordance with article 25(3)(a) of the Rome Statute. Concerning Sang, the Chamber only found reasonable grounds to believe that he is responsible for having in other ways contributed to the commission of crimes against humanity, in accordance with article 25(3)(d) of the Rome Statute.

Following the confirmation of charges hearings in September 2011, on January 23, 2012, the Chamber – again in a majority decision – confirmed the charges against Ruto and Sang, but not for Kosgey. Whereas the threshold for issuing summonses concerns "reasonable grounds to believe", to confirm the charges there needs to be "substantial grounds to believe" the suspects committed crimes falling under the jurisdiction of the Court.

With respect to Ruto, the Chamber found that "there is sufficient evidence to establish substantial grounds to believe that between 30 December 2006 and 22 December 2007, a criminal plan was developed and set in place by Mr. Ruto and other members of the organization (the Network) with the purpose of evicting members of the Kikuyu, Kisii, and Kamba communities in particular because they were perceived as PNU supporters." The Chamber found substantial grounds to believe that 1) On 31 December 2007, "Mr. Ruto jointly with other members of the organization committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(l)(a), (d) and (h) of the Statute; 2) "Between 1 January 2008 and 4 January 2008 Mr. Ruto jointly with other members of the organization committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in the greater Eldoret area, pursuant to articles 7(l)(a), (d) and (h) of the Statute"; 3) "Between 30 December 2007 and 16 January

2008 Mr. Ruto jointly with other members of the organization committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to article 7(l)(a), (d) and (h) of the Statute"; 4) "Between 30 December 2007 and 2 January 2008 Mr. Ruto jointly with other members of the organization committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(l)(a), (d) and (h) of the Statute."

The Chamber found substantial grounds to believe that "Mr. Sang, by virtue of his position within Kass FM as a key broadcaster, intentionally contributed to the commission of the crimes against humanity referred to above by: (i) placing his show Lee Nee Emet at the disposal of the organization; (ii) advertising the meetings of the organization; (iii) fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyus; (iv) broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; and (v) broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets." The Chamber concluded that there are substantial grounds to believe that 1) "On 31 December 2007 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(l)(a), (d) and (h) of the Statute"; 2) "Between 1 January 2008 and 4 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in the greater Eldoret area, pursuant to articles 7(l)(a), (d) and (h) of the Statute"; 3) "Between 30 December 2007 and 16 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to articles 7(l)(a), (d) and (h) of the Statute"; 4) "Between 30 December 2007 and 2 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(l)(a), (d) and (h) of the Statute."

With regard to Kosgey, it was noted that "[h]aving examined the evidence available as a whole, the Chamber does not find sufficient evidence to establish substantial grounds to believe that Mr. Kosgey is criminally responsible as an indirect co-perpetrator with Mr. Ruto and others in accordance with article 25 (3)(a) of the Statute or under any other alternative mode of liability".

Although the confirmation of charges hearings do in some ways resemble a trial, the findings of the Pre-Trial Chamber should not be seen as a "almost guilty" verdict. The confirmation of charges stage is primarily intended to protect the suspects against abusive and unfounded accusations. The question of guilt will be determined by Trial Chamber V. The ODM trial is scheduled to commence on 10 April 2013.

B. PNU Case

The so-called PNU case initially involved three supporters of Kibaki's (PNU political party) 2007 presidential campaign and/or government officials, namely then Head of Public Services Francis Muthaura, then Minister for Finance Uhuru Kenyatta, and then Head of Kenya's Police Forces Mohammed Ali. The ICC Prosecutor has alleged that as a response to the violence launched by ODM supporters – and with the purpose of keeping PNU in power – Muthaura and Ali used their positions in the National Security Advisory Committee to order the Kenyan Police Forces to use excessive violence in ODM strongholds, including Kisumu and Kibera. As a second tactic used to fight ODM supporters, the Prosecutor has alleged that Kenyatta facilitated a meeting between Muthaura and the Mungiki criminal gang in early January 2008, during which it was agreed that Mungiki members should carry out retaliatory attacks against civilian supporters of the ODM in the Rift Valley towns of Nakuru and Naivasha. The Prosecutor held that Muthaura coordinated with Ali to ensure that the police would not interfere with the planned Mungiki attacks. According to the Prosecutor, Kenyatta provided the necessary financial and logistical support for the plan to be carried out. The Prosecutor has held that the crimes committed by the three suspects include murder, rape and other forms of sexual violence, deportation or forcible transfer of population, other inhumane acts causing serious injury and persecution based on political affiliation.

In issuing its summonses, Pre-Trial Chamber II found reasonable grounds to believe that Kenyatta and Muthaura are responsible as indirect co-perpetrators in accordance with article 25(3)(a) of the Rome Statute. However, the Chamber only found reasonable grounds to believe that Ali is responsible for having otherwise contributed to the commission of crimes in accordance with article 25(3)(d) of the Rome Statute. Importantly, while the Chamber found reasonable grounds to believe that crimes against humanity were committed in the context of the Mungiki attacks, it did not find reasonable grounds to believe that the police inaction in Nakuru and Naivasha or the police shootings in Kisumu and Kibera amount to crimes against humanity, resulting that police crimes are no longer a topic in the PNU case.

Following the confirmation of charges hearings in September 2011, on January 23, 2012, the Chamber – again in a majority decision – confirmed the charges against Kenyatta and Muthaura, but not for Ali. This must be understood in light of the fact that to issue summonses there must be "reasonable grounds to believe", but to confirm charges the higher threshold of "substantial grounds to believe" is applied.

Concerning Kenyatta and Muthaura, the Chamber found "that the evidence placed before it provides substantial grounds to believe that, at least as of November 2007, a series of contacts took place between Mungiki representatives and individuals acting on behalf of Mr. Muthaura and Mr. Kenyatta. According to the evidence, the purpose of such contacts was to secure the support of the Mungiki for the upcoming presidential elections following a period of an intense government crackdown on the organization, which had commenced at least as of 2006." The Chamber found substantial grounds to believe that Muthaura and Kenyatta directly participated in a number of meetings with Mungiki leaders where the violent response was planned and organized, including a meeting at State House on 26 November 2007; a meeting the same place on 30 December 2007; and a meeting at Nairobi Club on January 3, 2008. The Chamber concluded that there is sufficient evidence to establish substantial grounds to believe that Muthaura and Kenyatta are individually criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute for 1) "murder constituting a crime against humanity within the meaning of article 7(l)(a) of the Statute, i.e. the killing of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around

Naivasha between 27 and 28 January 2008"; 2) "Deportation or forcible transfer of population constituting a crime against humanity 'within the meaning of article 7(l)(d) of the Statute, i.e. the displacement of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008"; 3) Rape constituting a crime against humanity within the meaning of article 7(l)(g) of the Statute, i.e. the rape of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008"; 4) Other inhumane acts constituting a crime against humanity within the meaning of article 7(l)(k) of the Statute, i.e.: (i) severe physical injury of perceived ODM supporters; and (ii) infliction of serious mental suffering to perceived ODM supporters by way of subjecting them to witnessing the killings and the mutilations of their close relatives, in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008"; and 5) Persecution constituting a crime against humanity within the meaning of article 7(l)(h) of the Statute, i.e. the following acts committed against perceived ODM supporters by reason of their perceived political affiliation: (i) killing; (ii) displacement; (iii) rape; (iv) severe physical injury; and (v) infliction of serious mental suffering by way of subjecting them to witnessing the killing and the mutilation of their close relatives, in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008".

Concerning Ali, the Chamber found that since there are not "substantial grounds to believe that the Kenya Police participated in the attack in or around Nakuru and Naivasha, i.e. that there existed an identifiable course of conduct of the Kenya Police amounting to a participation, by way of inaction, in the attack perpetrated by the Mungiki in or around Nakuru and Naivasha". Consequently, the Chamber held, it is not possible to entertain further the attribution of any conduct of the Kenya Police to Mr. Ali, and, a fortiori, his individual criminal responsibility." Accordingly, the Chamber rejected to confirm the charges against Ali.

As noted above, although the confirmation of charges hearings do in some ways resemble a trial, the findings of the Pre-Trial Chamber should not be seen as a "almost guilty" verdict. The confirmation of charges stage is merely intended to protect the suspects against abusive and unfounded accusations. The question of guilt will be determined by Trial Chamber V. The PNU trial is scheduled to commence on 11 April 2013.

4.4. Current Status of Domestic Proceedings

In July 2011 (and thus before the Appeals Chamber delivered its ruling in August 2011) the Kenyan Police stated that it had opened files and has been questioning (some of) the ICC suspects in connection to their alleged involvement in the post-election violence. Since then, however, there have been no public statements confirming the existence of active national proceedings with regard to the ICC suspects.

With respect to other perpetrators of the post-election violence, the Police have consistently claimed that a large number of cases are being prepared for prosecution. In March 2011, Police spokesman Eric Kiraithe

stated that: “We have a lot of evidence and it has always been updated. The cases have been pending because the prosecutions are supposed be done by a special tribunal, as recommended in the Waki report”. The spokesperson also indicated that since January 2011 there has been increased police activity in areas that were worst affected by the violence, with the aim of reviving cases that otherwise had “become cold”, and that detectives are reconstructing files relating to murder, rape and arson and other serious offences, involving around 6,000 suspects, that were originally opened at individual police stations.

Furthermore, in a March 2011 progress report which was forwarded to the ICC in connection to the admissibility challenge, the DPP stated that almost 3,400 cases were “pending under investigation”, the vast majority of them in the Rift Valley. The DPP also claimed that there had been 94 convictions for post-election violence related crimes, while 57 cases had led to acquittals, 179 had been withdrawn, 21 were pending the arrest of known persons, and at least 62 were pending before the courts. However, research undertaken by Human Rights Watch found that the DPP report appeared to have been “compiled hastily, with little concern for accuracy”, and further noted that “a number of cases included in the report have nothing to do with the election violence” and “[t]he actual number of known post-election violence convictions is significantly lower than the report indicated”. For example, Human Rights Watch research showed that many of the claimed convictions were either acquittals unrelated to the post-election violence or for minor offences, such as “taking part in a riot” or “handling stolen property.”

Of the 47 cases clearly related to the post-election violence that had actually reached the court system, it was found that only in eight cases had there been a conviction. Human Rights Watch also observed that of the post-election violence cases that have actually been brought to court, none of them involves politicians, local or national, who allegedly incited the violence, and none relates to the police violence that took place during the 2007/8 crisis. Concerning the priority cases created in 2008, Human Rights Watch found that they had usually not resulted in convictions, though there has been one minor assault conviction linked to the killing of Hassan Omar Dado; one suspect had been convicted of manslaughter in the killing of David Too; and there have been a number of convictions for the murder of police officers in Bureti. Since then, there have been a limited number of additional convictions. For example, Peter Kepkemboi was recently convicted for murder before the Nakuru High Court (for shooting Kamau Kimani Thiongo, a Kikuyu, in the head with an arrow), and sentenced to life.

Despite what sometimes appeared to be quite compelling evidence, there have been acquittals in several prominent cases. For example, suspects who had been charged with the arson attack on the Kiambaa church in Eldoret were acquitted in April 2009 for lack of evidence. Further, a police officer caught on

camera shooting protesters to death was also acquitted in June 2010 for want of proper investigation and prosecution.

In April 2012, a multi-agency taskforce – involving staff members from the DPP, the State Law Office, the Ministry of Justice, the National Police Service and Witness Protection Unit – was set up by the DPP to review the post-election violence files. In June 2012, members of the taskforce stated that it had reviewed the first of a total of three batches of files, amounting to around 1,400 hundred files, and made recommendations to the DPP on how to processes these files (the remaining files, approximately 4,500, were either still with the relevant police stations, or had been handed over to the taskforce, awaiting its review). According to the taskforce, the crimes mentioned in the files involve crimes under domestic law such as murder, arson, housebreaking, burglary, theft and sexual offences, but not international crimes such as crimes against humanity. However, it now seems clear that the work of the taskforce will not lead to a significant amount of additional prosecutions, if any. In mid August 2012, the taskforce stated that most of the cases fall "below the prosecutable level", as the files lack "essential information such as witness statements of complaints or investigating officers" or identification of the crime scene. The taskforce did not indicate what further steps will be taken to obtain additional evidence, nor did it clarify how the files that can actually be prosecuted will be moved forward in the system. It is also noteworthy that the DPP has stated that it is a problem that the post-election cases have only been investigated on an individual basis, not as part of a policy or a plan to target certain groups.

In sum, national proceedings with regard to the post-election violence have led only to a very limited number of court cases and even fewer convictions. It seems unlikely that a significant amount of additional prosecutions will take place within the existing structures of Kenya's legal system unless special procedures for handling these cases are adopted. The absence of a credible domestic justice process seems largely to be the result of lack of political will to promote accountability principles and make up with a culture which allows politicians, government officials and other leaders to operate beyond the reach of the law. Although in part, the problems derive from poor capacity and lack of skills among relevant legal sector bodies, including the police, these challenges also reflect a broader problem, namely that politicians have had an interest in maintaining poorly equipped legal sector institutions so as to avoid that an independent and impartial justice process could occur. While the ongoing judicial reforms offer hope of creating a more legitimate judiciary in Kenya, the flawed or non-existing reforms of the Police and the DPP make it unlikely that Kenya's justice system will manage to handle the task of prosecuting those responsible for the post-election violence, unless special measures are created.

5. The Legitimacy and Legality of ICC Intervention in Kenya

The legitimacy and legality of ICC interventions depend on various factors. In the Kenyan situation, two issues pertaining to legitimacy and legality have attracted significant attention in the discourses surrounding the ICC process, namely 1) The Prosecutor's use of *proprio motu* powers to deal with the post-election violence and thus the legitimacy of selecting the Kenyan situation for investigation; and 2) The issue of complementarity, including the justifications for rejecting the admissibility challenge filed by the government of Kenya. This Section of the Report looks into these issues in an attempt to offer a nuanced account of key controversies surrounding the ongoing ICC process.

5.1. Selecting the Kenyan Situation for Investigation

The ICC Prosecutor has consistently stated that the selection of situations is detached from political and other pragmatic considerations, but simply reflects an appropriate application of the law. In a key note address at the Council on Foreign Relations in 2010, for example, Luis Moreno-Ocampo stated: "My duty is to apply the law without political considerations. Other actors have to adjust to the law". The new Prosecutor, Fatou Bensouda, who came into office after the suspects in the Kenyan case had been admitted for trial, has made similar statements. Specifically, in the Kenyan situation, the Prosecutor held that the Office had a "duty to open an investigation" since the statutory criteria for opening an investigation were satisfied.

However, such statements stand in contrast to the fact that the Rome Statute offers little guidance concerning where the ICC should intervene, and therefore also how to prioritize the resources of a Court that was never intended to prosecute all of the crimes committed that principally fall under its jurisdiction. The main criteria accepted by the Rome Statute for selecting between situations where crimes under the Court's jurisdiction have been committed and which would otherwise be admissible concerns "gravity". However, the Statute does not spell out what is understood by gravity and how it should inform the Prosecutor's selection of situations.

Furthermore, until the Prosecutor's use of *proprio motu* powers in Kenya, the jurisprudence of the ICC has failed to offer an interpretation of the term gravity, which could have guided the Prosecutor's situational selection. In issuing the arrest warrant for Lubanga, Pre-Trial Chamber II held that considering the gravity

requirement in Article 17(1) (d), two features must be considered, including whether the situation was "systematic" or "large-scale" and whether the situation caused "social alarm in the international community". This interpretation was however rejected by the Appeals Chamber, which noted that the "systematic" or "large-scale" criteria blur the distinction between the jurisdictional requirements for war crimes and crimes against humanity, and that the "social alarm" criterion depends on subjective and contingent reactions to crimes rather than their objective gravity. The Appeals Chamber failed to offer an alternative test for assessing gravity.

In the absence of any legal guidance, the Prosecutor had until the Kenyan case tended to emphasize the scale of the crimes – more specifically the number of victims – justifying ICC intervention. As noted by Australian scholar Kevin Jon Heller: "In practice, the number of victims is the *only* factor that has played a significant role in the OTP's situational gravity determinations – an emphasis that it has defended on three different grounds. First, the OTP argues that its limited investigative resources require prioritizing situations involving mass atrocity. Second, the OTP believes that the international community is more likely to view investigations of situations involving large numbers of victims as legitimate. And third, the OTP points out that the number of victims tends to be reliably reported, making it a relatively objective factor."

Furthermore, the decision *not* to intervene in some cases has been justified mainly by making reference to a low number of victims. Analyzing the numerous communications received arising out of the war in Iraq, the Prosecutor found that there was "a reasonable basis to believe" that British soldiers had committed the war crimes of willful killing and inhuman treatment. Although the Prosecutor claimed to consider "various factors in assessing gravity", it was clear that the main justification for not requesting that an investigation be opened had to do with the number of victims, which, it was argued, was "of a different order than the number of victims found in other situations under investigation or analysis by the Office [i.e. Uganda, DRC and Darfur]".

In contrast, the Prosecutor's application for authorization to open an investigation into Kenya's post-election violence emphasized several other factors aside from the number of victims. More specifically, the application supported that the gravity requirement was satisfied on the basis of: 1) The number of victims (noting that "the post-election violence resulted in a reported 1, 133 to 1, 220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350, 000 persons, and 3, 561 reported acts causing serious injury"); 2) The social and economic consequences of the violence (noting how the violence was followed by "widespread looting and wanton destruction of residential and commercial areas"); 3) The widespread nature of the violence (noting that post-election violence related crimes were committed in six out of eight Kenyan

regions); 4) The ethnic or group-based dimensions of the violence (noting that "multiple crimes had been organized and planned within the context of a widespread and systematic attack against selected segments of the Kenyan civilian population [and] groups, and persons belonging to these groups, have been stigmatized and deliberately targeted on the basis of distinctive ethnic feature and/or presumed political affiliations"; 5) The cruelty of the violence (noting, inter alia, how "perpetrators often crudely cut off body parts", "terrorized the whole communities by installing check points where the perpetrators 'selected' the victims based on their ethnicity, and hacked them to death", "burning of people alive", "gang rape and genital mutilation", and "forced circumcision and penile amputation"); 6) The impact on victims (in particular the victims of sexual violence, women and children and displaced persons); 7) The broader impact on the local communities in terms of security, social structure, economy and persistence of impunity in the country; and 8) The negative impact on Kenya's economy (noting, inter alia, that Kenya's Gross Domestic Product growth rate fell from 7% in 2007 to 1.7% in 2008).

Accordingly, it would appear that the Prosecutor's use of *proprio motu* powers in Kenya presents a significant departure from the past practice that focused alone, or mainly, on the scale of the violence, specifically the number of victims. But this departure does not necessarily mean that ICC intervention in Kenya is illegitimate, or less legitimate than the preceding interventions. In fact, various factors indicate that the Court's decision to deal with Kenya's post-election violence is both justifiable and desirable.

First, Pre-Trial Chamber II seemed to endorse the more holistic approach taken by the Prosecutor in the Kenyan situation, holding that an assessment of gravity requires "a quantitative as well as a qualitative approach", and "it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave".

Second, the departure from earlier prosecutorial practice appears to offer enhanced compliance with the Prosecutor's stated understanding of gravity. The unpublished "Draft for Discussion: Criteria for Selection of Situations and Cases" (June 2006), for example, states that gravity will be determined not only on the basis of the number of victims, but also taking into account other factors, including the nature of the crimes, their manner of commission and their impact. The understanding that the scale of the crimes is not the only important threshold was reiterated in a draft Policy Paper on Preliminary Examinations, of October 2010, in which it was explained that "the Office's assessment of gravity includes both quantitative and qualitative considerations based on the prevailing facts and circumstances", which includes "the non-exhaustive factors of scale, nature, manner of commission of the crimes, and their impact".

Third, the selection of the Kenyan situation appears consistent with the 2009-12 Prosecutorial Policy which establishes overall principles to guide the Prosecutor's work. The Prosecutorial Policy refers to "positive

complementarity", whereby it is understood that the Prosecutor actively intervenes only when states do not have the intention or capacity to conduct national proceedings. The continued failure to establish the Special Tribunal, as had been recommended by CIPEV, or in other ways, to put in place a credible accountability process in Kenya would seem to render ICC intervention in the country in compliance with this principle (and arguably more so than for example the situation in Uganda where the country's judiciary would probably have been both able and willing to try LRA offenders had they been captured). The Prosecutorial Policy further states that the Prosecutor will be addressing the interests of victims, which means that the Prosecutor will be seeking the views of victims "at an early stage, before an investigation is launched, and to continue to assess their interests on an on-going basis" (which will *inter alia* form the basis of the determination of 'interests of justice' under Art 53). Although the Prosecutor had seemingly not undertaken independent efforts to obtain the views of the victims in Kenya before filing the application to have an investigation opened, surveys carried out by civil society organizations, including the ICPC, indicate that most victims have continuously (though with some variations) had a positive attitude towards ICC intervention. Moreover, the Prosecutorial Policy aims at maximizing the impact of the Office's work, which means that the Prosecutor will promote the ICC's main goal – understood by the Prosecutor as "to end impunity to contribute to the prevention of future crimes" – in various ways. Given the persistence of impunity in Kenya, both for political violence and other serious human rights abuses, ICC intervention in the country could be justified with reference to a special need to end this culture of impunity and thereby offering a way forward preventing a repetition of the 1992, 1997 and 2007/8 election violence.

To the extent one accepts the Prosecutor's description of the circumstances surrounding Kenya's post-election violence (and generally speaking, there are no good reasons not to), using the *proprio motu* powers in the Kenyan situation can therefore hardly be criticized for failing to comply with the law and policies concerning situational selection. Although the Kenyan case presents a departure from the justifications for selection used in the self-referrals, selecting the situation for investigation appears to offer a step forward for the ICC.

Fact Box 6: The *Proprio Motu* powers in the Rome Statute

According to Article 13 of the Rome Statute, ICC jurisdiction can be triggered in three different ways. First, a state party can refer a situation to the Prosecutor (Article 14(1)). Second, the UN Security Council may refer a situation to the Prosecutor (Article 13(b)). Finally, the Prosecutor may according to Article 15(1) initiate an investigation *proprio motu*.

The *proprio motu* powers are further explained in Article 15(2) and (3), according to which the Prosecutor, on the basis of an analysis of the information received or obtained, shall submit to the Pre-Trial Chamber a request for authorization of a formal investigation if it is deemed that that there is a "reasonable basis to proceed with an investigation". The Rome Statute itself does not clarify the "reasonable basis" threshold, but Rule 48 of the Rules of Procedure and Evidence provides that in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3), the Prosecutor is required to consider the criteria mentioned in Article 53(1) of the Statute, including 1) Whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed; 2) Whether the case would be admissible under Article 17 (which includes an assessment of gravity as well as the complementarity scheme, according to which the ICC only has jurisdiction if a state is not actively investigating or prosecuting the crimes in question); and 3) Whether, taking into account the interests of victims and the gravity of the crime, it would be in the interests of justice to proceed with an investigation. If the Pre-Trial chamber concludes that the case appears to fall within the jurisdiction of the Court and that, according to the above, there is a reasonable basis to proceed with the investigation, it shall authorize the commencement of a formal investigation (Article 15(4)).

From the outset, the Prosecutor's *proprio motu* powers have been seen as a controversial trigger of jurisdiction. During the drafting of the Rome Statute, several states, notably the US, were fundamentally opposed to granting the Prosecutor the powers to commence an investigation *proprio motu*, fearing that this would lead to a politicized ICC, for example in the form of a "Doctor Strangelove Prosecutor" who would run wild and target sensitive political situations. On the other hand, those who argued in favor of the *proprio motu* powers, including the group of "like-minded states" and many human rights organizations, held that failing to grant the Prosecutor these powers would jeopardize the Court's independence and credibility because the Court would be too dependent on states. Eventually, the drafters of the Rome Statute opted for including the *proprio motu* powers, though in a more restricted version than proposed by some, as the Prosecutor's decision to open an investigation requires judicial review.

However, until the Kenyan case, the ICC Prosecutor had refrained from using the *proprio motu* powers. In part, this was the consequence of a prosecutorial policy that deliberately sought self-referrals, rather than forcing ICC intervention on State Parties in which crimes under the jurisdiction of the Court had been committed. This policy was justified making reference to the necessity of obtaining cooperation with the relevant authorities, which was thought more likely if the government in question had requested and thus consented to ICC intervention.

5.2. Assessing Complementarity in the Kenyan Situation

The principle of complementarity whereby national courts are given priority to prosecute international crimes has often been pointed to as the cornerstone of the Rome Statute. According to Article 17(1)(a) of the Rome Statute, "the Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".

The question of whether this provision entails a single or a two-fold test to determine whether a case is inadmissible has been subjected to considerable debate in the literature on the ICC. On the one hand, some observers have held that Article 17 renders a case admissible before the ICC only if the state with jurisdiction over the crime is unwilling or unable to prosecute that crime. Accordingly, if states fail to investigate or prosecute, not because they are unable or unwilling but for other reasons, this view implies that the ICC does not have jurisdiction. On the other hand, many commentators have noted that the wording of Article 17 means that the question of unwillingness or inability only becomes relevant once it has been asserted that national proceedings are in fact ongoing.

The ICC has consistently supported this latter interpretation, thus holding that the determination of admissibility must rely on a two-fold test whereby any assessment of unwillingness or inability can only take place if it has been established that there is indeed investigatory or prosecutorial activity in the state concerned. In the case against *Katanga*, the Appeals Chamber observed: "In considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute."

This approach, which has the obvious advantage of accommodating cases that arrive at the Court through the self-referrals where the government were not necessarily unwilling or unable to prosecute, was upheld

in the Kenyan situation. The Appeals Chamber clarified: "It should be underlined … that determining the existence of an investigation must be distinguished from assessing whether the State is 'unwilling or unable genuinely to carry out the investigation or prosecution', which is the second question to consider when determining the admissibility of a case. For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps". Consequently, the ICC acted in consistent with its earlier practice when holding in the Kenyan situation that the issue of complementarity needs to be assessed taking the starting point in answering whether national proceedings actually exist.

Examining whether such proceedings existed, Pre-Trial Chamber II held that "the admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings". The Appeals Chamber agreed with this interpretation of the complementarity regime, noting that for a case to be inadmissible under Article 17(1) (a) of the Statute in connection to an application filed under Article 19, "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court". The Appeals Chamber elaborated: "Kenya's submission that 'it cannot be right that in all circumstances in every Situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State if the State is to retain jurisdiction' cannot be accepted. It disregards the fact that the proceedings have progressed and that specific suspects have been identified. At this stage of the proceedings where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for substantially the same conduct."

While the Kenyan government had alleged that national proceedings would soon "extend up to the highest levels," the Chambers concluded that the government had not submitted evidence that national proceedings actually existed with respect to the suspects involved in the ICC cases, and therefore dismissed the admissibility challenge. The Chamber's finding that there remained "a situation of inactivity" was in part reached on the ground that the Kenyan government had contradicted itself by arguing that the ongoing investigations would later extend to the highest level of the hierarchy, while at same time stating that there are actually ongoing investigations in relation to the six suspects involved in cases under the Chamber's consideration. The Court thus made it clear that for an admissibility challenge to succeed, investigations at the national level concerning the same suspects must be *ongoing*, as opposed to some future investigations.

Although one might argue that the chambers have set a high threshold for determining activity which could narrow the complementarity principle, the Court nonetheless seems to have reached a reasonable conclusion when dismissing Kenya's admissibility challenge. In light of the government's submission of evidence that pointed to the opening of case files against some of the suspects, perhaps however, it might have been more precise to reject the admissibility challenge with reference to the government's unwillingness to initiate a genuine process aimed at prosecuting those responsible for the violence, as opposed to stating that there remained a situation of inactivity.

6. Impact of the ICC Process in Kenya

Although the trials have not yet commenced, the ICC process appears to already have had a significant impact in Kenya. Acknowledging that any assessment of the impact of international justice will be surrounded by a level of uncertainty, this Section of the Report attempts to identify some of the major consequences of the ICC's intervention with respect to the post-election violence.

6.1. Will the ICC Help Prevent New Political Violence?

Some argue that pursuing accountability runs counter to peace and security because by targeting presidential candidates, the ICC process will push powerful individuals into a corner where, out of desperation, they will be more disposed to incite and organize violence. Although it cannot be excluded that some individuals will use the ICC process as a pretext for sponsoring new violence, it seems more likely that the accountability process will contribute to peace and security in the country, at least in the long run.

The ICC process presents an important step forward in ending Kenya's legacy of impunity, which has been a prerequisite for political violence. While the deterrent effect of the ICC as such is disputed, in the specific case of Kenya, where members of

the political elites have for decades incited and organized violence with impunity, there seems to be some merit in claiming that the Court's actions might deter some political leaders from using violence as a political tool in the future.

Now, it has been a common critique of deterrence theory that state officials who organize and plan large-scale violence do not act rationally. Mark Drumbl, for example, argues that "deterrence's assumption of a certain degree of perpetrator rationality […] seems particularly ill fitting for those who perpetrate atrocity". While this may be true in some cases, it seems more reasonable to assume that Kenyan leaders involved in the post-election violence viewed the violence in rational terms – as an efficient tool for maintaining or obtaining power, the benefits of which would outweigh any negative consequences, including the (low) risk of punishment. If assuming that most government officials and politicians in fact view their actions in relatively rational terms, ICC prosecutions of high-profile Kenyan leaders and officials ought thus to limit these individuals' incentive to use violence simply because the perceived risk of punishment ought to increase. Yet, politicians may still find reasons to use whatever means at their disposal to achieve or maintain power. Despite devolution, limits to presidential power, improved checks-and-balances and other progress envisaged with Kenya's 2010 constitution, gaining power in the upcoming presidential elections is still likely to be seen as tantamount to control over state institutions and personal wealth, and ethnic-driven politics are not only a feature of the past. Even if the ICC process challenges the perception that impunity for state-sponsored violence is self-evident, these other factors may limit the effect of deterrence.

Furthermore, due to the persistence of inter-ethnic tensions in Kenya, it is crucial that the ICC process is seen as even-handed. If not, risks would be high that "the accused might be able to whip up unrest and potentially serious new bouts of violence in their areas of origin". To the Court's credit, various measures have indeed been taken to avoid an ethnification of the accountability process. Besides equally targeting both sides to the election violence, it is important that the Court has decided that hearings take place and decisions are delivered simultaneously for the two different cases. The Court should also be lauded for having taken certain steps to limit the use of divisive ethno-political rhetoric. During the April 2011 hearings, for example, the presiding judge of Pre-Trial Chamber II warned the suspects in general tones that any use of "dangerous speeches" could lead the Chamber to issue arrest warrants on the suspects. Such warnings appeared, at least temporarily, to limit the use of inciting language. Nonetheless, the suspects and their supporters have to some extent succeeded in disseminating the picture that the Court targets whole communities, as opposed to individuals. But even as some politicians attempt to make the ICC process look like an attack on ethnic communities, trials in The Hague may ultimately contribute to an understanding that it was *individuals*, not ethnic groups as such, who organized the violence.

Needless to mention, the deterrent effect of the ICC also depends on the outcome of the process. Regrettably, being in power may be exactly what in the end excludes trial and punishment. Should one of the suspects who run for presidency (Ruto and Kenyatta) win the elections, it is hard to imagine that they will appear for their trials. Should this happen, the ICC's intervention in Kenya may end up prompting new violence, rather than deterring it, as the message sent would be that those in power are immune from the Court.

Yet, even when the Court has refused to confirm charges against suspects, there are some indications that the process has nonetheless had a deterrent effect. In connection to the Tana River unrest, the Deputy Police Spokesman Charles Owino, stated that the Police feared a repetition of the 2007/8 events where the Police Commissioner was named as an ICC suspect for allowing the Police to commit serious crimes. The Spokesperson made it clear that the Police wanted full cabinet approval of use of force to quell the unrest expressing concerns that politicians could otherwise "disown us and use our move for political expediency".

In sum, the ICC offers hope that Kenya's culture of impunity, which has been a driver of election violence and other forms of serious human rights abuses, may finally be challenged. Yet, the Court's ability to prevent new violence, both in general and in connection to the forthcoming elections–referred to by some as the "most emotive, high-stake election since independence" – may be limited due to a series of circumstances.

6.2. Broader Impact on Kenyan Politics, Including the 2013 Elections

Following the ICC Prosecutor's announcement of the identities of the suspects in December 2010, the ICC has contributed to a number of significant developments in Kenya's political landscape.

Notably, tensions between the two coalition partners seemed to escalate as an immediate consequence of the ICC issuing summonses on key members of the coalition government. Initially, decisive parts of the ODM political party, including

Prime Minister Odinga, made it clear that they supported ICC trials, thereby opposing the official government responses to the ICC, which appeared to have been conceived by Kibaki's PNU party. The lack of a coherent government policy was evident from a number of incidents. On March 13, 2011, for example, ODM Secretary General Anyang' Nyong'o wrote a letter on behalf of the ODM political party urging the UN Security Council not to order a deferral of the ICC cases, thereby distancing himself (and apparently the Party) from the official government policy. Further, in sharp contrast to the efforts made by the government to end ICC involvement, Odinga initially expressed strong support for trying the suspects in The Hague. Even as the ICC controversy at times seems to have intensified tensions between the two coalition partners, it should nonetheless not be seen as something which has caused a breakdown of an otherwise harmonious government.

Just like the coalition government has not been able to agree on a common line towards accountability, the ODM Party has also been affected by internal disagreement concerning the ICC. For example, in mid-March 2011, a number of ODM leaders – including Vice Chair Aden Bare Duale, Deputy Organizing Secretary Benjamin Langat, and Deputy Secretary General Mohamed Mohamud – sent a letter to the UN Security Council, explaining that the letter sent by ODM Secretary General Nyong'o did not reflect the ODM party's position on the deferral issue.

Although some of the ODM politicians who initially indicated strong support for the ICC seem later to have changed their stand on the process, key ODM figures, including Ruto, had already left the Party claiming that Odinga was the one who ought to be prosecuted and that the Prime Minister had played a role in making him a suspect. As Ruto left the ODM Party, he formed a (loose) coalition with Kenyatta and other politicians, including Vice President Musyoka. This partnership might seem ironic given that Ruto and Kenyatta are alleged to have incited violent attacks on

each other's supporters in connection to the 2007 elections. Combined with the absence of any clear political program, this had led many commentators to label the coalition a "marriage of convenience", which, it has been argued, was formed by the two suspects in order to influence government policies on the ICC issue, and to challenge Odinga's way to State House. Although the coalition members seem unable to agree on who should be promoted as the main presidential candidate and might fall entirely apart before the elections, it seems clear that the ICC process has played a role in consolidating alliances between politicians who by and large remain opposed to reform and accountability.

Finally, it is worth mentioning that a number of civil society organizations recently filed a petition with Kenya's High Court claiming that the two ICC suspects (Ruto and Kenyatta) are not eligible to run for presidency, as the charges brought against them mean they do not satisfy the requirements of integrity in Chapter VI of the Constitution. Depending on the High Court's decision, the ICC might thus indirectly end up playing a crucial role determining for who will become Kenya's next president.

Fact Box 7: the ICC's suspect selection

Other than the ambiguous gravity threshold discussed above, there is a lack of guidance in the Rome Statute concerning how in a given situation where the Court's jurisdiction has been triggered, the Prosecutor should select which – typically among many – crimes and suspect should be prosecuted.

In the absence of law, the Prosecutor has developed various policies relevant for selecting the suspects, including a policy that commits the Office to "prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation". This entails that the Prosecutor will "select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes" However, the ICC case law does not necessarily endorse a consistent application of this policy: In the situation in the DRC, the Appeals Chamber disagreed with the standards established by the Pre-Trial Chamber, according to which the gravity requirement entails that the ICC should focus on the "most senior leaders suspected of being the most

responsible" for crimes within the jurisdiction of the Court. The Appeals Chamber held that it would be more logical to assume that the Court would maximize its deterrent effect if "no category of perpetrators is per se excluded from potentially being brought before the Court".

Besides the level of seniority, the prosecutorial policy states that "incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization". While the 2006 draft policy concerning "Criteria for Selection of Situations and Cases" had stated that the Prosecutor will investigate various groups in a situation "in sequence", the 2009-12 Prosecutorial Strategy does not explicitly address the issue of sequenced prosecutions. Furthermore, the Prosecutor has consistently expressed commitment to conduct the selection process in an impartial manner, which means that the same methodology and standards will apply for all groups.

The Prosecutor's policies would therefore seem to offer a sound foundation for promoting even-handed justice as well as targeting those most responsible for the crimes. While the ICC Prosecutor has sometimes been criticized for being biased by targeting only rebel leaders in opposition to the incumbent, such criticism can hardly apply to the Kenyan situation as the Prosecutor opted for targeting – and equally so – both sides to the post-election violence, including senior government officials and politicians in power.

Nonetheless, some observers remain skeptical of the suspect selection in Kenya and question whether or not the Prosecutor ought to have focused on the two principals. While such allegations have tended to be based on mere speculations, the evidence tabled by the Prosecutor during the confirmation of charges process could be seen to indicate that other senior government officials might have been aware of the plans to launch violent attacks.

6.3. Other Potential Benefits and Challenges to the ICC Process

Besides its potential to help prevent new election violence and the broader impact on Kenyan politics, the ICC process may entail a number of other benefits as well as challenges. For example, it has been suggested that court proceedings may help establish an objective historical record of the crimes. This, it has been argued, could possibly contribute to reconciliation for example because such a narrative would remedy collective stigma.

Further, the ICC process may offer an opportunity for victims to obtain some amount of justice. As will be explained in the Fact Boxes below, the Court allows for victims participation in the process and victims have a number of other rights under the Rome Statute.

Fact Box 8: The ICC and the victims of Kenya's post-election violence

The ICC is generally understood to be a "victim friendly" institution, especially if compared to the ad hoc tribunals set up for the former Yugoslavia and Rwanda, and many national systems of criminal justice.

However, to understand how the ICC may help the victims of Kenya's post-election violence it is first necessary to explain how the Court defines "victims." Rule 85(a) of the Rules of Procedure and Evidence stipulates that individual victims refer to persons "who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." This provision provided Judge Ekaterina Trendafilova of the ICC's Pre-Trial Chamber II with a starting point when in early August 2011 she made a ruling concerning who should be considered victims in connection to the confirmation of charges hearings. In accordance with the jurisprudence of the ICC, the judge screened the applications received to clarify whether the victim could properly identify him- or herself; whether the events described in the application for participation constitute a crime within the jurisdiction of the Court with which the suspects are charged; and whether the applicant had suffered harm that "appears to have arisen as a result" of that crime. Such harm, the judge notes, should be "personal" but can involve physical injury, emotional suffering as well as economic loss. Consequently, both direct and so-called "indirect victims," including those who suffered due to the loss of a family member, could in principle be granted victim status.

Of the 394 applications received in the ODM case, the judge characterized the vast majority (327) as victims within the meaning of the ICC's legal framework. In the PNU case, 249 applications for victims status had been received, of which 223 were defined by the presiding judge as victims.

These victims have been granted several rights, both in connection to the confirmation of charges hearings and beyond.

A central feature of the Rome Statute is that victims are entitled to participate in the hearings, including the confirmation of charges hearings. In practice, this procedural right means that one or more legal representatives of the victims are appointed by the Chamber and can be present during all public sessions of the hearings. It also means that the "views and concerns" of victims can be presented by these representatives during the hearings provided that the personal interests of victims are affected by the specific issue under consideration and that such oral submissions do not infringe the rights of the suspects, the expeditiousness of the proceedings or other important objectives of the hearings. Further, victims' representatives are explicitly granted the right to make an opening and closing statement, an opportunity that the legal representative opted for during the confirmation of charges hearings.

Subjected to any restrictions concerning confidentiality and the protection of national security information, victims or their representatives may also "consult the record of all proceedings before the Pre-Trial Chamber." As a result, the legal representative of the victims in the Kenyan ICC cases have access to the evidence filed by the Prosecutor and the defense counsel, including unredacted versions of documents, though the Chamber may decide on a case-by-case basis that the representative shall not have access to material classified as confidential. The right to access material also allows the representative, following the

Chamber's authorization, to access transcripts of the sessions of the confirmation of charges hearings, including sessions held *in camera* or *ex parte*.

Further, it is noteworthy that the victims' representative may make written submissions to the Chamber related to law as well as fact. This right, which is restricted to instances where the personal interests of victims are affected and a number of other restrictions, has been used in Kenyan ICC cases. For example, the legal representative made a submission with regard to Kenyatta and Ali's submission regarding jurisdiction and admissibility in which the defense teams argued that the policy requirement in Article 7(2)(a) was not satisfied in the Kenyan situation. Noting the number of victims, the brutality of the violence and its organized nature, the legal representative of the victims submitted that the term "organizational policy" must be read in conjunction with the requirement of a "widespread or systematic attack against any civilian population", and that the facts pointed to the existence of such a policy.

Besides confirming or denying the charges against the suspects, Article 61(7)(c)(ii) of the Rome Statute allows the Chamber to adjourn the hearing and request the prosecutor to consider amending a charge because the evidence submitted "appears to establish a different crime within the jurisdiction of the Court." In the Decision on the Confirmation of Charges in the Lubanga case, Pre-Trial Chamber I understood this to allow the Chamber to independently – and against the wish of the prosecutor – add a charge against the accused. Seemingly with this decision in mind, the victims' representative in the ODM case has requested Pre-Trial Chamber II that she be allowed to make written submissions with the purpose of convincing the Chamber that it should expand the charges against the three suspects on its own initiative. Noting that virtually all of the victims "have suffered loss as a result of destruction of property," the representative made it clear that she believes the charge of persecution should be extended to include "acts of destruction and/or burning of property, infliction of injuries and looting". The presiding judge of Pre-Trial Chamber II rejected this application on the grounds that she believes "an amendment of the charges could only be brought by the Prosecutor" in light of the evidence submitted during the confirmation of charges hearings, thus dismissing the practice of Pre-Trial Chamber I in the case against Lubanga. Nonetheless, Judge Trendafilova did not exclude the possibility that arguments presented by the victims' representative at an "appropriate stage" could be taken into account by the Chamber when ruling on the charges, a ruling that could potentially involve requesting the prosecutor to amend the charges. In other words, the victims may, at least indirectly, affect how the Chamber rules on the charges, and thus the question of whether the suspects should stand trial and for what crimes.

The Rome Statute also provides the victims with a number of other procedural rights. For example, the victims' representative is allowed to question the witnesses and experts called by the prosecutor or the defendants to testify before the Court. While such examination is subjected to a number of restrictions, it is important to note that the Appeals Chamber has understood this right to imply that the representative's questioning may relate to matters which bear upon the guilt or innocence of the accused person. As illustrated by Chana's questioning of Cheramboss, a former commandant of Kenya's paramilitary General Service Unit (GSU) called to testify by Ruto's defense team in connection to the confirmation of charges hearings, this right does not only concern the trial itself, but may also be exercised in connection to other court hearings.

Interestingly, though neither the Rome Statute nor the Rules of Procedure and Evidence say anything specific about victims' right to lead evidence before the Court, the Appeals Chamber confirmed a ruling of the pre-trial chamber in the Lubanga case that the victims through their legal representative may present their own evidence during the trial pertaining to the guilt or innocence of the accused.

Crucially, victims also have a right to reparations as a direct outcome of the ICC cases. According to Article 75 of the Statute, the Court is empowered to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims." Such a decision, which can be based on a request from the victims or be made by the Court acting on its own initiative, may award reparations on an individual or collective basis, or both. Article 75 also authorizes the Court to order that a convicted person provide victims with reparations, including restitution, compensation and rehabilitation. Should the convicted person prove uncooperative, the Court may request the relevant state to seize property and assets of that person with regard to satisfying the victims. However, persons convicted by international tribunals often succeed claiming indigence, which is well illustrated by the *Lubanga* decision. With this in mind, it is important that – as unique feature of the ICC – a Trust Fund for Victims has been established.

The Trust Fund, which began its operations in 2007, is mandated to give effect to a possible ruling on compensation, but it may also in other ways help the victims in Kenya. As illustrated by the establishment of a series of projects in Uganda and the Democratic Republic of Congo despite the lack of any conviction in these cases so far, the Trust Fund has created a policy according to which victims may enjoy benefits even before the ICC cases are finalized. However, as the Trust Fund has limited resources – and taking into account that a pre-trial chamber has "strongly recommended" that the Fund should prioritize allocating resources to execute future reparation orders – it is far from certain that victims in Kenya will benefit from the Fund's existence in any significant way, or at all, at this stage.

While the ICC provides the victims of Kenya's post election violence with some important rights, it is vital that the government of Kenya gives effect to the victims' right to reparation, including establishment of a national compensation program, counseling, access to medical services, and other forms of reparations.

Trial Chamber V is at the time of writing yet to decide on the modalities of victims' participation at the trial phase of the proceedings.

Besides asking what rights the Rome Statute grants the victims, it is also important to investigate what attitudes the victims of the post-election violence have towards international justice. As will be explained in the text box below, the ICPC has conducted a study on that topic.

Fact Box 9: ICPC study of media coverage and victims' perception of the confirmation of charges process

In 2011, the ICPC conducted a study concerning media coverage and the level of victims' participation in the confirmation of charges hearings. It was observed that the confirmation process generated significant interests among victims, and many closely followed the hearings in the media. However, the study also concluded that victims appeared divided as to the ICC's effectiveness in bringing lasting peace and justice to the country, and that in some cases the process led to renewed tensions in the communities most affected by violence. While the study noted a high level of coverage of the confirmation process by local print and electronic media, the absence of simultaneous translations resulted that many victims were unable to understand the process. The ICPC study recommended, among others, that the ICC should engage in closer collaboration with Kenyan media, especially community level radio stations that cover areas with a particular high proportion of victims; that the ICC could consider engaging professional translators, who could offer simultaneous translation of the hearings in Swahili and some widely spoken local languages; and that the ICC should consider producing Swahili and local language translations of its leaflets and outreach documents, and distribute these documents for free to victims and the general public. The study also recommended that Kenyan media, despite intensive coverage of the hearings, could do more to reach out to the victims, for example by announcing repeatedly the timings of the hearings, and by increasing the amount of independent expert discussions of the hearings so as to avoid manipulation of victims. Furthermore, the study recommended that the government of Kenya take concrete action to enhance victims' understanding of the ICC process, for example by facilitating public viewing of the hearings in all the IDP camps, and enhancing security in the IDP camps to limit tensions and allowing victims to freely express their views. With respect to civil society organizations, the study recommended that enhanced coordination take place to avoid duplicity of projects that aim at orienting victims on the ICC process; that civil society organizations consider organizing a symbolic visit to the ICC by representatives of the victims during the subsequent hearings; and other measures be taken to enhance victims' engagement with the ICC.

7. Establishing a Credible Accountability Process at the National Level

The ICC process, as noted above, presents a positive move for fighting the culture of impunity in Kenya and may ultimately contribute to creating a more stable and peaceful democracy. However, as also mentioned, the ICC on its own is insufficient for significantly promoting these objectives. The best way of ensuring accountability for a broader range of offenders of the post-election violence and strengthen the rule of law in Kenya would be to establish a separate accountability mechanism at the national level, not to substitute the ICC but to complement it. This section of the Report will discuss what road ahead is preferable establishing a complementary accountability mechanism and some of the major controversies and challenges surrounding this. These discussions will center around two key modalities for complementarity which have dominated in the public debate on the issue, namely a Special Tribunal which works outside the structures of the Kenyan legal system and a Special Division of the High Court, which as the name suggests will rely on existing judicial structures (although various measures could be taken to ensure some level of externalization). Notwithstanding that accountability for the post-election violence cannot take place relying exclusively on the existing legal structures, this Section of the Report concludes by considering what is needed to create a more sustainable solution to accountability so that in the future, Kenya's legal system could become capable to deal with sensitive cases such as election violence.

Before turning to the analysis of different possibilities with respect to the institutional set-up of a complementary accountability mechanism to address the post-election violence, it is first necessary to elaborate on what crimes can and should be prosecuted in such a mechanism.

7.1. Should a Complementary Accountability Mechanism Prosecute Ordinary Crimes and/ or International Crimes?

Discussions about complementarity in Kenya have tended to assume that there should be a preference for prosecuting the post-election cases as international crimes, more specifically crimes against humanity, instead of or in addition to crimes under national law. The question of whether the criminal acts committed in the context of the 2007/8 crisis, in addition to being prosecuted as crimes under Kenyan law, can be prosecuted as international crimes must be answered taking the starting point in the Constitution's

treatment of the relationship between national law and international law. Article 2(5) and (6) of the 2010 Constitution stipulates that international law, whether customary or treaty based, forms part of the law of Kenya. Because crimes against humanity – and the duty to prosecute them – are recognized in international law, the starting point is that Kenyan courts can and must prosecute international crimes.

However, because the constitutional order in place at the time when the crimes were committed adopted a dualistic conception of the law (i.e. international law did not automatically form part of the domestic legal order) and no implementing legislation had been passed, the principle of prohibition of retroactive application of the law could potentially pose an obstacle to prosecuting the post-election crimes as international crimes. Yet, because Article 50(2)(n) of the 2010 Constitution explicitly exempts international crimes from the ban of retroactive application of the law, prosecuting the post-election crimes as international crimes would not in by itself violate the ban of retroactive application of the law even if the domestic legal order at the time did not recognize these crimes.

Nonetheless, Article 50(2) (n) does not necessarily fully resolve issues pertaining to the legality of prosecuting crimes committed in 2007/8 as international crimes. According to the doctrine of strict legality, there must be an applicable written law, passed by Parliament, that makes an act criminal and punishable for it to be punished in national courts and this law must be sufficiently specific.

One opportunity would be to argue that crimes recognized in the Kenyan Penal Code, such as murder and rape, can form the basis for prosecuting crimes against humanity. However, the principle of specificity is understood to relate to the objective elements of a crime as well as the subjective elements of the crime (the required *means rea*). With respect to the latter, crimes against humanity sets itself apart from the crimes that were punishable under Kenyan law at the time. For example, crimes against humanity are preconditioned on the perpetrator being aware of the connection between his misconduct and a policy or plan to commit a widespread or systematic attack on the civilian population. Consequently, allowing an accountability mechanism which operates within the existing structures of the Kenyan legal system to prosecute crimes against humanity on the basis of provisions in the Kenyan Penal Code would likely contravene the principle of specificity, which forms part of the principle of legality.

Further, because the rules in international law are not written, sufficiently specific and/ or implemented in national law that applies to events that took place in 2007/8, it is disputable whether one can rely directly on these rules prosecuting the post-election crimes as international crimes in national courts.

The best way to create a solid legal framework for prosecuting international crimes would consequently be to amend the International Crimes Act, currently applicable to offences committed after January 1, 2009, so

that the Act applies to the conduct that took place in 2007/8. Importantly, taking steps to make the International Crimes Act applicable to conduct that took place in 2007/8 would neither violate the Constitution nor international standards (since international human rights law exempts international crimes from the ban of retroactive application of the law).

However, if the accountability mechanism opted for is essentially international – which would be the case only if it is established by an international instrument such as a treaty and operates entirely outside the Kenyan legal system – it would not be necessary to amend the International Crimes Act. In this case, the crimes to be prosecuted would be defined in the instrument itself (or an associated instrument), and applying the statute to crimes committed in 2007/8 would neither violate the Kenyan constitution, nor the principle of legality, including prohibition of retroactivity, as recognized in international law, at least to the extent the definitions of the crimes reflect already existing definitions in international law and are sufficiently specific.

There are several benefits of prosecuting crimes against humanity in addition to prosecuting crimes recognized in the Kenyan Penal Code. Doing so would increase the likelihood that those who planned and organized the post-election violence would be targeted because crimes against humanity per definition have a systematic nature. Further, prosecuting crimes against humanity could help create a historical narrative of the violence which recognizes its organized nature (as opposed to creating a narrative that will almost inevitably portray the violence as sporadic). On the other hand, it must also be recalled that international crimes are significantly more complex than ordinary crimes, for example, due to the requirement that the perpetrator must be aware of a link between the individual crimes and a widespread or systematic attack on the civilian population. This could make it harder to obtain convictions, especially in light of the lack of expertise among Kenyan legal sector personnel and the fact that the existing files have not been prepared with an eye on prosecuting international crimes.

In part, due to the complexity of prosecuting international crimes, charges of international crimes could be reserved for senior government officials and others who played a significant role in planning and organizing the violence, while the majority of on-the-ground offenders could be charged with ordinary crimes under Kenyan law. It is worth noting in this regard that charges of serious crimes under domestic law will likely satisfy the complementarity principle under the Rome Statute, meaning that such cases would become inadmissible before the ICC. In contrast, the establishment of local accountability process, in by itself, cannot be used as an argument why the already ongoing ICC cases should be “brought home”, as claimed by some.

7.2. The Set-Up of a Complementary Accountability Mechanism

In the following, it will be examined what requirements and opportunities exist with respect to creating a complementary accountability mechanism either in the form of a Special Division of the High Court or a Special Tribunal.

Importantly, establishing a Special Division of the High Court does not by itself require any legal change and there are no constitutional obstacles to creating such a division. Article 164(3) of the Constitution simply states that the High Court shall be organized and administered according to an Act of Parliament. Further, the legal framework in place, including the Judicial Service Act, implicitly grants the CJ the authority to establish such a division. Since Article 165(3)(a) of the Constitution already grants the High Court "unlimited original jurisdiction in criminal and civil matters", serious crimes committed in the context of the 2007/8 crisis, if prosecuted as crimes under national law, would automatically fall under the jurisdiction of the High Court. The CJ's powers to "exercise general direction and control over the judiciary" and other powers granted by the Judicial Service Act must be understood to entail the discretion to assign particular types of cases, including post-election related cases, to particular divisions of the courts that according to the Constitution have jurisdiction in these cases. To the extent the post-election violence cases will be prosecuted as international crimes under the International Crimes Act, the same argument applies as Article 8(2) of that Act stipulates that trials pertaining to the crimes mentioned in the Act must be conducted in the High Court.

However, even if a Special Division of the High Court with exclusive jurisdiction over post-election violence cases is established, the decisions of the division would still be subjected to the review of the Court of Appeal according to Article 164(3) of the Constitution, and possibly the Supreme Court (Article 163(3) (b), *cf*. Article 163(4)). It would therefore require a constitutional amendment to create a system whereby the decisions of a Special Division of the High Court are not subjected to review by the superior courts established by the Constitution. Again, however, there is nothing that prevents the CJ from setting up a Special Division of the Court of Appeal to hear appeals from the Special Division of the High Court.

Because the system of courts is outlined in Article 162 of the Constitution, establishing a Special Tribunal, which functions independently of the existing judicial structures and the decisions of which are not subject to the review of the superior courts named in the Constitution, would require a constitutional amendment. However, should the Special Tribunal essentially be an international body, which as already noted will only be the case if it is established by an international instrument, creating it would, in accordance with the

practice of the Special Court for Sierra Leone, not require a constitutional amendment (though some might argue that the government by signing the treaty would be defying the constitution).

With regard to other legal sector bodies that would be involved in an accountability process that operates within the structures of the Kenyan legal system, the starting is that the National Police Service is responsible for investigating and the DPP for prosecuting, and that no other authorities may instruct these State Officers in this regard (Articles 245(4)(a) and 157(6), respectively). However, as indicated by the failure to prosecute a significant amount of post-election related cases so far, relying on the existing investigatory and prosecutorial structures would likely pose the greatest challenge to the credibility of an accountability mechanism.

It is therefore important to note that Article 157(12) of the Constitution allows Parliament to enact legislation conferring powers of prosecution on authorities other than the DPP. This must be understood to mean that an Act of Parliament could establish a dedicated prosecutorial office to focus on the post-election cases, which functions outside the structures of the DPP. Even if a Special Prosecutor for post-election cases could perhaps by analogy be granted the powers (in accordance with Article 157(4) of the Constitution) to direct the Police to undertake investigation, internal resistance in the Police and its largely unreformed nature would likely render such a solution unsuitable, especially when it comes to police violence and sensitive cases involving high-level government officials. A more credible solution might therefore be to propose that a Special Prosecutor for post-election cases has a team of dedicated investigators connected to the office (who are not supervised by the Inspector-General of the National Police Service, but take instructions from and are supervised by the Special Prosecutor). While this will likely be seen as a controversial move by some, there is nothing in the Constitution that explicitly states that only the Police can carry out investigations.

Should one instead opt for establishing a Special Tribunal, the law creating this tribunal could create specialized investigatory and prosecutorial units that work independently of the existing structures; thus overcoming the challenges presented by the existing structures related to investigation and prosecution.

Another important question related to the set-up of a complementary accountability mechanism concerns staffing, more specifically whether international experts can be included in the various bodies associated with pursuing accountability. There are various advantages of including international personnel. For example, should the accountability mechanism be mandated to prosecute international crimes, the lack of expertise with respect to international criminal law among Kenyan legal sector personnel means that it would be important to include international expertise at all necessary stages, including investigation, prosecution and adjudication (and possibly witness protection and defense). Furthermore, whether or not

the mechanisms to be established deals with international crimes and/ or crimes under Kenyan law, relying alone on Kenyan staff is likely to make the mechanism more open to political manipulation. On the other hand, it is of course also true that international involvement should not be seen as a silver bullet which will solve all problems relating to political manipulation of transitional justice processes, as clearly indicated by the failure of the TJRC.

To the extent a Special Tribunal is created by means of an international instrument, its statute could spell out special appointment procedures and set standards for international involvement, and the rules in the Kenyan Constitution would not pose an obstacle, simply because they would not apply to an internationalized tribunal of this character.

In contrast, to the extent an accountability mechanism is established by Kenyan law (be it a Special Tribunal or Special Division), applying special procedures for the appointment of judges would require a Constitutional amendment (Articles 172(1)(a)) and 166(1) of the Constitution). However, there is nothing that prohibits international judges satisfying the criteria spelled out in Article 166(2) and (5) of the Constitution from being appointed as a judge and obtain a seat in the bench of Special Division. However, should it be possible to have international judges appointed through the normal procedures, it remains a challenge that there will not automatically be an end to their tenure, and thus no inbuilt exit strategy for the international judges once the accountability process is completed or international staffing is no longer deemed necessary to ensure integrity and credibility in the process. There appears to be no obvious way of solving this problem. Further, because the assumption is that the judges will serve on normal terms, it may be difficult to attract qualified international judges with wide experience in international criminal law.

With regard to other relevant legal sector bodies, there is nothing in the Constitution that prohibits the appointment of international staff as prosecutors or investigators (or as advisors to a special prosecutorial or police unit dedicated to dealing with the post-election cases). However, should it be decided that the prosecution of the cases will rely on the existing prosecutorial structures; it is up to the DPP to decide whether he wishes to employ non-Kenyans in his office to deal with these cases. On the other hand, should a Special Prosecutor be established under Article 157(12) of the Constitution, the relevant legislation could lay down requirements to the composition of this Office, arguably also with regard to the nationality of the Special Prosecutor in person (though it could be argued that a Special Prosecutor not subjected to the supervision of the DPP in reality holds a State Office and must hence be a Kenyan citizen).

Concerning the Police, Article 245(4) of the Constitution prohibits the Cabinet secretary responsible for police services from giving instructions concerning the employment of any member of the National Police Service. Article 246(3)(a) further establishes that the National Police Service Commission is responsible for

recruiting and appointing persons to hold or act in offices in the service, which means that it is not possible to include internationals in the Police to assist with investigation and preparation of files relating to the post -election violence, should the Police be opposed to such inclusion. In this event, it requires a constitutional amendment to have international staff appointed to a special investigatory unit of the Police. As already mentioned, however, there is nothing in the Constitution which explicitly states that only the Police can carry out investigations. One way of ensuring international involvement in reviewing existing files and carrying out further needed investigations could therefore be that the legislation which creates a Special Prosecutor for post-election violence cases stipulates that the Office also has within its mandate the authority to review existing files relating to the post-election violence and carry out further investigations where needed, and that the investigatory team handed this task must include internationals.

7.3. Victims' Rights and Security

The current criminal procedures in Kenya rely on the Common Law system, which does not allow for victim participation.

Consequently, in so far as the accountability mechanism used to deal with the post-election cases is essentially Kenyan (i.e. a Special Division of the High Court or a Special Tribunal, set up by Kenyan law), allowing victims' participation in the process would require an Act of Parliament, which stipulates that the Criminal Procedure Code is not applicable, or is modified, with regard to proceedings relating to the post-election violence cases and creates special procedures for victims' participation in these proceedings. Such special procedures could stipulate that victims, through a legal representative, can make statements and written submissions related to law or fact as well as a right to obtain compensation (either from the perpetrator or a special fund), as is known from ICC proceedings.

However, even in the absence of such legislation, the victims have certain rights under the Criminal Procedure Code. This involves the right to be heard with regard to the contents of a possible plea agreement (Article 137(d)). Further, a victim impact statement, though not mandatory, can be called for and can be taken into account in sentencing convicted offenders (Article 329 (C) (1), cf. Article 329 (D) (1) and Article 137I (1)). Importantly, the Court may also order compensation to victims in the context of the criminal proceedings if it is found that "the convicted person has, by virtue of the act constituting the

offence, a civil liability to the complainant or another person" (Article 175(2) (b)), and stolen property can be restored to the person from which it was stolen (Article 177). Further, Article 176 stipulates that "in all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated". In addition to these rights set out in the Criminal Procedure Code it is important to bear in mind that the 2010 Constitution entails provisions which could prove relevant for victims of the post-election violence. Notably, Article 35(1) stipulates that "every citizen has the right of access to (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. Accordingly, state agencies must facilitate easy access of relevant information to victims and others, for example with respect to medical journals.

Concerning victims' protection, the Witness Protection Amendment Act (2010) establishes a Witness Protection Agency (Article 3(A) (1) with the purposes, *inter alia*, to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their cooperation with prosecution and other law enforcement agencies (Article 3(B) (1). The Agency is mandated, *inter alia*, to establish and maintain a witness protection program; (b) determine the criteria for admission to and removal from the witness protection program; (c) determine the type of protection measures to be applied (Article 3(C)(1)). Under the Witness Protection Act, the application procedure establishes that the decision to be admitted into, or excluded from, the protection program is made by the Director of the Witness Protection Agency (Article 7).

Although the Witness Protection Agency is now fully operational, the Agency's capacity to protect witnesses remains disputed, especially in sensitive cases such as those relating to the post-election violence, in part due to limited funding. Further, many Kenyans question the Agency's ability to adequately protect witnesses given a history of attacks on witnesses, sometimes by the very security agencies that were meant to help protect them. In this respect, it may be seen as a problem that the Police Commissioner sits on the Agency's board. Especially in the post-election violence cases which involve high-level government officials it is not unlikely that witnesses will perceive the current witness protection program as insufficient for safeguarding their security.

In this light, the best way of enhancing the security of witnesses – and with that their willingness to testify – would probably be to create a special unit of the Witness Protection Agency. Although such a unit could be established within the existing legal framework (nothing in the law prevents creating a special unit), this

does not guarantee the necessary funding for the unit. Further, taking into account that *perceptions* of willingness and ability to protect will be crucial for promoting witnesses to testify, it would be preferable if measures are taken to create a special witness protection unit or agency for post-election related offences, which operates outside the existing structures, and is guaranteed the necessary independence, powers and resources. To the extent this unit or agency operates independently of the existing agency, new legislation would be required.

If the accountability mechanism created to deal with the post-election violence cases is essentially international (i.e. a Special Tribunal set up by treaty), the statute of the tribunal would spell out the applicable procedures, including those relating to victims' participation and protection, and there is no requirement that these resemble Kenyan law, and no domestic legal change is needed.

7.4. Pragmatic Concerns

Several factors complicate the establishment of a complementary accountability mechanism. Most notably, the current political environment makes it very difficult to obtain the necessary political support for creating a national body which could prosecute the post-election violence cases in a credible manner.

The country is in the run-up to elections, and it is rather unlikely that many politicians – even some of those who might otherwise support accountability principles – will show dedication to establishing such a process before next year's election, for example by passing the required legislation. While the resistance to accountability principles makes the pursuit of a credible accountability process difficult, the current political climate does nonetheless offer some options for creating a complementary accountability mechanism. For example, as a result of the resistance to the ICC, a local accountability process has not been pushed completely off the political agenda. Further, the AG's Working Committee on the ICC has proposed that the government pursues accountability for the post-election violence within the existing structures of the judiciary.

Comparing the two main options for an accountability mechanism under consideration here, the political climate seems to render the establishment of a Special Tribunal significantly more difficult – in particular because establishing it requires a constitutional amendment (and thus two-thirds of the votes in Parliament) – than establishing a Special Tribunal.

7.5. Preferred Road Ahead Dealing with Accountability at the National Level

Fact Box 10: Comparing the different possibilities for a complementary accountability mechanism

The relative advantages and disadvantages of a Special Division vis-à-vis a Special Tribunal can be assessed according to three overall factors: 1) Legitimacy and credibility; 2) The ability to promote desired goals of criminal justice; and 3) Feasibility.

1. Legitimacy and credibility:

The legitimacy and credibility of an accountability solution to deal with serious crimes depends on various factors. Chief among them are respect for human rights, including fair trial standards; independence and impartiality; not being biased; local ownership and relevance to victims and other key audiences; the ability to convict a fair number of the perpetrators of the crimes (both the actual perpetrators and the organizers and planners of the crimes); and competence and authority.

A. Respect for human rights, including fair trial standards: The extent to which the two options for an accountability process are likely to respect human rights standards, including fair trial standards is difficult to assess in general. As a general rule, however, it is probably fair to say that in sensitive post-conflict contexts or politically unstable environments, tribunals that operate outside the structures of the conventional justice system and are based on significant international involvement tend to be better equipped to comply with human rights standards, including fair trial standards.

B. Independence and impartiality: The notion of judicial independence is usually understood to both require that the judiciary is ensured institutional independence from the executive and the legislative branch of government as well as decisional independence, which requires that judges must have freedom to decide a case according to the law without having to fear reprisals. In light of the historical lack of independence in Kenya's judiciary, the starting point must be that a Special Tribunal operating outside the structures of the conventional justice system will have greater capacity to resist pressure from politicians and others who might wish to unduly influence the proceedings. Yet, with the ongoing judicial reforms in Kenya (further discussed below in Section 7.5), it is not self-evident that a Special Division of the High Court would fall short respecting standards relating to judicial independence, especially if foreign judges could be included in the bench and various other safeguards could be created.

C. Not being biased: It is a common problem that accountability measures set up to deal with serious crimes committed in times of conflict or other forms of turmoil face accusations that they are politicized in that they only target one side to a conflict or certain categories of offenders, usually those in opposition to the incumbent. Such criticism has been raised both with respect to accountability measures that operate

within the existing legal structures and with respect to highly internationalized and externalized tribunals, including the ICC. Important tools for achieving unbiased justice include involvement of international staff; an independent prosecutor that focuses on the gravity of the criminal conduct and takes into account the need to prosecute crimes committed in various regions and by different actors; and the existence of an outreach strategy that efficiently counters unmerited claims of bias. In the Kenyan context, avoiding allegations of bias might not depend so much on the overall modality of the process (within or outside the conventional justice system), as on how the process is set-up in terms of creating safeguards against selectivity. Yet, there must be an assumption that it would prove easier to safeguard a mechanism which operates outside the existing structures of the legal system (a Special Tribunal) against allegations of bias, if compared to a mechanism that operates within the existing structures (a Special Division).

D. Local ownership and relevance to victims and other key audiences: Trials conducted by international courts, such as the ICTY, ICTR and ICC, often face legitimacy problems because those who have been most directly affected by the crimes lack "ownership" of the process, the trials are being conducted far away from the scenes of violence and the tribunals fail to sufficiently take into account the local context. Special tribunals that rely on a hybrid structure are often said to help overcome these legitimacy problems, for example because they are typically located in the country where the crimes took place and often include nationals of the country affected among their staff. Conducting trials within the existing structures of the national judiciary is generally accepted to enhance local ownership and ensure relevance to victims and other key audiences. Further, such trials can help build the capacity of the national judiciary and promote public trust in it. A high level of internationalization may thus work against local ownership and relevance to victims and other key audiences, though of course local relevance is closely linked to other factors, such as the mechanism's ability to efficiently deal with different categories of offenders. Taking into account these factors, there should be a preference for creating a Special Division as opposed to a Special Tribunal.

E. The ability to convict a fair number of the perpetrators: Legitimacy and credibility also depend on the extent to which accountability measures are efficient and can prosecute and convict a fair number of perpetrators, and that the selection of offenders for prosecution does not exclude certain categories of offenders, such as those who planned or organized the violence. In terms of numbers, there is a general assumption that the more international and externalized from the national legal system a tribunal is, the more limited is its ability to prosecute and convict a large number of perpetrators. For example, whereas the Bosnian War Crimes Chambers, which operated within the structures of the national legal system, concluded more than 200 trials, the highly internationalized Special Court for Sierra Leone, which operated outside the structures of the national legal system, has only held three trials and convicted nine individuals. In terms of the ability to include different categories of offenders, including those with the greatest responsibility for the crimes, there is usually an assumption that the more internationalized and externalized an accountability mechanism is, the easier it will be to prosecute high-ranking government officials and others responsible for planning and organizing the violence, especially if these actors are associated with the incumbent. In the case of Kenya, several factors will prove determining for an accountability mechanism's ability to prosecute and convict a fair number of perpetrators from different categories of offenders. Notably, it will depend on how the investigatory and prosecutorial units are managed and resourced, and the extent to which the mechanism can be safeguarded against political interference. To the extent special measures are taken to remedy problems relating to investigation and prosecution, there must be an assumption that a solution which operates within the existing structures will

manage to prosecute and convict a larger number of offenders. On the other hand, a solution that operates outside the existing structures may be more likely to involve high-ranking government officials and others who bear the greatest responsibility for the post-election violence.

F. Competence and authority: The competence and authority of an accountability mechanism relates to various factors. In the case of Kenya, particularly important questions involve the mechanism's ability to prosecute international crimes (as opposed to only prosecuting crimes under domestic law) and the mechanism's ability to enforce its decisions. As for the former, a Special Tribunal set up with significant international involvement and operating externally from the Kenyan legal system will likely be better suited to prosecuting international crimes. However, depending on the detailed set-up of the Special Division and the associated bodies (relating to investigation and prosecution), this solution could also potentially be empowered to deal with international crimes. Concerning the mechanism's ability to enforce its decisions, it is difficult to predict which option should be seen as preferable, though a Special Tribunal, operating outside the structures of the Kenyan legal system, is probably more likely to face problems giving effect to arrest warrants, etc.

2. Ability to promote desired goals of criminal justice:

A second major issue to take into account analyzing the advantages and disadvantages of a Special Division vis-à-vis a Special Tribunal concerns the mechanisms' ability to promote desired goals of criminal justice.

A. Deterrence: Deterring potential offenders from committing crimes is accepted to be a major goal of criminal justice, whether at the national or international level. Deterrence is usually divided into two different aspects, one pertaining to the ability to deter members of the public in general from violating the law (general deterrence) and the other pertaining to the ability to deter specific individuals, namely those who have already violated the law and are subject to a criminal justice process, from re-offending (special deterrence). While both aspects of deterrence are obviously important, most observers focus on general deterrence when justifying criminal justice in the context of large-scale atrocities. The ability to deter the public from committing crimes (including international crimes) depend on various factors, such as perceptions on the chances of being taken into custody, prosecuted and convicted; the extent to which other factors, such as institutional approval of crimes and a violent ideology, may guide potential perpetrators; and the extent to which potential offenders think in rational terms. While it is beyond the scope of this Report to offer a detailed account of whether a Special Division or a Special Tribunal is most likely to contribute to deterrence, a few observations can be made. First, general deterrence is likely to be more effective if an accountability mechanism targets different categories of offenders – and a fair number of offenders from these different categories. For purposes of general deterrence, it would therefore be ideal if accountability could be pursued for on-the-ground perpetrators (including specific categories of offenders, such as police officers, which have tended to be beyond the reach of the law) as well as local leaders who organized the violence and national political leaders and other who funded and planned the violence. As already noted a Special Tribunal, operating outside the existing structures of the Kenyan legal system, is probably more likely to convict high-level perpetrators, while a Special Division is probably more likely to prosecute a larger number of perpetrators, at least if set up in a manner where the judicial functions are not undermined by inefficient investigation and prosecution. Second, because deterrence

depends on perceptions of how likely it is to be prosecuted and convicted, it also depends on timely prosecuting and punishment. This favors a Special Division, simply because it is more likely to commence its operations in a timely manner.

B. Retribution: Besides deterrence, retributive theory has traditionally played a major role justifying criminal trials. The retributivist argues that the offender should be punished simply because he or she deserves it. Unlike deterrence theory, the role of criminal justice is thus not to contribute to the social good, but punishment is seen as a moral imperative based on the necessity of punishing the criminal's wrongdoing. However, retribution faces several major challenges accounting for the trial and punishment of atrocity crimes. Common concerns involve the selective prosecution and punishment of these crimes and the difficulties of punishing adequately international crimes, such as crimes against humanity. If retribution is seen as a relevant justification for punishing perpetrators of Kenya's post-election violence, it is important that those who bear the greatest responsibility are punished; that as many perpetrators as possible are punished; and that the perpetrators of the most serious crimes are punished severely. Whereas a Special Division is likely to deal with a larger number of perpetrators, depending on the circumstances, a Special Tribunal may prove more successful punishing high-level perpetrators who planned and organized the violence. From a retributive perspective there is thus no clear answer as to what mechanism should be preferred in general, but emphasis should be paid to allowing severe penalties and punishing a large number of perpetrators, especially those who bear the greatest responsibility for the violence.

C. Expressivism: Expressivists argue that trial and punishment of offenders should mainly be justified with reference to the ability of criminal justice to promote the public's faith in the rule of law, for example by educating the public; creating a historical narrative of atrocities and contribute to truth-telling, and/ or communicate and consolidate global norms, such as the prohibition of international crimes. From this perspective, it is crucial that criminal trials are conducted in accordance with human rights standards and that the norms expressed have relevance to different audiences. Further, the trials must be acceptable and accessible to the public. In this respect, a Special Division solution has the advantage of building trust in Kenya's existing judicial institutions (at least if they operate in a legitimate and credible manner).

D. Restorative justifications: Though restorative justice has historically been perceived an alternative to criminal justice, there is increased recognition that criminal trials may also serve restorative objectives, such as victims' redress. Although there is little precedence, a Special Tribunal could be set up in such a way that victims can participate in the proceedings and obtain reparations, but the same could be done for a Special Division if special procedures are created. However, awarding compensation to the victims depends on the availability of funds, which is likely to be easier within the framework of a highly internationalized Special Tribunal, which in any event will depend on massive foreign funding and is thus less dependent on the goodwill of the national political leadership (once it is operationalized).

3. Feasibility:

The feasibility of the two options depends on a number of factors, key among them political will to enact the necessary legislation, challenges to operationalizing the process and issues pertaining to funding.

A. Political will to enact necessary legislation: Creating a Special Division does not, on its own, require Parliament to pass any legislation, but could be created simply on the basis of a decision by the CJ (though, as discussed elsewhere in this Report, new legislation will be necessary to give effect to certain desired processes surrounding the Special Division). On the other hand, creating a Special Tribunal, which does not form part of the ordinary legal system, would require a constitutional amendment, unless it is set up by treaty (which would also require significant political goodwill, both nationally and internationally). Consequently, given the lack of political will discussed elsewhere in this Report, the Special Division option seems more feasible, if not the only viable option, in any near future.

B. Challenges to operationalizing the process: Operationalizing a Special Division could happen within a relatively short time frame. At the judicial level, it simply requires the CJ to administratively establish the division. However, because operationalizing the process also requires that post-election violence cases are actually brought to the division, the greatest challenges would likely be to operationalize the necessary investigatory and prosecutorial units. Establishing a Special Prosecutor will take some time, even if an Act of Parliament could be passed in the near future. In comparison, operationalizing a Special Tribunal will take much longer, even if political will should emerge in the near future. Experiences from other countries indicate that it can take several years from the decision is made in the national political leadership to the actual hearings commence.

C. Funding opportunities: Undoubtedly, running a Special Tribunal externalized from the existing legal system will be much more expensive compared to a Special Division which operates within the existing structures. To exemplify: The total costs of running the highly internationalized Special Court for Sierra Leone are well above 200 million USD, whereas the less internationalized Special Panels for Serious Crimes in Timor Leste needed around 14 million USD (including the costs of having international staff involved in the process). Notwithstanding that there are different modalities of a Special Tribunal, the costs of running a Special Tribunal will likely be significantly higher than the Special Division option and there are no indications that foreign donors are interested in covering the costs of a Special Tribunal for Kenya

The comparisons made in the Fact Box above Show that in terms of legitimacy and credibility, some factors favor a Special Tribunal solution (respect for human rights, including fair trial standards; independence and impartiality; not being biased; ability to prosecute those who bear the greatest responsibility for the violence; and competence to prosecute international crimes) whereas other issues favor a Special Division solution (local ownership and relevance to victims and other key audiences; the ability to convict a fair number of the perpetrators; and authority to enforce its decisions). Often, however, the scope of these relative advantages will depend more on the detailed set-up of the mechanism than the question of whether the mechanism operates inside or outside of the existing structures of the Kenyan legal system.

Analyzing the two major options for an accountability process to deal with the post-election violence in context of desired goals of criminal justice does not generally

favor one over the over. Rather, the preference depends on what goals of criminal justice are perceived most important. Arguably, particular attention should be paid to deterrence, not least with an eye on avoiding a repetition of the 2007/8 post-election violence. This would assumedly result in a preference for a Special Division.

The option of the Special Division of the High Court is in all aspects – including political will to establish in a timely manner, ability to operationalize in a timely manner and likelihood of obtaining the necessary funding – more feasible than the Special Tribunal option. Creating a Special Division and the associated structures to try post-election cases in a credible manner in the High Court presents enormous challenges, not least in terms of obtaining the necessary political support. Yet, the Special Division solution – which unlike a Special Tribunal solution does not require an amendment of the Constitution – appears to be the only realistic solution in any foreseeable future.

Consequently, creating a Special Division of the High Court seems to be the preferred road ahead for a complementary accountability process. The Special Division should have exclusive jurisdiction over post-election crimes, whether defined as international crimes or serious crimes under Kenyan law. To make the process credible, it would be necessary to establish a Special Prosecutor for post-election cases, created under Article 157(12) of the Constitution and working independently of the DPP. Further, involving international expertise, both in the office of the Special Prosecutor and the Special Division itself, could help strengthen the legitimacy and credibility of the process; especially to the extent it will prosecute crimes under international law.

7.6. Creating Sustainable Solutions to Accountability

Accepting that it is difficult, if not impossible, at present to conduct a credible accountability process for the post-election violence relying solely on the existing structures of the legal system does not mean that the existing legal sector bodies should be abandoned or neglected. On the contrary, to ensure respect for the rule of law and promote accountability principles in the long-term, it is vital to strengthen the capacity and independence of legal sector bodies, such as the judiciary, the police and prosecutorial bodies. Creating sustainable solutions to accountability requires fundamental reforms of these bodies and continued investments and commitment to create legal sector structures that are capable of enforcing the law. Although the 2010 Constitution creates a solid framework for reforming legal sector bodies, many of the

reform agendas have not been sufficiently implemented as of yet. This has resulted in continued lack of public trust in important legal sector bodies, such as the police, which undermines the prospects for creating a culture with enhanced respect for the rule of law. In the following, some key action areas for creating sustainable solutions to accountability are identified.

First, attention needs to be paid to investigatory bodies. As already noted, the absence of credible national proceedings with respect to the post-election violence can in part be attributed to challenges associated with the Police. For example, the investigatory steps taken against the ICC suspects appear to have been purely formalistic and the quality of investigations with respect to other perpetrators of the post-election violence has tended to be of such poor quality that only exceptionally can the police files be used to prosecute the alleged perpetrator. Further, the Police have been responsible for some of the most serious abuses, either by action or inaction. To avoid a repetition of these failures, reforms of the Police are necessary.

The 2010 Constitution creates a framework for this. The Constitution encourages a principled change in the perception of security, requiring for example that national security must be pursued in "utmost respect for the rule of law, democracy, human rights and fundamental freedoms" (Article 238(2(b)), and by requiring that the National Police Service prevents corruption and promotes and practices transparency and accountability (Article 244). Further, the Constitution safeguards against undue political interference in the work of the Police, for example by stipulating that the appointment of the Inspector General of the National Police Service must be approved by Parliament (Article 245(2)) (although parliament is not involved in the appointment of the two Deputy Inspector Generals who will head the Kenya Police Service and the Administration Police Service). The Constitution also creates a National Security Council (Article 240), whereby some amount of parliamentary oversight over security policies is established. Moreover, it is laudable that the Constitution stipulates that the composition of national security agencies, including the Police, must reflect the regional and ethnic diversity of the people of Kenya (Article 238(2)). Although the Constitution does not establish a civilian body tasked exclusively with hearing complaints over the Police, the Kenya National Human Rights and Equality Commission is mandated to investigate and report on national security organs' human rights compliance (Article 59).

Generally speaking, police reforms have not received sufficient attention. The government has created a Police Reform Implementation Committee to oversee the implementation of the reforms; the Independent Police Oversight Authority is now in place; and the necessary Bills have been passed. Yet, the Police Service Commission has not become operationalized (though in September 2012 Kibaki and Odinga finally agreed

on the nominees, who are now awaiting Parliament's approval). This has caused a delay in the appointment of the Inspector General of Police, resulting to the Police Commissioner, Matthew Iteere, being currently in office unconstitutionally. Recently, a Kenyan court dismissed a petition to have the police reforms, including the appointment of the Inspector General, delayed till after the March 2013 elections.

The slow pace of reforms is associated with continued low public confidence in the Police (less than 50 % are satisfied and confident with the Police according to a recent survey), which poses a risk for new election violence. The low trust in the Police also reflects that its capacity to undertake independent and effective investigations remains limited.

This problem is further exacerbated by lack of adequate resources for police. Although the CIPEV report raised concerns with the capacity of the police force and pointed to the need for increased resources to improve it, as noted in the recent KNDR monitoring report, "inadequate resources to procure the necessary equipment and improve on skills through training continue to recur as an issue hindering the effectiveness of the police." The current ratio of police to the population is about 1:1,900, which is far below the UN recommended standard of 1:400.

To improve respect for accountability principles, it is necessary to strengthen the capacity of the Police to undertake independent investigations and in other ways reform the Kenyan Police. The reforms envisaged with the 2010 Constitution must be implemented in a manner which respects the spirit of the Constitution. Further, the Police needs to be allocated the necessary resources and personnel to give effect to these reforms. More generally, measures need to be taken to effectively combat the culture of impunity which continues to characterize the Police.

Second, as illustrated by the flawed accountability process surrounding the 2007/8 election violence, the Office of the DPP is crucial for building sustainable solutions to accountability.

Whereas the past Constitution of Kenya authorized the AG to decide whether criminal prosecutions should commence, the new Constitution grants the DPP this authority (Article 157) and the AG will function as the legal advisor and representative of the government in all civil matters (Article 156). Further, the 2010 Constitution stipulates that the DPP can only take over a criminal suit with the permission of the person or authority who instituted it and the DPP may only discontinue a prosecution with the permission of the court (Article 157(8)). The Constitution also states that to avoid abuse of prosecutorial powers, the DPP "shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process" (Article 157(9)). The Constitution further attempts to safeguard the DPP from undue influence, stipulating that the DPP "shall not require the consent of any person or authority for

the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority" (Article 157(10)).

Yet, the DPP faces allegations of lack of impartiality and the Office in its current form is unlikely to contribute to accountability when high-stake political interests are involved, such as election violence and other crimes involving government officials. Some have attributed this to the political compromises surrounding the appointment of new State Officers. The DPP Keriako Tobiko, who since 2005 served as deputy public prosecutor, has faced allegations of misuse of office and is generally seen to lack the will to promote profound change in Kenya's legal system.

To promote a sustainable accountability solution in Kenya, pressure must be added on the DPP to conform to the principles set out in the Constitution, and other actors must refrain from attempting to interfere with the work of the DPP.

Third, creating long-term solutions to accountability obviously requires the existence of an independent and strong judiciary.

The new constitution provides a sound framework for this. Unlike its predecessor, the 2010 Constitution explicitly guarantees the independence of the judiciary (Article 160). It also entails a number of provisions that will help promote such independence in practice. Although the President still maintains the power to appoint judges, the nominations must be based on the recommendations made by the Judicial Service Commission (JSC), on which the President no longer has any direct influence (Articles 166(1) and 171-72). Furthermore, even though the CJ, who is also the president of the Supreme Court and the chairperson of the JSC, is still appointed by the President, his appointment is based on recommendations made by the JSC and requires parliamentary approval (Article 166(1)). Importantly, the President is no longer substantially involved in the process of removing judges from their office (art. 168), and the Constitution grants the judiciary financial autonomy (Articles 173).

The reforms of the judiciary have now been implemented: The Judicial Service Act detailed the mandate of the JSC, which has been operational for the sometime; the Vetting of Judges and Magistrates Act was enacted in 2011, and the vetting process is currently ongoing; and the Supreme Court Act was similarly enacted in 2011 and the Court is now fully operational. The institutional framework for a reformed judiciary is thus largely in place.

Besides the relative success of these institutional changes, the appointments of key posts in the new judiciary have created a sound platform for a stronger and more independent judiciary. Following significant controversy and opposition by politicians opposed to change, in June 2011, Parliament approved

the nominations of a well-known reformer, Willy Mutunga, for CJ and he was soon after sworn into office. Although the judiciary's independence is still not consolidated, the CJ will likely make it significantly more difficult for political forces to interfere with the work of the judiciary, which could over time promote accountability principles.

However, a truly independent judiciary which promotes the rule of law and accountability principles requires a change in the political culture whereby the other branches of government respect the separation of powers. Although this is unlikely to happen overnight, by showing that no one is above the law, the judiciary itself plays an important role facilitating such change.

Beyond issues pertaining to the legal sector bodies discussed above, improving respect for accountability principles in the long-term depends on a number of other factors, including the existence of institutions that can help create a new generation of Kenyans with commitment to the rule of law. High quality legal education is vital in this respect.

Kenya currently has six law programmes – four in public universities and another two in private universities (though several other programmes are in the process of being approved by the Commission for Higher Education). Only one of these programmes has a post graduate programme. Furthermore, since independence only three people have earned a PhD in law from a Kenyan university, and reportedly there are currently only three full professors (in addition to a number of associate professors) in the country. Besides the instruction offered by law professors, practitioners, including advocates, often lecture the classes. But they do so alongside running their legal practices or other full time engagements, and due to the lack of full time law professors they often lack the supervision and mentoring needed.

While the demand for legal education is growing, facilities are not sufficient and class rooms are often over packed. Further, master students often lack qualified supervision. Consequently, those who can afford it often send their children abroad to study law. Although this adds to the number of qualified lawyers, Kenya needs its own high quality legal education programmes to create a critical mass of trained lawyers, who can help promote the rule of law and accountability principles. For that to happen, significant investments in higher education are required, the learning environment must improve and students must be encouraged to take seriously their education, rather than focusing on other engagements, for example to afford their education.

Notwithstanding the importance of improving university level legal education, other approaches are also relevant for enhancing awareness of the law. For example, short-term courses on legal topics can be conducted by civil society groups to improve the skills of various categories of professionals, including civil

servants, students and others. Such training may promote awareness of the law and help create a critical mass of individuals with legal training and commitment to the rule of law, while at the same time potentially improve access to justice in the country.

8. Conclusions: Lessons from Kenya's Contested Accountability Process

The accountability process in Kenya is different from many other attempts at pursuing justice for serious crimes. Notably, while the coalition partners have on some occasions expressed commitment to prosecuting those responsible for the post-election violence, the coming to power of some of those suspected of being most responsible for the violence has resulted in the undermining of the prospects for accountability and/or instrumentalizing the process to serve a narrow political agenda. This means that the government has not been able to adopt a clear policy framework for dealing with accountability issues, but instead, once the ICC became involved, used significant resources attempting to undermine the process. At the same time, an accountability process is in fact ongoing at the international level, and, uniquely, this process targets incumbent government officials of a state party to the ICC. Yet, there are concerns that the government might not offer the necessary cooperation with the Court, which could in the worst event undermine the process. While Kenyan politics, notably the outcome of the March 2013 elections will likely be determining whether, or the extent to which, the government will cooperate, the ICC process is at the same time determining for Kenyan politics. Not least, should the High Court of Kenya rule that two of the ICC suspects (Ruto and Kenyatta) cannot run for presidency because the ICC has confirmed charges against them and thus do not meet the integrity requirements in Chapter VI of the Kenyan Constitution, this could be seen as an important impact of the synergy between international and national justice.

But the uncertainty of the outcome of international justice as well as the general absence of national proceedings also raises important questions concerning how in the absence of political will, accountability principles can effectively be promoted in post-conflict or crisis settings. Lessons from other countries, including some of the Latin American countries undergoing democratic transitions in the 1980s, demonstrate that accountability for serious crimes can be complicated even when there is (some level of) political will to accountability, but also that an accountability process may take place even decades after the crimes have been committed. This, however, should not be seen as a relevant argument for adopting a "wait-and-see" policy in Kenya. In Argentina, for example, later prosecutions of military officers involved in serious crimes took place, in part, due to the dedicated and consistent advocacy of civil society. In other words, while at present it seems difficult to achieve the necessary political will in Kenya for a credible domestic accountability process to complement the ICC proceedings, consistent advocacy for such a solution is important because it may prove determining for whether it eventually takes place.

Already, civil society groups in Kenya – generally supportive of the ICC process – have played an important role for informing the victims of the post-election violence – as well as the general public – about the proceedings and adding pressure on national decision-makers to comply with international obligations. Although there are no guarantees this will be sufficient for ensuring that the suspects eventually appear for their trials, it demonstrates how a committed and relatively unified civil society can be drivers of an accountability agenda.

However, in contexts such as Kenya where there is no or limited political will to using the national legal system to pursue criminal accountability for political violence, civil society and other actors may also explore alternative avenues for accountability. This could involve private prosecutions of the perpetrators, including categories of offenders such as police officers who have been granted *de facto* immunity from prosecution. Furthermore, in the absence of political will, accountability and some amount of redress for victims could be promoted by relying on regional and international human rights bodies. As the right to remedy for serious human rights abuses as well as a state duty not to endorse wholesale impunity for international crimes has become well-established principles in international law, petitions could be made to the regional human rights system and/ or international treaty monitoring bodies, such as the UN Human Rights Committee. Using such avenues could add pressure on the government of Kenya to fulfill its obligations under international law, including the duty to prosecute serious international crimes and offer remedies to the victims. Also, civil society may promote accountability principles relying on the new Constitutional framework. As evident from the successful petition filed by civil society organizations to block the appointment of Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission, national courts appear willing to use the constitution's integrity requirements to bar from office individuals involved in abuse of power. Depending on the outcome, the petition to bar Ruto and Kenyatta from running for presidency could similarly prove an important way of using national courts to enforce some kind of accountability.

More generally, a key lesson from the Kenyan case is that in instances where a power-sharing deal may be the only viable solution to ensuring a quick ending to ongoing violence, accountability measures and other transitional justice processes should as far as possible be externalized from the political forces brought to power if these forces are thought to lack commitment to these processes. Though political will at the level of the national leadership is obviously important for promoting criminal prosecutions of serious crimes, strategies could be adopted early on to add pressure on decision-makers to grant legal sector bodies the resources and independence needed for pursuing accountability. For example, whereas the KNDR agreements stated commitment to further discussions about criminal justice, it might have been a more effective approach had the context of power-sharing been used to make agreements which conditioned the

continued existence of the coalition government on the swift creation of an independent and effective accountability mechanism. Organizations involved in mediating a resolution of conflicts and advocating for the inclusion of accountability measures – in this case the AU – could also play a more active role in the accountability process itself, for example by exercising oversight or some level of control of the process.

On a positive note, CIPEV should be lauded for coming up with an innovative approach to accountability, whereby the threat of possible ICC intervention was brought up early on to add pressure on political elites to create a domestic accountability process. Although this strategy did not result in the creation of such domestic (or hybrid) mechanisms, at least it contributed to an agenda which recognized that in the absence of domestic proceedings, international justice could offer an alternative route to securing some amount of justice. As this Report has implied, the ICC Prosecutor's decision to use the *proprio motu* powers to open an investigation into the post-election violence seems partly to have been influenced by CIPEV's ability to create this agenda in the first place.

Finally, an important observation from the Kenyan process is that transitional justice discourses need to understand the causes of violence and injustices before engaging in a discussion of relevant processes and institutions. In Kenya, accountability is important to counter the country's legacy of impunity because the failure to hold to account those who use violence as a tool of political competition has proven to be a driver of such violence. Setting the example with criminal justice thus seems particularly important in contexts where serious crimes are committed regularly and violence has been institutionalized in political processes. Yet, it must also be acknowledged that a political culture which is based on corruption, nepotism and other abuses of power and endorses violence as a tool of competition cannot be transformed overnight. A criminal justice process, on its own, is insufficient for achieving the kind of profound change needed. Consequently, civil society groups and other actors who support a fundamental transition need to become drivers of a broader agenda which accepts that achieving a more peaceful and just society is preconditioned on altering the political culture. While accountability principles should be central to this agenda, it is also necessary that the relevant accountability tools are conceptualized and coordinated with other measures, including a broader reform agenda, truth-seeking, reconciliation and reparations.

9. Recommendations

1. Recommendations to civil society:

Continue to support the ICC process, notably by:

Advocating for the government's cooperation with the Court, including arresting and transferring the suspects should they fail to appear voluntarily for trial

Providing accurate and detailed information to the public about the ICC proceedings and related issues, including the responses of the government of Kenya and their legality

Supporting and informing the victims of the ICC process, including their rights under the Rome Statute

Cooperating with international partners to ensure well-coordinated responses to the ICC process as well as the responses of the government of Kenya

Advocate for the creation of a Special Division of the High Court to complement the ICC proceedings, notably by:

Advocating for the adoption of the necessary legislation to make the process credible, including the establishment of a Special Prosecutor for post-election violence cases under Article 157(12) of the Constitution and amending the International Crimes Act so it applies to crimes committed in 2007/8

Consulting the CJ with regard to administratively establishing a Special Division of the High Court as soon as possible and including international judges in the division

Consulting international partners and advocate for their support, including necessary funding, to a complementary accountability process

Establishing outreach programs once the Special Division is created to promote public awareness and trust in the mechanism

Advocating that the ICC, once the process has become operational, shares evidence with the Special Prosecutor in accordance with Article 93(10) of the Rome Statute, with the

purpose of prosecuting and convicting high-level perpetrators that are not currently involved in the ICC process

Support the creation of sustainable solutions to accountability, notably by:

Advocating for swift implementation of the Police reforms stipulated in the 2010 Constitution and other measures, including sufficient government funding, aimed at creating effective and rights-oriented law enforcement and creating solid investigatory capacity

Adding pressure on the DPP to conform to the principles set out in the Constitution as well as other actors should they attempt to interfere with the work of the DPP

Supporting the reformed judiciary, for example by functioning as a watchdog with respect to safeguarding its independence

Advocating for and supporting high quality legal education in Kenya, including sufficient government funding of higher education

2. Recommendations to the government of Kenya:

Continue to cooperate with the ICC, in particular by:

Refraining from undermining the ICC process and accepting that there is no legal leeway to end the Court's proceedings

Refraining from confusing the debate about accountability, for example by stating that the cases will be "brought home" or "transferred" to the African Court of Justice or the East African Court of Justice, but instead offer accurate information to the public concerning the process

Guaranteeing the safety and protection of victims and witnesses in Kenya

Arresting and transferring the suspects should they fail to appear voluntarily for trial

Take the necessary measures to establish a Special Division of the High Court to complement the ICC proceedings, including:

Putting forward bills in Parliament concerning the establishment of a Special Prosecutor for post-election violence cases under Article 157(12) of the Constitution and an amendment to the International Crimes Act so it applies to crimes committed in 2007/8

Guaranteeing the safety and protection of victims and witnesses in Kenya, for example by establishing a special witness protection agency for post-election related crimes

Supporting the independence and operations of a Special Prosecutor, including taking steps to ensure that the existing files with the DPP are handed over to the Special Prosecutor

Refraining from interfering in the work of the Special Division or the Special Prosecutor, including refraining from adding pressure on the judiciary or the prosecutor with respect to the outcome of specific cases

Support the creation of sustainable solutions to accountability, notably by:

Ensuring swift implementation of the Police reforms stipulated in the 2010 Constitution and provide sufficient funding to the Police and other security agencies to promote effective and rights-oriented law enforcement and solid investigatory capacity

Supporting the independence of the reformed judiciary, for example by refraining from attempting to interfere in specific cases or in other ways adding undue pressure on the judiciary

Supporting the independence of the DPP, for example by refraining from attempting to interfere in specific cases or in other ways adding undue pressure on the DPP

Promoting high quality legal education in Kenya, including providing sufficient funding to higher education institutions

3. Recommendations to the Kenyan judiciary:

Support the creation of a Special Division of the High Court to complement the ICC proceedings, notably by:

Establishing a Special Division of the High Court as soon as possible and taking measures to include international judges in the division

Refraining from giving in to pressure exercised by other government agencies or individuals with respect to accountability for the post-election violence

4. Recommendations to international partners:

Continue to support the ICC process, notably by:

Adding pressure on the government of Kenya to cooperate with the Court, including making it clear that non-cooperation will result in travel bans for the suspects and those that support a policy of non-cooperation, freeze of foreign assets and potentially cuts (or redirection) of development assistance

Support civil society organizations that effectively work for the ICC process

Advocate for the creation of a Special Division of the High Court to complement the ICC proceedings, notably by:

Adding pressure on the government of Kenya to commit to the creation of a Special Division of the High Court

Supporting the Special Division and related bodies such as the Special Prosecutor, notably by offering funding to the process

Support the creation of sustainable solutions to accountability, notably by:

Adding pressure on the government to swiftly implementing the Police reforms stipulated in the 2010 Constitution and in other ways support effective and rights-oriented law enforcement and the creation of solid investigatory capacity in Kenya

Supporting the reformed Kenyan judiciary, for example by offering training to legal sector personnel

Supporting high quality legal education in Kenya, for example by offering specific funding to higher learning institutions

Appendix 1: An outline of ICPC activities in the area of accountability

The main activities of the ICPC to promote accountability for the post-election violence and more generally challenge impunity in Kenya can broadly be divided into four areas: 1) Engagement with key bodies; 2) Monitoring and analysis; 3) Advocacy; and 4) Outreach activities and capacity building. Below is a detailed, although far from exhaustive, overview of the ICPC's main activities related to the pursuit of accountability for the post-election violence.

1. Engagement with key bodies:

Engagement with CIPEV and other civil society organizations: Together with Kenyans for Peace with Truth and Justice (KPTJ) and other Civil Society organizations, ICPC engaged substantially with the CIPEV. Further, immediately after the CIPEV report was published, on October 16, 2008, ICPC initiated consultations with other civil society organizations, particularly those working under the auspices of MultiSectoral Task Force on Transitional Justice, and convened an international experts' conference on December 3, 2008 on the Special Tribunal for Kenya. The resolutions and discussions of the conference were reduced into a position briefing paper on the Special Tribunal for Kenya which was widely disseminated and published in an abridged version in Daily Nation (January 24, 2009 "What law on Violence Tribunal should take into Consideration").

Engagement with the ICC: Between March 29 and April 2, 2009, ICPC took part in a civil society delegation which held consultations with Kofi Annan and representatives of the ICC. In acknowledgement of the Rome Statute's complementarity regime, it was agreed that the ICC would only intervene if the government of Kenya failed to enact a national mechanism that would enable genuine investigations and prosecutions of the perpetrators of the post-election violence. Civil society further recommended that the ICC should conduct an outreach program to enhance the public's understanding of the Court's jurisdiction, operations and other relevant factors. Further, on September 18, 2009, the ICC Prosecutor met with representatives of Kenyan civil society, including ICPC, discussing what roles the ICC could potentially play in the efforts of dealing with the post-election violence. Later on when the ICC had opened a formal investigation, the ICPC continued its active engagement with the ICC, notably by sharing information with the Court, and providing input concerning how the safety and security of victims could best be preserved. Most recently, on August 24, 2012, the Civil Society Organization Network, of which ICPC is a member, submitted to the ICC Trial Chamber V a request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence. The submission seeks leave to submit observations as *amicus curiae* on the modalities of victim participation at the trial phase of

the ICC proceedings, noting that the victims "deserve and require relevant access to information pertaining to how and when they can participate".

Engagement with victims: Besides the abovementioned, the ICPC has held a series of meetings with the victims of the post-election violence. For example, prior to the first visit of the ICC Prosecutor, ICPC consulted victims, and drafted a petition which was placed in the local press as a paid-up advert (November 5, 2009 under the title: "The Joint Victims And Civil Society Communiqué To Kenyans, The Office Of The Prosecutor Of The International Criminal Court (ICC) And The International Community"). Further, on January 21-22, 2010, the ICPC held a public victims forum in Nakuru to facilitate further dialogue and obtain the victims' views on the most appropriate accountability process. On May 8, 2010, the ICPC facilitated a meeting between the ICC Prosecutor and victims at the Kasarani Hotel in Nairobi, during which victims of the post-election violence were offered a better basis for understanding what the ICC process might bring. The ICPC also organized a victims' forum in Nyanza and Western provinces on the May 12-14, 2010, where especially the victims of police brutality during the 2007/8 crisis were informed of their right to justice and reparations. Further, in May-June 2011 ICPC registered victims of the post-election violence to participate in the proceedings at the ICC in both cases on the Kenyan situation. This was in a bid to ensure the victims access their right to remedy and redress for the harm or injury suffered during the violence.

Engagement with other international actors: The ICPC has been engaging with other international actors involved in the process of accountability for the post-election violence, including the African Union, the European Union (including Parliament and Council), the African Commission on People's and Human Rights and diplomatic missions. Among other activities, the ICPC as part of the KPTJ delegation has held meetings and made submissions with regard to the pursuit of accountability to various organs of the African Union, ambassadors and other senior staff of embassies.

2. Monitoring and analysis:

Analysis of the Special Tribunal Bills: Together with ICTJ, ICPC undertook a detailed assessment of the Special Tribunal Bill immediately after it was made publically available in December 2008. It was concluded that the bill had

serious flaws and that it had been prepared without sufficient consultations with civil society and other relevant actors. Consequently, ICPC, alongside a section of parliamentarians and parts of the international community, pleaded for the withdrawal of the Bill to allow for more consultations and remedying the flaws of the Bill. Moreover, ICPC has conducted various analyses of the factors that led to the failure to establish a Special Tribunal. For example, ICPC found that the efforts to set up an effective Tribunal have "been a mere rhetoric with cabinet rooting for the TJRC and ICC. Either by default or design, the Kenyan Government has failed to appreciate the complimentarity principles of the Rome Statute. Attempts by Imenti Central M.P., Hon. Imanyara have been futile with outright sabotage, undermine and blockage of the Bill on the floor of the House with a conspicuous silence by both the President and Prime Minster. Members of Parliament have consistently ganged up to block the enactment of the credible and independent Special tribunal for Kenya fearing that it would cast its net wide in terms of crimes and suspects." The ICPC has further conducted a detailed study on the options and challenges facing the Special Tribunal option and other forms of hybrid accountability processes.

Analysis of the International Crimes Act: Analyzing the International Crimes Bill 2008, the ICPC observed that it has "two grave deficits namely: It does not provide as required by the Rome Treaty for express provision on the irrelevance of official capacity as a bar to proceedings. This is a major flaw in the bill since it insulates the Head of State from scrutiny; and that there is no provision for retroactive application of the bill, at least only as far back as May 2005 when Kenya deposited its instrument of ratification in New York so as to

bring the recent violations within its ambit. Section 77(8) of the constitution needs to be accordingly amended".

Analysis of the ICC process and its potential impact: Following the ICC Prosecutor's decision to use the proprio motu powers, ICPC has undertaken in-depth analysis of the ICC process, including a detailed study explaining the benefits of ICC prosecution. Among others, this study noted: "The court can help avoid a collective stigma, by clearly identifying individuals responsible for crimes. The ICC may be in the special interest of victims of crimes, where proceedings before the court offer an unprecedented form of inclusiveness." While the ICPC has supported the ICC process in light of the failure to set up a credible national mechanism, ICPC has also pointed to the challenges facing international justice, including potential threats to human rights defenders, victims and witnesses; and a potential politicization and ethnicisation of the process of seeking criminal accountability.

Analysis of relevant provisions in the Rome Statute: The ICPC has conducted analyses of provisions in the Rome Statute of particular relevance to the Kenyan situation, including the nature and scope of Article 16 deferrals and admissibility challenges. As opposed to what the Kenyan government has been implying, the ICPC for example clarified that the UN Security Council can defer ICC investigation in order to "maintain or restore international peace and security", but not with reference to the alleged existence of national proceedings, which is an issue of admissibility dealt with by the ICC itself.

Analysis of media coverage and victims' participation in the ICC process: The ICPC has conducted a study concerning the level of victims' participation in the confirmation of charges hearings. It was observed that the confirmation process generated significant interests among victims, many closely following the hearings in the media. However, the study also concluded that victims appeared divided as to the ICC's effectiveness in bringing lasting peace and justice to the country, and that in some cases the process led to renewed tensions. While the study noted a high level of coverage of the confirmation process by local print and electronic media, the absence of simultaneous translations resulted that many victims were unable to understand the process. Based on this analysis, the study recommended among others that the ICC should engage in closer collaboration with Kenyan media, especially community level radio stations that cover areas with a particular high proportion of victims; that the ICC could consider engaging professional translators,

who could offer simultaneous translation of the hearings in Swahili and some widely spoken local languages; and that the ICC should consider producing Swahili and local language translations of its leaflets and outreach documents, and distribute these documents for free to victims and the general public. The study also recommended that Kenyan media, despite intensive coverage of the hearings, could do more to reach out to the victims, for example by announcing repeatedly the timings of the hearings, and by increasing the amount of independent expert discussions of the hearings so as to avoid manipulation of victims. Furthermore, the study recommended that the government of Kenya take concrete action to enhance victims' understanding of the ICC process, for example by facilitating public viewing of the hearings in all the IDP camps, and enhancing security in the IDP camps to limit tensions and allowing victims to freely express their views. With respect to civil society organizations, the study recommended that enhanced coordination take place to avoid duplicity of projects that aim at orienting victims on the ICC process; that civil society organizations consider organizing a symbolic visit to the ICC by representatives of the victims during the subsequent hearings; and other measures be taken to enhance victims' engagement with the ICC.

3. Advocacy:

Advocacy for adoption of Special Tribunal Bill: Initially, in accordance with the recommendations of CIPEV, the ICPC worked for the enactment of a bill to establish a Special Tribunal. As part of these efforts, ICPC initiated consultations with other civil society organizations, particularly those working under the auspices of Multi-Sectoral Task Force on Transitional Justice, and held a series of consultative meetings with regard to establishing a Special Tribunal for Kenya. These meetings – which examined the proposals made by CIPEV in light of legal, political and other practical challenges – led to the establishment of certain benchmarks for legitimacy and credibility, including:

The Tribunal's Statute must generally comply with the criteria set by the CIPEV report

For the tribunal to win confidence of victims, it must be credible and impartial, also with respect to investigations and prosecutions

The Tribunal must guarantee international standard of fair trials

The Tribunal must hand down appropriate penalties in event of convictions

The Tribunal must ensure that a wide category of crimes and perpetrators are prosecuted

The Tribunal must have financial and political independence

The Bill must provide for a strong and effective victims and witness protection mechanism.

Other forms of advocacy with regard to the Special Tribunal bill: For example, in the context of the failure to create a Special Tribunal, ICPC wrote a public statement and worked on an open protest letter to the President and the Prime Minster (tilted: "Save the Special tribunal for Kenya") which was placed as a paid-up advert in the national media (on August 7, 2009 in the Daily Nation and on August 9, 2009 in the Standard and Taifa Leo).

Advocacy in support to ICC process: With the failure to establish the Special Tribunal, the ICPC has advocated for support to the ICC process. For example, following the government's shuttle diplomacy aimed at obtaining a UN Security Council deferral, the ICPC facilitated peaceful protests in Naivasha, Nakuru and Eldoret. Together with a number of other civil society organizations, the ICPC obtained around one million signatures in support of the ICC and against any amendment to the International Crimes Act and a possible Kenyan withdrawal from the Rome statute. Further, in January 2010 the ICPC, on behalf a group of victims from Kisumu, sent a memorandum of the Kisumu victims of post-election violence to the ICC, which argued in favor of ICC intervention due to the absence of a national accountability process.

4. Outreach activities and capacity building:

Public outreach with regard to the factors taken into account by the Prosecutor deciding whether to launch an investigation using the proprio motu powers: The ICPC has reached out to the public concerning the basis for launching a proprio motu investigation. Among others, the ICPC communication explained: "First, there must be a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed […] Second, even where an ICC crime or crimes have been committed, the ICC prosecutor must determine whether they would be admissible. Admissibility has two components: gravity and complementarity. Gravity: The ICC's jurisdiction is limited to only the most serious crimes of concern to the international community. To assess whether the crimes alleged have the requisite gravity, the ICC prosecutor considers the scale, nature, and manner of commission of crimes, as well as the impact of crimes. Complementarity: The ICC's jurisdiction is also limited to cases where national authorities are unwilling or unable to act to investigate the crimes in question for purposes of prosecution."

Public outreach with regard to the nature of complementarity: ICPC has informed the public about the nature of the principle of complementarity, including the rationale for prioritizing national proceedings. For example, the ICPC communication clarified: "National authorities, including those in Kenya, have the primary responsibility to bring those responsible for international crimes to account. Providing judicial remedies to victims and administering criminal justice fairly are core aspects of good governance and help to build respect for the rule of law and to deter future crimes. The ICC's authority to act only where national authorities are unable or unwilling, thus, respects the role of national courts and encourages the development of credible and independent judicial systems within national jurisdictions. National trials have several distinct advantages in practical terms. Trials by the ICC are most likely to be carried out at the seat of the court in The Hague. Although the ICC is attempting to develop robust outreach and public information programs, proceedings in Kenya are likely to be more accessible, including by those communities directly affected by the crimes tried. National trials would also strengthen Kenya's judicial system and would add to the experience and expertise of national authorities in the investigation and prosecution of international crimes, particularly through taking on board lessons from the tribunal's proposed mix of national and international staff. Moreover, this mix will enable international staff to perform their functions more competently. It is likely that such investigations and prosecutions could also be conducted more quickly than those of the ICC, which will need to develop specialized expertise on Kenya. The ICC's indispensable role is in closing the impunity gap

for serious international crimes where credible national investigation and prosecution are not possible."

Public outreach with respect to the rights of victims: The ICPC has for example published a report, which noted: "While the punishment of individuals for violence has received much greater attention shifting more to individual criminal responsibility, the position of the victims of these crimes has not been equally addressed. Their rights and interests have largely been overlooked. Yet redress and reparation for victims of violations is an imperative demand of justice. The relevance of rights is questionable if victims have no legal capacity to enforce their rights, before either a national or an international court, once they claim to have become a victim […] The 'Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law' […] aim to provide victims of violations of human rights with a right to a remedy. The content of this right includes access to justice, reparation for harm suffered and access to factual information concerning the violations. It distinguishes between five forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The rights of victims of the post-election violence have been grossly disregarded. While the Rome Statute of the ICC provides for the right of victims to participate in its proceedings and the rights to reparations, we have to acknowledge its limitations. The uniqueness of the Special tribunal for Kenya Bill 2009 provides for both reparation and participation as an easier and quicker road compared to the ICC."

Capacity building: During the debate about the Special Tribunal bill in late 2008 / early 2009, the ICPC conducted capacity building sessions for various groups including the media, civil society organizations, women organizations and special thematic community groups including internally displaced persons that had direct interest with the Tribunal. Further, in July 2009, ICPC convened a media workshop for North Rift Valley journalists and convened a workshop in Mombasa for journalists in the region in order to enhance journalists knowledge of transitional justice, including criminal accountability for the post-election violence.

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REPARATIONS FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS

Mokaya Orina

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1. INTRODUCTION

There is ardent importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels. ***In the pursuit to honor victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field.*** This obligation to respect, ensure respect for all and implement international human rights law emanates from treaties to which a state is a party, customary international law and the domestic law of each state. These laws require a state to be adequate, effective, and prompt and give appropriate remedies including reparations to victims suffering from human rights violations.

States therefore have the duty to take appropriate, administrative and other appropriate measures to prevent violations. In cases of human rights violations, a state is expected to investigate the claimed violations and take action against those allegedly responsible in accordance with domestic and international law. These victims should have equal access to justice irrespective of who may ultimately be the bearer of responsibility for the violation and to finally provide effective remedies-reparation to the victims. Kenya as a state has ratified a number of International humanitarian laws and adopted some of the laws as its domestic laws; however, the state still lacks a legal methodology when dealing with reparations for victims. This report intends to bring out issues that should be covered in the event of a formation of a draft policy framework addressing reparations for victims of Human rights. It should focus on remedies for victims, a normative framework, Enforcement and Limitations of law.

BACKGROUND

Human rights violations has been a thorn in the Kenyan flesh for a long time and can thus be traced as far back as the colonial periods where forced labour and slavery were regarded as the engines of capitalism. The post colonial Kenya inherited rogue practices from the colonialists even though several steps were taken to "Africanize" the country. The governments of the day are alleged to have caused the assassinations and disappearance of persons who were a potential threat to the government. In as much as the state agencies and the government were to be blamed for these atrocities the ordinary citizen also

engaged in gross violation of the rights of fellow citizens. This has been witnessed in various incidents such as the tribal clashes of 1992 and the post election violence of 2007/2008.

From the various violations and atrocities committed by the colonial masters against the Maumau freedom fighters, the various killings in the Kenyatta regimes like the deaths of Tom Mboya and J.M. Kariuki and the Wagalla Massacre, the Nyayo Torture Chamber Victims in the Moi Era and the more recent police killings of suspected Mungiki adherents and the Post Elections Violence(PEV) under the Kibaki regime, to mention but a few, it has been seen that it is the government which instead of protecting the citizens from these violations, is the principal violator of human rights of her own people.

Economic and social rights have been overlooked for a long time by the Kenyan legal system. Not until the introduction of the current Constitution, economic and social rights lacked constitutional recognition. Much attention was being paid to civil and political rights at the expense of economic and social rights. Various attempts to protect economic and social rights had been made but bore no fruit due to lack of political will in the country. For instance, sessional paper number 10 of 1965 had recognized economic and social rights. Part of the paper required the state to ensure equal opportunities to all citizens eliminate discrimination and provide social services such as education, medical care and social security. The paper further suggested that the state had the right to take idle land and either give it to the landless or use it for the interest of the state. This was hampered by the lack of political will.

This paper aims at looking at the legal framework for the development and recognition of the right to remedies and reparations for victims of human rights violations in Kenya. It will give recommendations as what the laws should entail, who qualifies to be compensated, the procedures for application for compensation, human rights violations that meet the threshold of compensation among other very important elements that are necessary for the proper determination of this subject.

1.2 MEANING OF REPARATIONS

The Oxford Dictionary defines reparations to mean the act of giving something to somebody or doing something for them in order to show that you are sorry for suffering you have caused. It also defines reparation as money paid by a country that has lost a war, for the damages and injuries it has caused.

There is no singe definition of reparation that is universally agreed upon. The above definition is the simplest one and the easiest to understand.

1.3 DEFINITION OF THE TERM 'VICTIMS'

The word victim is used in almost every possible context to designate anyone who suffers a negative outcome or any kind of loss, harm, or injury, whether the harm is material, physical or psychological. Accordingly there are victims of crime, war, accident, diseases, poverty, injustice, oppression, discrimination, natural disasters, etc.

Article 1 of the UN Victims Declaration (1985), defines as victims:

> Victim of crime is any person, or group of persons, that individually or collectively, has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

The *U.N Basic Principles and Guidelines* define it to mean;

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.

An indirect victim is defined as;

> Where appropriate and in accordance with domestic law, the term victim also includes direct family or dependants of the direct victim, friends and other relatives , and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization, Witnesses, non-governmental organizations (juristic persons)…

Rule 85 of the *ICC Rules of Procedure and Evidence* defines victims as;

> (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to promptredress, as provided for by national legislation, for the harm they havesuffered.

REMEDIES TO VICTIMS OF HUMAN RIGHTS VIOLATION

According to *The United Nations Basic Principles and Guidelines on the Right to Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), the following are the available forms of reparations:

(a.) Restitution- it entails the restoration of a victim to the original situation before the alleged violation took place. This may be in the form of resettlement and getting employed again.

(b.)Compensation- should be paid to any economically accessible damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.

(c.)Rehabilitation- these should include medical and psychological care as well as legal and social services.

(d.)Satisfaction- includes a broad range of measures including those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and reburial of remains, public apologies, judicial and administrative sanctions, commemorations and human rights training.

(e.)Non- repetition guarantees can include reforms insecurity sector or judiciary and broader institutional reforms e.g. Constitutional changes as those recently adopted in Kenya.

FORMS OF REPARATION

3.1 Individual Reparations

Individual reparations in the form of monetary damages for economically assessable loss as well as restitutionary measures such as resettlement of the displaced persons and the re-employment of those sacked politically.

3.2 Collective Reparations

Collective reparations are effected to a whole group of individuals who suffered similar violations and may be found in one geographical location. This may be done in the form of development projects in the area worst hit by the violations. For instance the Equalisation Fund provided for in the constitution is a means of remedying the areas which had been marginalized for a long time. This helps to alleviate the suffering caused during such marginalization.

3.3 Interim Reparation

Interim Reparation is to help victims who are in urgent need because of the gross human rights violation they suffered. Victims will be helped to get access to the services and facilities they need. There is limited money available for this kind of assistance.

3.4 Symbolic Reparation, Legal and Administrative Measures

They are to help communities remember the pain and the victories of the past. This could include setting aside a day for national remembrance and reconciliation as well as the building of memorials and monuments. They are supposed to restore the dignity of victims and survivors of gross human rights violations.

Some of the measures may include**;** issuing of death certificates, exhumation, reburials and ceremonies,headstones and tombstones, declarations of death and resolving outstanding legal matters related to the violations.

THE LEGAL FRAMEWORK PROTECTING THE RIGHT TO REPARATIONS

4.1 THE LEGAL FRAMEWORK IN KENYA

The legal framework in Kenya in so far as victim compensation is concerned is not fully developed. There exists several provisions of the law providing for compensation in certain circumstances but this does not fully appreciate and cover victim compensation for human rights violations. The compensation is mainly concerned with payment of fines and costs incurred by the prosecution during trial. The following are the laws that provide for victims violation in Kenya;

4.1.1 The Constitution

The Constitution of Kenya provides for a comprehensive bill of rights under chapter four. It gives every person the *locus standi* to commence court proceedings in the event of infringement or violation of any right under the bill of rights. This standing has also been extended to a party who is acting on behalf of another, as a member of a group or class of persons and public interest.

The High Court and subordinate courts have the authority to enforce and uphold the bill of rights and a court may grant appropriate relief including declaration of rights, an injunction, a conservatory order, an order for compensation and an order of judicial review. The High Court has been given the mandate to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Article 50(9) provides for the enactment of legislation providing for the protection, rights and welfare of victims of offences. In addition Article 59 establishes the Kenya National Human Rights and Equality Commission which is mandated to monitor and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated. Also every person has the right to complain to the commission, alleging that a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

It provides for the equalization fund which shall be used to provide basic services including water, roads, health facilities and electricity to marginalized areas to bring them to same level with the rest of the nation. In addition either house of parliament may establish committees which have the same powers as the High Court to call evidence by summoning witnesses compel production of documents and examine witnesses. The use of such committees may be instrumental in checking the various government departments likely to violate human rights.

4.1.2 Penal Code

The Penal Code, under section 24(g), lists payment of compensation as one of the modes of punishment of the offender. However, the statute does not make elaborate provisions relating to the operation of this mode of punishment. Requirements such as eligibility for compensation, amount of compensation, time limits, grounds for compensation among other requirements are not provided for.

Section 31 of the Penal Code, which purports to expand on compensation as a mode of punishment doesn't make elaborate provisions on the operation of this mode of punishment. The section reads as follows;

> 'Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.'

4.1.3 The Truth, Justice and Reconciliation Act

The TJRC Act was passed in 2008 after a dispute presidential election. The Act provides that any person who feels or thinks that his or her rights have been violated can file a complaint in court and seek redress and compensation. The TJRC was established under Section 3(1) of the Truth Justice and Reconciliation Act 2008, to determine ways and means of redress for victims of gross human rights violations under Section 5 (e) of that Act.

The mandate of courts in Kenya is not comparable with the mandate of the TJRC whose recommendations and proceedings are subject to the court's supervisory jurisdiction. Further, the mandate of the TJRC with regard to human rights, abuses and violation is to identify and specify the victims of the violations and make appropriate recommendation for redress. This is a limited mandate as it requires further implementation. It is not therefore a mandate which is adequate to provide the plaintiffs with the instant relief which the plaintiffs require.

Moreover, one of the reasons why the TJRC Act was promulgated was the concern that "*some of the transgressions against our country and its people cannot be properly addressed by our judicial institutions due to procedural and other hindrances*". But that the Nation must address the past in order to prepare for the future, by building a democratic society based on the rule of law and desirous to give the people of Kenya a fresh start, where justice is accorded to the victims of injustice, and past transgressions are adequately addressed.

4.1.4 International Crimes Act, No.6 of 2008

In line with the *Rome Statute,* this statute merely facilitates the implementation of the *Rome Statute*. Therefore its provisions constantly allude to this international instrument. The relevant provision with regard to victim reparation therefore is one that provides for application of the *Rome Statute.*

4.2 INTERNATIONAL LEGAL INSTRUMENTS PROTECTING RIGHT TO REPARATION

By virtue of Articles 2(5) and 2(6) of the Constitution of Kenya, international law is also applicable as a source of law in Kenya. The right to a remedy when rights are violated is expressly guaranteed by global and regional human rights instruments. Most texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy.

4.2.1 The Universal Declaration of Human Rights

This declaration provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws"

4.2.2 The International Covenant on Civil and Political Rights

It contains three separate articles on remedies. Article 2.3 calls on States Parties to ensure that any person whose rights or freedoms recognized in the Covenant are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity. Secondly to ensure that any person claiming such a remedy shall have the right thereto determined by competent

judicial administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy. And finally, it is to ensure that the competent authorities shall enforce such remedies when granted.

4.2.3 The Convention on the Elimination of Racial Discrimination

This convention also contains broad guarantees of an effective remedy (Art. 6), like the Convention on the Elimination of All Forms of Discrimination against Women, which requires competent national tribunals and other public institutions to ensure "the effective protection of women against any act of discrimination".

4.2.4 Declaration on the Protection of All Persons from Enforced Disappearance.

The Working Group elaborated on the obligation to provide adequate compensation. Compensation is deemed "adequate" if it is "proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family." Amounts shall be provided for any damage, including physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation, and costs required for legal or expert assistance. In the event of the death of the victim, as a result of an act of enforced disappearance, the victims are entitled to additional compensation. Measures of rehabilitation should be provided, including medical and psychological care, rehabilitation for any form of physical or mental damage, legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence, and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.

4.2.5 The United Nations Basic Principles and Guidelines on the Right to Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

The UN Basic Principles proposes a typology of reparations to victims. They include; Restitution, Compensation, Rehabilitation, Satisfaction and Non- repetition guarantees as discussed above

4.2.6 The United Nations Convention against Torture (CAT)

Article 14(1) provides, “states to ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as

possible and that in the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation".

4.2.7 Rome Statute of the International Criminal Court

Victims can request reparations for harm suffered under Article 75 for crimes within the court's jurisdiction. The court may also decide to deal with reparations on its own initiative, even where victims have not submitted applications. The court may order various types of reparation, including the following: compensation, restitution and rehabilitation.

The court may award reparations either on an individual or a collective basis; whichever is most appropriate for the victims in the particular case. Furthermore, the ICC states parties have established the Trust Fund for victims of crimes within the jurisdiction of the court and their families to provide some form of reparation even when the convicted person does not have sufficient assets.

4.2.8 United Nations Declaration on the Rights of Indigenous Peoples

The UN Declaration on Indigenous Peoples was adopted to promote the rights and interests of minority indigenous peoples as well as their cultures and traditions. Article 12 provides that, "state parties shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous people".

4.2.9 The African Charter on Human and People's Rights

Article 5 of the African Charter on human and people's rights, and expressed the view that the State has a duty in its legal system to ensure that victims of acts of torture obtain redress and adequate compensation as contemplated by Article 14.

4.3 CASE LAW ON REPARATION OF VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS

Victims of gross violations of human rights may use previously set precedents in court to argue as to why they should be compensated as long as the facts of their cases are similar to those already decided to which they seek to rely upon. Some of the cases in Kenya include;

4.3.1 Harun Thungu Wakaba v Attorney General

The case had been consolidated into one. The plaintiffs were 21 in number. Generally, the complaints took a similar pattern. Each plaintiff was arrested individually on a particular date, taken to a police station and thereafter to the Nyayo House Basement, where each was held incommunicado in a completely dark cell. Each of the plaintiff was also subjected to interrogation, and various acts of torture, inhuman and degrading treatments, at the Nyayo House. After being held for a number of days, most of the plaintiffs were charged in court, several with treason offences, others with some minor offences. Some pleaded guilty under duress and were convicted and sentenced to terms of imprisonment. Others, pleaded not guilty, and were remanded in custody, where the inhuman and degrading treatment continued. Several of the plaintiffs were released after more than 2 years in custody, when the Attorney General entered *Nolle Prosequi* in their cases. The plaintiffs complain of having suffered physical and psychological torture, and also having suffered loss and damage as a result of the incarceration. The plaintiff's sought a declaration that their fundamental rights and freedoms under Section 70, 72(3 & 5), 74(1), 77, 78(1), 79(1) & 80(1), 82(3) had been and were contravened and grossly violated by the police officers and other Kenyan Government servants, agents, employees and institutions, on dates which were specified in each case, and diverse dates thereafter. They also sought a declaration that the plaintiffs were entitled to the payment of damages and compensation for the violations and contraventions of their fundamental rights and freedoms under the aforementioned provisions of the Constitution. They also sought General damages and exemplary damages on an aggravated scale, under Section 84(2) of the Constitution of Kenya, for the unconstitutional conduct by government servants and agents.

The court held that each of the plaintiffs is entitled to the payment of damages as compensation for the violations and contraventions of the aforestated fundamental rights and freedom. Each of the plaintiffs was awarded general damages between kshs.1 million and 3 million.

4.3.2 Dominic Arony Amolo vs. the Attorney General

In this case, the court held that claims under the fundamental rights, and the fundamental rights provisions under Section 70 to 83 of the Constitution, cannot be subject to legal wrongs or causes of action under the Limitation of Actions Act Cap 22.

4.3.3 Wachira Weheire v Attorney- General

The plaintiff stated that while at Nyayo house he was interrogated while naked for lengthy sessions, while hungry, thirsty and without sleep, and held incommunicado in a dark cell. That he was frequently assaulted by Special Branch Officers using slaps, kicks, whips, tyre strips, broken table, chair legs, as well as hose pipes, and placed naked in water logged cells, and that he was threatened with death and forced to confess to false charges in breach of section 74(1) of the Constitution.

The plaintiff further sought General damages, exemplary damages on an aggravated scale under section 84 (2) of the Constitution of Kenya for the unconstitutional conduct by government servants and agents. The court ruled as follows;

> ***"We are therefore of the view that a global award of Kshs.2.5 million would be sufficient compensation to the plaintiff for the violations suffered by him and the consequent loss".***

4.3.4 Alberto Fujimori Case

On 7th April, 2009 the Special Criminal Court of the Peruvian Supreme Court found former president Alberto Fujimori who served between 1990- 2001, guilty of grave human rights violations and sentenced him to twenty five(25) years in prison, the maximum penalty allowed by Peruvian law. Burt asserts that the trial of Fujimori is truly historic; it marks the first time a democratically elected head of state has been extradited to his own country, put on trial for human rights violations and convicted. Equally historic is the fact that dozens of human rights trials are currently underway in Peru as elsewhere in Latin America.

The Fujimori trial is all the more remarkable given that domestic prosecutions for heads of state for human rights crimes are extremely rare in any country. Trials of other heads of states such as Charles Taylor or Slobodan Milosevic have been carried out primarily by internationally constituted courts. The Fujimori trial demonstrates that with sufficient political will, domestic tribunals can prosecute high-level public officials who commit or order the commission of grave human rights violations.

4.3.5 Velasquez Rodriguez Case (IACtHR)

The case of Caso Velasquez Rodriguez arose out of the events in Honduras from 1981-1984 of forced disappearances. The Inter –American Commission on Human Rights presented evidence to the IACtHR on behalf of the applicant (victim's father), suggesting that the Honduran government tolerated, a pattern or practice of forced disappearance. The IACtHR stated that if the applicant could link disappearance of a particular individual to that practice, then the disappearance of a particular individual could be proved through circumstantial or indirect evidence or by logical inference. The court observed thus, "***the objective of international human rights laws is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for reparation of damages resulting from the acts of the states responsible***".

The availability of these legal provisions, both domestic and international, indicates the importance of victim compensation but little has been done to meet the intended purposes. There is need for consolidation of these provisions into an Act of parliament to cover all cases of human rights violations. The international conventions sighted herein above may be applied to provide a guideline for such a system in Kenya, based on the fact that the provisions only apply as 'soft law' and not legal obligations.

NORMATIVE FRAMEWORK

This is a proper understanding on both the policy and legal framework that are to work on victims of human rights reparations both under Domestic Law and International Law

5.1 FEATURES OF A REPARATION REGIME

5.1.1 Complexity

A reparations programme is more complex if it distributes benefits of more distinct types and in more distinct ways than its alternatives .Thus at one end of the spectrum lie very simple program as that distribute say money exclusively, and in one payment say as in Argentina. Money and an apology or money and some measure of truth telling, constitute an increase in complexity of the reparation effort. In general, since there are certain things money cannot buy, complexity brings with it the possibility of targeting benefits flexibly so as to respond to victims needs more closely.

5.1.2 Integrity/Coherence

Coherence or complementarity may be internal or external. Internal coherence refers to the relationship between the different types of benefits. Reparations may include symbolic and material benefits for example, monetary compensation with an acknowledgement of responsibility from the violator. External coherence refers to the close relationship with other transitional mechanisms such as minimally with criminal justice, truth telling and institutional reform. This requirement is both pragmatic and conceptual

5.1.3 Comprehensiveness

This refers to types of crimes the reparations program seeks to redress. Also entails the definition of victims adopted in the process. The Peruvian reparations program is hailed as one of the most comprehensive reparations program as *Lisa Laplante* notes, "*its definitions of victims and beneficiaries is one of the most inclusive, which includes symbolic reparations (for example public gestures, acts of recognition, memorials etc)*". The program also includes reparations in the form, of services like health and education, restitution of citizen rights individualized economic reparations and collective community wide reparations.

Leaving important categories of victims undressed not only deprives a compensatory regime of gains in legitimacy that it may accrue by establishing a comprehensive program. Jon Elster posits that a comprehensive program or regime virtually guarantees that the issue of reparations will continue to be on the political agenda which means it will remain available as the target of legislative or beauracratic given take. This may undermine the stability and reliability of reparations agreement.

5.1.4 Finality

This refers to whether the program stipulates that receiving its benefits forecloses other avenues of civil redress or not. Finality means courts have been made inaccessible to citizens. Under the Argentina program reparation signifies finality of redress.

5.1.5 Sufficiency

There is no absolute reliable way to measure the worth of the benefits under the reparation program. This also entails whether the compensation will be a one sum payment or payable in installments.

5.2 FACTORS TO BE CONSIDERED IN A REPARATIONS REGIME

5.2.1 Recognition and Identification

Recognition of victims of violations of human rights entails first the acknowledgement of violations of their rights. This is achieved through the setting up of a body to receive complaints from the victims of such violations. In Kenya there already exists the KNHRC which has the mandate to receive complains form victims of human rights violations.

A key element after the recognition of the violations of human rights it is imperative to identify the victims who suffered harm and determine who is eligible for reparations. This will also entail assessing the extent of damage suffered by the victim.

5.2.2 Registration

The registration of the victim will be crucial to enable efficient handling of all reparations claims. This enables to cater for all persons affected without leaving out individuals or groups. It is necessary to establish a registry which will cater for the records of victims. The accessibility of the registry is important to enhance justice for all. The registration may also entail visits to different areas where the alleged violations took place.

5.2.3 Vulnerability

Some form of human rights violations require urgent attention such medical and psychological care to mitigate the harm suffered. For instance the starving children in drought-hit Turkana require urgent relief food which should be nutritious to avoid more deaths. The IDP's required immediate attention as required shelter and food as they await settlement.

6. FUNDING OF THE REPARATION PROGRAM

The legal duty is squarely on the state to guarantee compensation by requiring the offender to compensate the victim or by providing compensation directly to the victim then following up the offender.

In proposing a system of funding, the most challenging bit is how such a system can be financed. In the United States for example, the system is funded by the state through national revenue. Other sources of funding include funds from court fines, probation fees or sometimes the perpetrator's property may be attached so as to realize compensation to the victim.

In the interest of justice, if the perpetrator is able, his property must be seized and used to compensate the victim. The attachment of the perpetrator's property has been shown to be one of the modes through which responsibility may be passed to the offender. In Canada for example, research has revealed that by attaching the offender's property, the convicts tend to abstain from future criminal activities since they are aware of the fact that their hard-earned property will be confiscated for purposes of compensation. Where he is unable, then the burden must fall squarely on the state to ensure that the victim receives adequate compensation for the injuries he suffered.

7. CHALLENGES THAT MAY BE FACED DURING THE IMPLEMENTATION PROCESS

Some of the challenges include;

What is the criterion for determining who is liable for human rights violations and who is eligible for recognition and deserves reparations?

Low levels of trust in commissions-reason; should the government be excluded?

Limited of power of commissions

Corruption

Police insufficiency

General lack of will of parliamentarians

Intimidation of victims

Delay of cases and the longer periods may lead to defeat of justice

How do you determine imprisonment period?

When is the compensation supposed to occur?

Guarantees on non repetition; to ensure non repetition of atrocities

Role of the DPP aa against the police

Role of the judiciary in reparations

Paradox of reparations-no amount of compensation can actually be enough to make the victims lives to go back to normal.

Independence of the office that can be trusted to do prosecution; formation of institutions with a mandate to prosecute

Current limitations

Lack of information to the victims

Lack of a significant government scheme-trust funds for reparations

Lack of legislature/legislative framework in the government- in terms of enforcement and recommendations

Lack of imitativeness from the government's side on reparation

Lack of definition of terms-victims, reparations. Victims are unable to access justice due to proper lack of knowledge

Lack of proper civil education for the society

8. COMPARATIVE STUDY

8.1 Argentina

There is no such thing as a reparation program in any strict sense of the word 'program' in Argentina. Instead there are several initiatives each stemming from a separate piece of legislation and covering a distinct set of victims. The main laws cover the following sets of crimes; disappearance and arbitrary detention and grave injuries and death while in detention.

The mode of reparation was money and it's hailed as having paid out the highest amounts of money in Latin America having issued bonds with face value of $224,000. The reparation scheme also included pensions to spouses and children of disappeared persons. Further the reparation regime included health benefits for children below 21 years and 25 years for children with disability.

8.2 Peru

In its 2001 to 2003 investigation of human rights abuses committed during the20 year civil war, the Truth and Reconciliation Commission found that the conflict between government counterinsurgency forces and *Maoist Sendero Lumiso*(shining path) guerillas claimed the lives of 690,000 civilians. However the reparations council projects the total number of dead and disappeared civilians at around 50,000 based on its field visits to each region where people applying for reparations fill out registration forms.

The TRC confirmed the casualties of the violence were distributed by class and ethnicity, reporting that 75% of the dead and disappeared spoke a native language other than Spanish, and three out of every four people killed lived in a rural region, were farmers, poor and illiterate.

National indifference especially among the powerful elite residing in urban centres, was greatly blamed for permitting this ethnic massacre. These findings reflect a historical tradition of marginalization of a significant portion of Peru's poor and ethnic sectors, conditions that the TRC blamed for the violence and prioritized as deserving reform to ensure lasting peace.

The Program of Integral Reparations (PIR) under the TRC is one of the most comprehensive reparations program. Its definitions of victims and beneficiaries are one of the most inclusive. For instance those who suffered human rights violations are referred to as "affected". In its introduction the PIR presents the

ethical, political and psychological and juridical justification for its proposals, linking reparations to the prevention of violence and the promotion of national reconciliation.

Reparations to the families of local authorities like mayors or justices of the peace killed or disappeared in the conflict was 1350 dollars while damages to the families of members of the "*rondas- campesinas*", the rural vigilante groups trained by the army to fight *Sendero* and thus seen as heroes' were set at approximately 14,000 dollars.

The reparations were calculated on the basis of actual monthly incomes in the conflict areas, mainly poor highlands where incomes are generally far below the official minimum wage. The damages are based on incomes lost in the years a breadwinner was killed or disappeared or since the victim was left disabled.

Collective reparations have been made in the form of infrastructure projects at a community level in areas hard hit by the conflict. It also includes symbolic reparations such as public gestures, acts of recognition, memorials, and reparations in the form of services like health education, restitution of citizen rights, individualized economic reparations and collective community-wide reparations.

LESSONS TO LEARN FROM INTERNATIONAL CRIMINAL COURT LUBANGA JUDGMENT ON REPARATIONS

1. Applicable Law

1. The Court determined that pursuant to Article 21(1)it shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence. The Court will also consider the Regulations of the Court, the Regulations of the Registry and the Regulations of the TFV.

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over

the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. Article 21(3) of the Statute, the implementation of reparations "must be consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

3. Jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field.

2. Dignity, Non-discrimination and non-stigmatization

All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. They shall be treated with humanity and it shall respect their dignity and human rights, and the court will implement appropriate measures to ensure their safety, physical and psychological well being and privacy, pursuant to Rules 87 and 88 of the Rules as well as their special needs as children, -the elderly, those with disabilities and the victims of sexual or gender violence, pursuant to Article 68 of the Statute and Rule 86 of the Rules.

3. Beneficiaries of reparations

Pursuant to Rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.

An "indirect victim" must have a close personal relationship with direct victim in order to qualify, for instance as exists between a child soldier and his or her parents, spouse and children. They may also include individuals who suffered harm when helping or intervening on behalf of direct victims and legal entities such as non-governmental, charitable and non-profit organizations, statutory bodies including government departments,

4. Accessibility and consultation with victims

A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation.

The victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective. Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations program.

5. Victims of sexual violence

The Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls, men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach. The approach taken should enable women and girls in the affected communities to participate in a significant and equal way in the design and implementation of any reparations orders.

6. Child victims

The Court should be guided, inter alia, by the Convention on the Rights of the Child and the fundamental principle of the "best interests of the child" that is enshrined therein. Further, the decisions in this context should reflect a gender-inclusive perspective. The views of the child victims are to be considered when decisions are made about individual or collective reparations that concern them, bearing in mind their circumstances, age and level of maturity.

7. Scope of reparations

The Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both. They may also be awarded to individual victims groups of victims, if in either case they suffered personal harm on non-discriminatory and gender-inclusive basis.

Where there is uncertainty as to the number of victims of the crimes i.e. that a considerable number of people were affected - and the limited number of individuals have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.

Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently. Furthermore, individual reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities. When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis.

8, Modalities of reparations

Although Article 75 of the Statute lists restitution, compensation and rehabilitation as forms of reparations, this list is not exclusive. Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate. A gender-sensitive approach should be applied when determining the manner in which reparations are to be applied.

a. Restitution- it should, as far as possible, restore the victim to his or her circumstances before the crime was committed and is directed at the restoration of an individual's life, including a return to his or her family, home and previous employment; providing continuing education; and returning lost or stolen property.

b. Compensation- should be considered when i) the economic harm is sufficientlyquantifiable; ii) an award of this kind would be appropriate and proportionate(bearing in mind the gravity of the crime and the circumstances of the case);and iii) the available funds mean this result is feasible. Compensation requires a broad application, to encompass all forms of damage, loss and injury, including material, physical and psychological harm.

The concept of **"harm"** denotes "hurt, injury and damage." It does not necessarily need to have been direct, but it must have been personal to the victim." Examples of harm include;

1. **Physical harm**, including causing an individual to lose the capacity to bear children;
2. **Moral and non-material damage** resulting in physical, mental and emotional suffering.
3. **Material damage**, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings.
4. **Lost opportunities**, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights (although the Court must ensure it does not perpetuate traditional or existing discriminatory practices, for instance on the basis of gender, in attempting to address these issues).
5. **Costs** of legal or other relevant experts, medical services, psychological and social assistance, including, where relevant, help for boys and girls with HIV and Aids.

c. Rehabilitation- shall be implemented on the basis of the principles relating to non-discrimination, and this shall include a gender-inclusive approach that encompasses males and females of all ages. It will include the provision of medical services and healthcare (particularly in order to treat HIV and Aids); psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services.

d. Other Modalities of Reparations- The conviction and the sentence of the Court are examples of reparations, given they are likely to have significance for the victims, their families and communities.

The Court, assisted by the State Parties and the international community pursuant to Part 9 of the Statute on "International cooperation and judicial assistance", is entitled to institute other forms of reparation, such as establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programs that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatization and marginalization of the victims of the present crimes.

The convicted person may contribute to this process by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis.

9. Proportional and adequate reparations

The reparations should, in all circumstances, be awarded on a non-discriminatory basis, and they need to be formulated and applied in a gender-inclusive manner. The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court.

Reparations should aim at reconciling the victims of the present crimes with their families and all the communities affected by the charges. Whenever possible, reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights. Reparations need to support programs that are self-sustaining, in order to enable victims, their families and communities to benefit from these measures over an extended period of time. If pensions or other forms of economic benefits are to be paid, these should be allocated, if possible, by periodic installments rather than by way of a lump payment.

10. Causation

The "damage, loss and injury," which form the basis of a reparations claim, must have resulted from the crimes which the convicted person was proved to have committed. Reparations should not be limited to "direct" harm or the "immediate effects" of the said crimes but instead the Court should apply the standard of "proximate cause".

In reaching this conclusion as to the relevant standard of causation to be applied to reparations, and particularly to the extent that they are ordered against the convicted person, the Chamber needs to reflect

the divergent interests and rights of the victims and the convicted person. Balancing those competing factors, at a minimum the Court must be satisfied that there exists a "but/for" relationship between the crime and the harm and, moreover, the crimes for which the accused was convicted were the "proximate cause" of the harm for which reparations are sought.

11. Standard and burden of proof

At trial, the prosecution must establish the relevant facts to the criminal standard, namely beyond a reasonable doubt. Given the fundamentally different nature of these reparations proceedings, a less exacting standard should apply. Several factors are of significance in determining the appropriate standard of proof at this stage, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.

When reparations are awarded from the resources of the Trust Fund for Victims or from any other source, a wholly flexible approach to determining factual matters is appropriate, taking into account the extensive and systematic nature of the crimes and the number of victims involved.

12. Rights of the defense

Nothing in these principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial.

13. States and Other Stakeholders

State Parties have the obligation under Parts 9 and 10 of the Statute, of cooperating fully in the enforcement of orders, decisions and judgments of the Court, and they are enjoined not to prevent the enforcement of reparations orders or the implementation of awards.

Importantly to our situation in Kenya, the Court determined that **pursuant to Articles 25(4) and 75(6) of the Statute, reparations under the Statute do not interfere with the responsibility of States to award reparations to victims under other treaties or national law.**

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